

Nos. 18-1201, 18-1211

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CIRCUS CIRCUS CASINOS, INC.
d/b/a CIRCUS CIRCUS LAS VEGAS
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**

**FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas was the respondent before the Board and is the petitioner/cross-respondent before the Court.

2. The Board is the respondent and cross-petitioner before the Court; the Board's General Counsel was a party before the Board.

3. Michael Schramm, an employee, was the charging party before the Board.

B. Rulings Under Review: This case is before the Court on Circus's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on June 15, 2018, and reported at 366 NLRB No. 10.

C. Related Cases: This case has not previously been before the Court.

/s/ David Habenstreit

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Dated at Washington, D.C.
This 10th day of May 2019

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FINAL BRIEF GLOSSARY

References to the Record	Designation
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Organizations	
Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas	Circus
National Labor Relations Board	Board
Occupational Safety and Health Administration	OSHA
United Brotherhood of Carpenters and Joiners of America, Southwest Regional Council of Carpenters and its affiliated Local Union #1780	Union

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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THE NATIONAL LABOR RELATIONS BOARD**

**FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This unfair-labor-practice case is before the Court on the petition of Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued

on June 15, 2018, and reported at 366 NLRB No. 110. (JA 1063-78.)¹

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, which authorizes the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. §§ 151, 160(a). The Board's Order is final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Circus's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board's finding that Circus unlawfully threatened carpenter Michael Schramm for engaging in protected concerted activity by complaining with a coworker about second-hand marijuana smoke and demanding a policy for dealing with it?

2. Does substantial evidence support the Board's finding that Circus unlawfully suspended and discharged Schramm for engaging in that protected concerted activity?

¹ References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Does substantial evidence support the Board's finding that Circus unlawfully denied Schramm's valid request for a union representative during an investigatory interview?

RELEVANT STATUTORY AND REGULATORY ADDENDUM

The addendum attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

Michael Schramm, who was employed by Circus as a temporary journeyman carpenter, filed an unfair-labor-practice charge alleging that Circus threatened, suspended, and discharged him in retaliation for his protected concerted activity and denied his request for a representative at an investigatory interview in violation of Section 8(a)(1) of the Act. 29 U.S.C. § 158(a)(1). The Board's General Counsel issued an unfair-labor-practice complaint, and an administrative law judge conducted a hearing and issued a recommended decision, finding that Circus's conduct violated the Act. (JA 1066-78.) After reviewing the parties' exceptions, the Board adopted the judge's findings and recommended order as modified. (JA 1063-65.)

II. THE BOARD'S FINDINGS OF FACT

A. Circus Hires Schramm as a Temporary Carpenter; Circus Threatens Schramm with Discharge after He and Another Employee Complain about Second-Hand Marijuana Smoke

Circus operates a hotel and casino in Las Vegas. Its engineering department is headed by Chief Engineer Rafe Cordell and employs 176 laborers, painters, carpenters, and engineers in four bargaining units. (JA 1066; JA 36-37, 40-41.) In September 2013, Circus hired seven temporary journeymen carpenters, including Schramm, to perform work on doors and windows in all 3,767 hotel guest rooms. (JA 1066; JA 43-48.) Schramm is in the carpenters' bargaining unit and is a member of United Brotherhood of Carpenters and Joiners of America, Southwest Regional Council of Carpenters and its affiliated Local Union #1780. (JA 275.)

Engineering department employees, including the temporary carpenters, are required to attend weekly safety meetings. At a safety meeting in early November, engineer Fred Tenney raised the issue of second-hand marijuana smoke. He told Assistant Chief Andrew Nelson, Cordell's deputy, that the engineers had "been finding this second-hand marijuana smoke everywhere" and asked for a procedure to deal with it. (JA 1067; JA 145, 280-81, 490.) Schramm seconded Tenney's concerns, and Nelson said he would look into it. (JA 1067; JA 325.) On November 12, Tenney filed a grievance over engineers' daily exposure to second-

hand marijuana smoke and requested that Circus institute a procedure to address the problem. (JA 1067; JA 266.)

At a second safety meeting later in November or early December, Tenney again raised the issue of marijuana and expressed his concern that second-hand smoke exposure might lead to positive drug test results.² (JA 1067; JA 145-47.) Cordell laughed and assured employees they would not test positive from such exposure. (JA 147, 153.) Schramm spoke up, questioning whether Cordell was “qualified to say that . . . because [he is] not a professional in that field.” (JA 1067; JA 147, 282.) Schramm further shared his experience at another casino, where employees were also subjected to marijuana smoke. Cordell declared that employees did not have to worry about positive drug tests because “that’s not going to happen.” (JA 1067; JA 147-48, 283.) Schramm persisted and told Cordell that he could not know this for certain. Tenney interjected and asked, “what’s the policy?” (JA 283.) Cordell then told employees to call security if they smelled marijuana smoke. (JA 1067; JA 146, 283.) Tenney pointed out that he had called security on several occasions to no avail. Cordell responded that

² Employees, including temporary employees, who are involved in any on-the-job accident resulting in property damage or physical injury are required to undergo drug testing. (JA 1067 & n.8; JA 49, 204.)

employees should call their supervisors. (JA 1067; JA 146, 283.) Schramm objected, asking “What’s the supervisor going to do about it?” (JA 284.)

At this point, Cordell became red-faced and said Circus would just move Schramm to another work area. Schramm noted that moving him would not solve the problem because other employees would still be exposed. Schramm told Cordell that employees did not want to be moved around; instead, they “want[ed] an answer to this. We want a policy.” (JA 1068; JA 148, 153-54, 284.) In reply, Cordell told Schramm, “Well, you know what, maybe we just won’t need you anymore.” (JA 1068; JA 148, 284.) Tenney said that sounded like a threat. Schramm responded, “No, that didn’t sound like a threat; that was, in fact, a threat.” (JA 1068; JA 148, 284.) Cordell, who became “redder and redder in the face,” abruptly left the meeting. (JA 1068; JA 148, 284.)

On December 6 at a pre-shift meeting, Cordell presented Circus’s new marijuana smoke policy to employees. Under the policy, if engineering employees smell marijuana smoke, they “must notify security.” (JA 1067; JA 111-12, 268, 805.) Circus’s preexisting corporate security policy specified how security officers would respond to reports of marijuana. (JA 117-18, 267.)

B. Circus's Respiratory Protection Program

Parts of Circus's facility contain asbestos, and engineering employees working in those areas are required to wear a respirator. (JA 1070; JA 85, 405.) Because wearing a respirator can be stressful and trigger a medical emergency, employees who may work with hazardous materials first undergo a medical evaluation and fit-testing, after which they receive a personal respirator mask. (JA 1070; JA 406, 430, 701.) Circus employs a contractor to conduct the medical evaluation. (JA 1070; JA 413.)

The process begins with an annual questionnaire, which engineering employees submit in a sealed envelope to the program administrator, who sends it, unopened, to the contract doctor. (JA 1070; JA 90-93, 234.) The questionnaire is required and developed by OSHA. (JA 1070; JA 415.) In completing the questionnaire, employees must "identify any health issues that may complicate the wearing of a respirator." (JA 1070; JA 234.) Under the written program guidelines, employees have "the right to contact the Contract Doctor to discuss the content of the questionnaire." (JA 1070; JA 234.) The contract doctor, after reviewing the questionnaire, will perform a medical examination if she "questions the ability of the employee to perform assigned tasks while wearing a respirator." (JA 1070; JA 234.) If the doctor has no concerns, or concludes after an

examination that the employee can wear a respirator, Senior Watch Engineer Henry Simms fits the employee with a respirator mask. (JA 1070; JA 90-93, 458.)

Just as employee reports of cardiovascular or respiratory disease can trigger an examination by the doctor, so can reports of anxiety or fear. (JA 449, 451, 703.) Employees who cannot wear a respirator mask for whatever reason are not issued one and are not assigned work where a respirator would be required. Employees are not disciplined or discharged because of their inability to wear a respirator. (JA 1071; JA 420-21.)

C. Schramm, Anxious and Afraid of Wearing a Respirator, Is Ordered To Take a Respirator “Exam” and Denied the Opportunity To Talk to a Doctor First, Contrary to Circus’s Policy

During Schramm’s new employee orientation in September, Simms handed out the respirator medical questionnaires and told the permanent employees to return them in a sealed envelope. He told the temporary carpenters not to return them because they were not going to be fitted for respirators. Nevertheless, he instructed the temporary employees to “hold on” to the questionnaires because Circus “might need them in the future.” (JA 287-88.) Schramm’s duties in the hotel rooms would not expose him to asbestos or other contaminants. (JA 288, 444-45.)

On December 10, shortly after Schramm and Tenney complained about second-hand marijuana smoke and Cordell threatened to discharge Schramm, Simms notified Schramm that he “was going to have a fitting today” and would have to take a “respirator exam” that afternoon. Simms did not tell him what that “exam” entailed. (JA 1070-71; JA 288-90, 384-86.) Simms directed him to report to the contract respirator clinic between 2 and 2:30 p.m. (JA 1071; JA 289-90.) Brandon Morris, Schramm’s supervisor, told him to report to the clinic right after lunch at 1:30 p.m. so he would not have to waste time returning to work. (JA 1071; JA 290.)

Schramm, who had completed the written questionnaire, reported to the clinic right after lunch. Because of anxiety about putting a mask over his face, Schramm wanted to “slip in and talk to the doctor.” (JA 1071; JA 290-92, 530.) At the clinic, two contract employees gave Schramm forms to fill out. Schramm told them that he first wanted to see the doctor, but they refused his request. (JA 1071; JA 292-93.) The clinic personnel told him they needed to take his height and weight and “stuff like that” but provided no further explanation of the process. (JA 340-41.) Schramm said he would talk to his supervisor then return at his actual appointment time “because I got to see [the doctor].” (JA 1071; JA 293.)

The contract personnel called Safety Manager Karl Beeman and told him that an employee “refused to take the exam and instead wanted to see the physician

directly,” a request they had refused. (JA 1071; JA 397, 438-39.) Beeman reported this incident to Cordell. Simms also made a routine visit to the clinic that day and was told by clinic personnel that Schramm “refused to undergo the medical exam.” (JA 1071; JA 475.) Simms also reported this to Cordell. (JA 476.)

After his initial visit to the clinic, Schramm reported back to work and waited for his supervisor to make his regular rounds at 2 p.m. (JA 293-94.) While waiting, Schramm told employee Saxton what had occurred in the clinic. When Saxton said he had failed his respiratory mask test, Schramm responded that he “wish[ed] they’d exempt me. I want an exemption.” (JA 1071; JA 295.) At this point, Supervisor Morris called and told Schramm to come down to the shop. (JA 1071; JA 295.)

D. Circus Suspends Schramm

Schramm and Morris reported to Cordell’s office between 2 and 2:10 p.m.—the same time as Schramm’s respirator exam appointment. Cordell informed Schramm that he was suspended pending investigation for refusing to take the respirator exam. Schramm insisted that he had not refused but had gone down early to talk to the doctor. Schramm further said he was still within the appointment window, and he would go right away and take the exam. Cordell

refused, telling Schramm it was “too late now to take the exam,” and suspended Schramm instead. (JA 1071; JA 296-98.)

Cordell also emphasized that this was “not the time or the place” for Schramm to explain; the only purpose of the meeting was suspension. (JA 1072; JA 67.) Cordell gave Schramm a notice of suspension pending investigation, stating that Schramm would have the opportunity to attend an investigatory meeting later. (JA 1072; JA 177, 298.) As they were leaving Cordell’s office, Morris wished Schramm good luck and gave him the phone number for the Union. (JA 1072; JA 299, 772.) Following the meeting, Cordell submitted an internal memorandum to employee relations stating that Schramm had refused to go through the respirator evaluation. (JA 1072.)

Following this meeting, Schramm telephoned the union hall and left a voicemail message, explaining that he had been suspended and seeking assistance. The Union did not return his call. (JA 1072; JA 299, 329.)

E. Circus Investigates the Incident and Denies Schramm a Union Representative at His Due-Process Meeting

Airth Colin, a human resources employee, conducted the investigation of Schramm. (JA 1072; JA 512-13.) She interviewed Beeman and Simms and reviewed the emails they sent to Cordell. (JA 513-14.) In his email, Beeman wrote that clinic personnel told him Schramm “wanted to see the doctor” and

“refused to take the physical exam.” (JA 1072; JA 261.) Simms’s email reported he had been told by clinic personnel that Schramm said he “could not wear a respirator and that he would not go through the testing.” (JA 1072; JA 260.)

In their interviews, Beeman and Sims reported what they had been told by clinic personnel. Colin’s notes from those interviews show that Beeman said Schramm would “not allow the pre-screening to be done. He just wanted to go see the [doctor].” (JA 1072; JA 714.) Beeman wondered whether Schramm knew his “job is secure” and he would “just get reassigned to tasks that don’t require [a] respirator.” (JA 1072; JA 714.) Simms reported that Schramm told the clinic personnel he “cannot wear a respirator so I don’t need to go through the test.” (JA 1072; JA 715.) Colin did not interview the clinic personnel themselves or any other employees who were present in the testing area at the time. (JA 1071 n.14; JA 738.)

On December 12, Colin called Schramm and told him to report for a due-process meeting the next day. (JA 1072; JA 300, 522.) She also told him that if he wanted union representation, he should bring a representative with him. (JA 1072; JA 522.) Once again, Schramm called the Union hall and again reached voicemail. This time, he left a message stating the date and time of the meeting with human resources. The Union did not return his call. (JA 1072; JA 301, 349.)

Schramm reported for the due-process meeting on December 13. When he reached human resources, he looked around to see if any union representative had showed up in response to his messages. He found no one. Schramm then entered the meeting room where Cordell, Colin, and another human resources employee, Sandra Mower, were assembled. He told them that he “called the Union three times [and] nobody showed up, I’m here without representation.” (JA 1073; JA 301.) Neither Cordell, Colin, nor Mower responded to Schramm’s statement, and the meeting went forward. (JA 301.)

Schramm explained to the managers that he had reported to the respirator clinic at 1:35 p.m., prior to his scheduled testing time, and “pleaded” with the personnel to let him see the doctor. (JA 1073-74; JA 748.) When clinic personnel denied his request, he said he would return during his 2-2:30 p.m. time slot. Managers repeatedly asked him why he had refused to take the exam and why he had not contacted human resources. Schramm explained that Cordell suspended him at 2:15 p.m. without giving him an opportunity to go back to the clinic. It did not occur to him to contact human resources. (JA 1073; JA 302.)

Schramm further explained that he wanted to see the doctor because of his “anxiety and [] phobias” about putting the mask over his face. (JA 302.) Because he did not want his co-workers to know about his fear, he wanted to talk to the doctor privately, but “now everybody knows my business.” (JA 1073; JA 303.)

Schramm was “embarrassed” but knew he would “freak out” having a respirator over his face, and he wanted an exemption from wearing the respirator. (JA 1073; JA 355.) Schramm told the managers that if he were returned to work, he would take the exam. (JA 1074; JA 748.)

At the end of the meeting, Schramm submitted a written statement explaining that when he reported to the clinic, he asked to see the doctor. Clinic personnel told him no, that he could not see the doctor “without first going through the exam.” (JA 1073; JA 178-79.) He tried to explain to the personnel that he had “personal and important questions for the doctor,” but they again told him no. His written statement ends with a summary of all that occurred: “For the simple request of asking to see the doctor before we begin (so I can keep some privacy) I was denied. I tried to make it right but was preempted with a suspension.” (JA 1073; JA 178-79.)

F. Circus Discharges Schramm

Following the due-process meeting, Circus decided to discharge Schramm for failing to take the respirator exam. (JA 1074; JA 542.) Cordell called the union’s business agent to inform him of the decision. The business agent asked Cordell to lay Schramm off instead so that he would be eligible for rehire. In response, Cordell noted on Schramm’s separation notice that he was being let go because the “project ended.” (JA 1074; JA 108, 180.)

On December 20, Schramm returned to the casino for a meeting with Cordell, Colin, and Mower, who gave him the separation notice. Union steward Jerry Mong tried to reverse the discharge, but Mower told him the matter was closed. (JA 1074; JA 371, 508.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce and McFerran, Chairman Ring dissenting in part) found that Circus violated Section 8(a)(1) of the Act by threatening, suspending, and discharging Schramm in retaliation for his protected concerted activity of complaining about workplace health and safety, and by denying his request for a representative at an investigatory interview which Schramm reasonably believed could result in discharge. (JA 1063-64.) The Board also denied Circus's motion to reopen the record to submit additional documents related to the unlawful threat. (JA 1063 n.1.)

The Board's Order requires Circus to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (JA 1064.) Affirmatively, the Order directs Circus to make Schramm whole for any loss of earnings and other benefits; remove from its files any reference to Schramm's unlawful suspension and discharge and notify him that this has been done; and post the Board's remedial notice. (JA 1064-65.)

SUMMARY OF THE ARGUMENT

Substantial evidence supports the Board's finding that Circus violated Section 8(a)(1) of the Act by threatening Schramm with discharge. The Board credited the mutually corroborative testimony of Schramm and a coworker that, after they complained about second-hand marijuana smoke and demanded a policy for dealing with it, Chief Engineer Cordell threatened Schramm with discharge, telling him "maybe we just won't need you anymore."

Substantial evidence also supports the Board's finding that Circus again violated Section 8(a)(1) by suspending and discharging Schramm for concertedly making those complaints about workplace health and safety. It is undisputed that Circus knew about his activity. Further, Cordell's threat to discharge Schramm as he voiced those complaints—a threat that Circus soon carried out—firmly establishes that Circus had an unlawful motive for taking the adverse action.

Hoping to rebut this strong evidence of its unlawful motive, Circus claimed that it would have gotten rid of Schramm even if he had not engaged in protected concerted activity because he purportedly refused to take a respirator exam. The record, however, amply supports the Board's finding that this proffered rationale was false and therefore merely a pretext to mask Circus's true, unlawful motive. Thus, as the Board emphasized, Circus suspended Schramm before his appointed time to take the exam had expired and refused his requests to talk with a doctor

beforehand (as was his right). Schramm then offered to proceed with the exam as scheduled and repeated his offer at a so-called due-process meeting, but Circus refused both requests. As the Board aptly explained, if Circus's "true concern" had been testing Schramm, it would have "allowed [him] to speak to the doctor prior to testing or, at a minimum, sent [him] back for testing while he was within his testing period." (JA 1076.) Circus, of course, did neither. In these circumstances, the Board reasonably found that Circus necessarily failed to meet its burden of showing it had a benign reason for targeting Schramm, and therefore that his suspension and discharge were unlawful.

Circus challenges the Board's well-documented and logical findings of fact primarily by taking issue with its credibility resolutions. But a party seeking to overturn credibility determinations must mine the record and show that the credited testimony was "hopelessly incredible, self-contradictory, or patently unsupportable." Circus utterly fails to meet this heavy burden.

Finally, Circus again violated Section 8(a)(1) by refusing Schramm's request to have a union representative present during his due-process investigatory meeting prior to his discharge. Under the Board's well-established *Weingarten* rule, Circus was obligated to grant Schramm's request, discontinue the interview, or inform him that he was free to either participate in the interview unaccompanied by a union representative or have no interview at all. Instead, Circus simply proceeded

to interview Schramm, thereby further violating Section 8(a)(1) of the Act.

Although Circus argues that Schramm did not request a union representative until after the meeting and alternatively that his request was inadequate, the credited evidence shows he put Circus on notice by making an adequate request at the start of the meeting.

STANDARD OF REVIEW

The Court “accord[s] a very high degree of deference to administrative adjudications by the [Board] and [will] reverse its findings only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.”

Ozburn-Hessey Logistics, LLC v. NLRB, 833 F.3d 210, 217 (D.C. Cir. 2016)

(internal quotation marks omitted). Under that deferential standard, the Court will

uphold the Board’s findings if they are supported by substantial evidence and will

overturn them only if the Board “acted arbitrarily or otherwise erred in applying

established law to the facts of the case.” *Tenneco Auto., Inc. v. NLRB*, 716 F.3d

640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted). *See also* 29

U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept

[it] as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340

U.S. 474, 477 (1951). A reviewing court may not “displace the Board’s choice

between two fairly conflicting views, even though the court [may] justifiably have

made a different choice had the matter been before it *de novo*.” *Id.* at 488.

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives substantial deference to inferences the Board has drawn from the facts, including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (internal quotation marks omitted). Thus, the Court's "review of the Board's conclusions as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016) (internal quotation marks omitted).

The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted). Additionally, the Court reviews under an abuse of discretion standard the Board's rulings on motions to reopen the record. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999). And finally, given the Board's broad discretion over determining the appropriate remedy for unfair-labor-practice violations, the Board's remedial determinations are "subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); accord *UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

ARGUMENT

I. CIRCUS VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING SCHRAMM WITH DISCHARGE FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. The Act Prohibits Employers from Interfering with, Restraining, or Coercing Employees Engaged in Protected Concerted Activity

Section 7 of the Act guarantees employees the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). The test for a Section 8(a)(1) violation is an objective one, analyzing whether “considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with those rights.” *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Proof of animus or actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931-32 (D.C. Cir. 1991).

Thus, an employer violates Section 8(a)(1) by threatening employees with job loss or other reprisals. *See, e.g., Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1176, 1178 (D.C. Cir. 1987). The employer’s statements are assessed based on whether employees would “reasonably perceive” them as threats. *Progressive Elec., Inc. v.*

NLRB, 453 F.3d 538, 544 (D.C. Cir. 2006). A coercive threat may, therefore, be implicit or explicit. *Tasty Baking*, 254 F.3d at 124. In applying this standard, the Board considers “the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

B. Circus Coercively Threatened Schramm with Discharge

Substantial evidence supports the Board’s finding that Circus unlawfully threatened Schramm with job loss. As Schramm and Tenney both testified, they robustly challenged Chief Engineer Cordell about second-hand marijuana smoke in the facility, and Cordell responded by asking whether moving Schramm to another area would solve his problem. When Schramm demurred, explaining that other employees would still be exposed, Cordell then told Schramm, “well, you know what, maybe we just won’t need you anymore.” (JA 1068; JA 148, 284.)

The Board appropriately affirmed the administrative law judge’s finding that Circus violated Section 8(a)(1) of the Act when Cordell made this “unambiguous” threat. (JA 1075.) *See, e.g., Progressive Elec*, 453 F.3d at 544 (employer violated Act by telling employees that protected activity would “cost all you guys your jobs”). In making her finding, the judge reasonably credited Schramm and Tenney’s mutually corroborative testimony that Cordell threatened Schramm with

discharge for expressing concerns about marijuana smoke in the facility. As the judge explained, she found Schramm and Tenney to be “forthright and thoughtful” as well as “non-argumentative witnesses whose demeanors evinced thoughtful reflection of each question.” (JA 1069.) Moreover, she found their testimony to be “more inherently probable” because, for them, the meeting at which Cordell threatened Schramm was a “memorable occasion,” whereas for other witnesses, it was just another weekly safety meeting. (JA 1069.) Their testimony was further corroborated by a company witness, employee Machala, although Circus never specifically asked him about the threat. (JA 1069; JA 821-24.) Because the judge’s credibility determinations were based “[o]n the entire record, including [her] observation of the demeanor of the witnesses” and the content of their corroborative testimony (JA 1066 & n.5), those rulings should not be disturbed. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003).

Circus erroneously claims that it presented six witnesses who “rebutted” Schramm’s and Tenney’s testimony about the threat. (Br. 37.) In fact, the judge found that only two of Circus’s witnesses (Cordell and Machala) were testifying about the same meeting as Schramm and Tenney. The other four (Tejeda, Cole, Simms, and Nelson) presented testimony “so vague” the judge found it “impossible” to determine whether they were present at the same meeting. (JA 1068.) Moreover, contrary to Circus’s bald claim that its witnesses “rebutted”

Schramm's testimony, the judge found that while Cordell himself denied making the threat, "no other witness presented by [Circus] was specifically asked about this statement." (JA 1069.) The judge found it "telling" that, other than Cordell, none of Circus's witnesses "was tested on this point." (JA 1069.)³

Circus gains no more ground in arguing that the Board should have drawn an adverse inference from the General Counsel's failure to call carpenter Andrew Saxton. (Br. 40.) Whether the Board draws an adverse inference is a matter within its discretion. *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 266 n.1 (D.C. Cir. 1998). Here, the Board did not abuse that discretion. Two witnesses—Schramm and Tenney—credibly testified that Cordell threatened Schramm. The General Counsel, therefore, had no need to call yet another employee to corroborate that testimony. Nor did the judge have any obligation to draw an adverse inference from the absence of cumulative evidence. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1344 (D.C. Cir. 1972) ("[W]here a party has good reason to believe he will prevail without introduction of all his evidence, it would be unreasonable to draw any

³ Circus's suggestion that Schramm and Tenney somehow collaborated on their testimony is unsupported by the record. (Br. 36-37.) For example, Schramm did not describe discussing "their version of events" with Tenney. (Br. 37. *See* JA 356-58.) Nor did Tenney testify "specifically" that he and Schramm "discussed the supposed 'events' in detail." (Br. 37. *See* JA 165-68.)

inference from a failure to produce some of it.”); *accord Advocate S. Suburban Hosp. v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006) (finding adverse inference to be of little value where testimony is “essentially cumulative”).

Moreover, Circus misunderstands a key aspect of the adverse inference rule, which “provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.” *UAW*, 459 F.2d at 1336. Here, Saxton is simply a Circus employee, and as such, was equally available to Circus and not within the General Counsel’s control. Particularly in these circumstances, the judge was hardly required to draw an adverse inference against the General Counsel for not calling Saxton as an additional witness. *See Bufco Corp. v. NLRB*, 147 F.3d 964, 971 (D.C. Cir. 1998); *accord Advocate S. Suburban Hosp.*, 468 F.3d at 1049.⁴

Given the judge’s explicit and detailed credibility resolutions, Circus has failed to demonstrate that her findings are “hopelessly incredible,” as it was required to do. *PruittHealth*, 888 F.3d at 1294. *See also Parsippany Hotel Mgmt.*

⁴ Nor is there any merit to Circus’s unsupported assertion that the administrative law judge “could have and should have called other witnesses.” (Br. 33.) Circus participated in the hearing, called its own witnesses, and cross-examined the General Counsel’s witnesses. It “cannot palm off on the ALJ its apparent failure to properly question” those witnesses. *Advocate S. Suburban Hosp.*, 468 F.3d at 1048.

Co. v. NLRB, 99 F.3d 413, 426 (D.C. Cir. 1996) (“The mere fact that conflicting evidence exists is insufficient to render a credibility determination ‘patently insupportable,’ since such a conflict is present in every instance in which a credibility determination is required.”); *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135 (D.C. Cir. 2003) (finding credibility determinations to be supported by substantial evidence despite uncredited, contradictory testimony). Thus, the Board’s finding that Cordell unlawfully threatened Schramm, a finding based on credited, corroborated testimony, is supported by substantial evidence and should be upheld.

C. The Board Did Not Abuse Its Discretion by Denying Circus’s Motion To Reopen the Record

Contrary to Circus’s claim (Br. 52), the Board properly denied its motion to reopen the record to introduce previously available documents that it could have presented at the hearing. (JA 1063 n.1.) The Court will uphold the denial of such a motion unless the Board abused its discretion and “it ‘clearly appear[s] that the new evidence would compel or persuade to a contrary result.’” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (quoting *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir. 1988)). Circus made no such showing here.

Briefly, during the hearing, Tenney testified that he routinely used Circus's work order tracking system (called HotSOS) to record notations about meetings, and he used the system to note that Cordell threatened Schramm. (JA 1070; JA 148.) Attempting to rebut this testimony, Circus provided HotSOS records for just two dates (November 21 and December 6); neither date showed any notation by Tenney about a threat.⁵ (JA 1069; JA 855-77, 879.) It was not until after the administrative law judge issued her recommended decision that Circus decided to move to reopen the record to introduce HotSOS records for all of November 2013.

The Board did not abuse its discretion in denying Circus's motion. As it noted, under its Rules, a "motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result." 29 C.F.R. § 102.48(c)(1). In addition, "[o]nly newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing."

⁵ As shown in the Statement of the Case, Circus holds safety meetings for engineering employees on a weekly basis. Schramm and Tenney testified that they believed Cordell made the threat at a safety meeting before Thanksgiving, possibly November 21. (JA 1069; JA 163, 335, 375-76.) Cordell testified that he believed Schramm first spoke up about marijuana smoke at a December 6 pre-shift meeting, but Schramm did not attend pre-shift meetings. (JA 1067 & n.9; JA 335, 805.)

Id. Newly discovered evidence is that which existed at the time of hearing and “of which a party was excusably ignorant.” *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363 (5th Cir. 1978). Moreover, the evidence “must be material, and not cumulative or impeaching, and it must be such as to require a different result.” *Id.* at 364.

As the Board explained, the records that Circus belatedly sought to adduce do not meet these requirements. (JA 1063 n.1.) They were not newly discovered or unavailable at the time of the hearing. To the contrary, they are records that Circus “routinely created and maintained” in its computerized system, and the company “was certainly aware of their existence” before the hearing closed, since it introduced such records for select dates. (JA 1063 n.1.) As the Board further noted, Circus failed to adequately explain why, with reasonable diligence, the additional records could not also have been presented at the hearing. (JA 1063 n.1.)

Circus does not challenge the Board’s well-reasoned basis for denying its motion. Instead, Circus asserts that the records it belatedly sought to add show Tenney “lied under oath,” and argues that the judge erred by crediting his testimony. (Br. 52-53.) This argument, however, does not get Circus around its fundamental failure to meet the established criteria for reopening the record: the evidence was not newly discovered, and at most Circus was merely trying to

impeach a witness. The Board “will not reopen a record so that a party may attack a judge’s credibility resolutions.” *Michigan State Employees Ass’n*, 364 NLRB No. 65, 2016 WL 4157599, at *1 n.2 (Aug. 4, 2016); *accord Labor Ready, Inc.*, 330 NLRB 1024, 1024-25 (2000), *enforced*, 253 F.3d 195 (4th Cir. 2001).

In any event, and contrary to Circus’s claims, the judge explained that the lack of corroboration in the HotSOS records would not change her determination that Cordell made the threat. She noted it was “possible” that Tenney “simply misremembered the substance of his memo.” (JA 1070.) She also found that even if the records “completely contradicted” Tenney’s testimony that he made a memo, “this fact alone does not require” rejection of his testimony, given prior findings that his testimony was “inherently credible and entitled to greater weight than that of [Circus’s] witnesses.” (JA 1070.) As shown above, the judge credited Tenney and Schramm’s “forthright and thoughtful” testimony that Cordell threatened Schramm. Whether Tenney subsequently wrote a note about that threat on his employer-provided cell phone does not negate the judge’s decision to credit his corroborated testimony that Cordell made the threat. *See Parsippany Hotel*, 99 F.3d at 426 (“The mere fact that conflicting evidence exists is insufficient to render a credibility determination ‘patently insupportable,’ since such a conflict is present in every instance in which a credibility determination is required”).

II. CIRCUS VIOLATED SECTION 8(a)(1) OF THE ACT BY SUSPENDING AND DISCHARGING SCHRAMM FOR ENGAGING IN PROTECTED CONCERTED ACTIVITY

A. The Act Prohibits Employers from Taking Adverse Actions against Employees for Engaging in Protected Concerted Activity

As described above, Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act, which protects employees engaged in concerted activities for the purpose of mutual aid or protection. 29 U.S.C. §§ 157, 158(a)(1). Concerted activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)). It includes employee comments that arise as a “logical outgrowth of concerns expressed by the employees collectively.” *Five Star Transp., Inc.*, 349 NLRB 42, 43-44, 59 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008). An employer that suspends or discharges an employee for engaging in protected concerted activity violates Section 8(a)(1) of the Act. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 81 (D.C. Cir. 2015).

In determining whether an employer has taken an adverse employment action against an employee because of the employee’s protected activity, the Board

applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management*, 462 U.S. 393, 404 (1983); *accord Shamrock Foods*, 346 F.3d at 1135-36. Consistent with that test, if substantial evidence supports the Board’s finding that protected activity was a “motivating factor” in the employer’s adverse employment action, it is unlawful unless the record as a whole compels acceptance of the employer’s affirmative defense that it would have taken the same action in the absence of protected activity. *Id.* at 397, 401-03; *accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). If the employer’s proffered reasons for its actions are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to establish its affirmative defense. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998); *see also Wright Line*, 251 NLRB at 1084.

Unlawful motivation is a factual question that the Board may find established on circumstantial as well as direct evidence. *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988). In doing so, the Board may rely on a variety of factors, including the employer’s knowledge of and hostility toward protected activity, and “the absence of any legitimate basis for an action”—i.e., the absence of a credible explanation from the employer.” *Southwest Merch. Corp.*

v. *NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB at 1088 n.12); accord *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001). Ultimately, because motive is a question of fact that implicates the Board’s expertise, its finding of unlawful motivation is “entitled to substantial deference.” *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

Here, the Board found that Circus suspended and discharged Schramm because of his protected concerted activity, and its stated reason for taking those actions was pretextual. Accordingly, Circus violated the Act. As we now show, those findings are supported by substantial evidence and should be upheld.

B. Circus Suspended and Discharged Schramm because of His Protected Concerted Activity

As an initial matter, there is no dispute that Schramm, by raising concerns about second-hand marijuana smoke in concert with Tenney, was engaged in protected concerted activity and that Circus knew about it. *See, e.g., N.W. Rural Elec. Coop.*, 366 NLRB No. 132, 2018 WL 3495117, *5 (finding employee comments about workplace safety and health to be protected); *Burle Indus.*, 300 NLRB 498, 501 (1990) (employee’s conduct related to concerns over exposure to

fumes constituted protected concerted activity), *enforced*, 932 F.2d 958 (3d Cir. 1991) (table).⁶

Circus’s suspension of Schramm—which precipitated his discharge just 10 days later—was an adverse employment action, contrary to its claim. (Br. 42.) Section 10(e) of the Act bars Circus from raising this new argument for the first time on review. *See* n.6. In any event, contrary to Circus (Br. 42), this case is unlike *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017), where the employee simply “went back to his job as normal” and was “fully compensated” for the work he missed. *Id.* at 711. In those very different circumstances, the Court found that issuing a “suspension pending investigation” form, “without more, does not have any adverse impact on the employee who receives the form.” *Id.* at 710. Here, of course, Circus not only suspended Schramm but discharged him and did not compensate him for the work he missed while suspended. (JA 177, 180.) Accordingly, Schramm’s suspension was an adverse employment action. *See Southwire Co. v. NLRB*, 820 F.2d 453, 459 (D.C. Cir. 1987) (affirming Board’s

⁶ Circus did not argue otherwise before the Board or in its opening brief. *See* 29 U.S.C. §160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *See also Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues not raised in opening brief are waived).

findings that suspensions and discharges were unfair labor practices because the employees' protected conduct was a substantial or motivating factor for the actions).

Moreover, the Board found strong evidence of Circus's discriminatory motivation in Cordell's unlawful threat—uttered moments after Schramm and a coworker complained forcefully about secondhand smoke—that “maybe we just won't need you anymore.” (JA 1068; JA 148, 284.) Indeed, by discharging Schramm, Circus “made good” on that threat. *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000). Particularly given this direct threat of discharge, the Board was fully “entitled to draw an inference” of unlawful motive. *Fort Dearborn*, 827 F.3d at 1074.

On these facts, Circus seriously errs in asserting, without argument, that there was no “intrinsic connection” between Schramm's concerted complaints about working conditions and Cordell's responsive threat of discharge, which he soon carried out. (Br. 42.) The timing of these interconnected events well supports the Board's finding of an unlawful motive. *See, e.g., Inova*, 795 F.3d at 82 (“The Board and this court have long recognized that the close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation.”); *accord NLRB v. S.E. Nichols, Inc.*, 862 F.2d

952, 959 (2d Cir. 1988) (“An inference of anti-union animus is proper when the timing of the employer’s actions is ‘stunningly obvious.’”).

In any event, as shown, the Board did not rely solely on timing as Circus suggests. (Br. 42.) Circus’s bare assertion fails to account for the Board’s finding that its “animus toward [Schramm’s] activities is demonstrated by its threat”—“a threat of discharge which persuades that a substantial or motivating reason for [Circus’s] discharge of Schramm was his protected concerted activity.” (JA 1076.) Indeed, Circus promptly proceeded to make good on its threat. In these circumstances, Circus is mistaken in asserting that the Board based its findings on timing or “mere coincidence.” (Br. 42.)

C. Because Circus’s Stated Reason Was Pretextual, Circus Necessarily Failed To Meet Its Burden of Showing that It Would Have Suspended and Discharged Schramm Even Absent His Protected Activity

Faced with this compelling evidence of unlawful motive, it was incumbent on Circus to show that it would have suspended and discharged Schramm even if he had not vociferously complained, in concert with a coworker, about the problem of second-hand marijuana smoke. Attempting to meet this burden, Circus asserted that it would have taken those actions in any event because Schramm refused to take a respirator exam. Ample evidence supports the Board’s finding (JA 1076)

that Circus's asserted reason was merely a pretext and thus "wholly without merit."

Wright Line, 251 NLRB at 1084 n.5. (JA 1076.)

As the Board found, Circus's claim that it discharged Schramm for refusing to take the respirator exam does not withstand scrutiny: its written policy specifically gives employees the right to discuss the respirator questionnaire with a doctor before completing it. (JA 1070 & n.12, 1076.) Circus, however, did "not afford [Schramm] this opportunity." (JA 1076.) Instead, as the Board emphasized, Circus suspended him before his appointment time to take the exam had even expired. Moreover, although Schramm then squarely told Cordell he would go ahead and take the exam during the testing period, Cordell refused. (JA 1076.) On these facts, the Board reasonably concluded that Circus "was predisposed to discharge Schramm and the motivation had nothing to do with Schramm's respirator test." (JA 1076.) As the Board aptly noted, if the test had been Circus's "true concern," it would have let him speak to the doctor "or, at a minimum, sent [him] back for testing while he was within [his testing] period." (JA 1076.) Circus's failure to honor its own policy further supports the Board's finding of pretext. *See Fort Dearborn*, 827 F.3d at 1076.

In addition, the Board properly relied on Circus's conduct during the "due-process meeting" to support its finding of pretext. (JA 1076.) At that meeting, Schramm stated he wanted to see the doctor "due to a medical condition," as he

was “unambiguously” allowed to do under Circus’s written policy. (JA 1070 & n.12, 1076.) Colin, a human resources staff member who attended the meeting, testified that she believed Schramm was being honest when he described his “significant fear” of wearing a respirator. (JA 746.) And as Safety Manager Beeman testified, an employee report of anxiety or fear related to wearing a respirator normally triggers an evaluation by the doctor. (JA 449, 451, 703.) But instead of offering Schramm assistance, human resources staff members Colin and Mower “stone walled” Schramm and repeatedly asked why he had not taken the issue to human resources previously. (JA 1076; JA 302, 524-25.) The Board reasonably found that Colin and Mower’s conduct during the meeting “indicates a strong probability that [Circus] was merely going through the steps . . . but had already determined that Schramm would be discharged.” (JA 1076.) *See Inova*, 795 F.3d at 84 (“one-sided investigation” supported Board’s finding that employer’s justification for firing employee was pretextual).

The Board’s finding of pretext is further supported by Cordell’s second refusal to allow Schramm to take the respirator exam. During the “due-process meeting,” Schramm once again offered to take the exam. Once again, Cordell denied him the opportunity. (JA 1076; JA 74.) Given that Schramm’s purported refusal to take the exam was “the only ground” Circus relied upon in discharging him, “Schramm’s offer should have satisfied its concerns.” (JA 1076.) *See NLRB*

v. Lone Star Textiles, Inc., 386 F.2d 535, 536 (5th Cir. 1967) (upholding Board’s finding of pretext where employer claimed it would not have discharged employee if he had rectified his timeclock error one day earlier).

Based on this compelling evidence of pretext, the Board reasonably found that Circus’s stated reason for taking action against Schramm was not in fact its real reason, and therefore that Circus “fail[ed] as a matter of law to carry its burden at the second prong of *Wright Line*.” *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016). To meet that burden, Circus had to show that, despite its animus, “[it] *would* have fired [Schramm], not that it *could* have done so.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 937 n.5 (D.C. Cir. 2011) (emphasis in original; internal quotations omitted). On this record, Circus completely failed to demonstrate that it would have discharged him for purportedly refusing to take the respirator exam even absent his protected concerted activity.

Circus gains no ground, and cannot meet its burden under *Wright Line*, by asserting that it “reasonably believed” Schramm engaged in misconduct by refusing to take the respirator exam. (Br. 43, quoting *Sutter E. Bay Hosps. v. NLRB*, 687 F.3d 424, 435-36 (D.C. Cir. 2012).) Given Circus’s failure to argue below that the Board should have analyzed this case under *Sutter*, Section 10(e) bars it from making this claim on review. *See* n.6 above. In any event, Circus cannot circumvent the Board’s finding of pretext by repackaging its *Wright Line*

defense as a reasonable belief that Schramm's purported refusal to take the respirator exam amounted to misconduct. When the smoke from Circus's claim clears, the credited evidence establishes that far from refusing to take the exam, Schramm offered to take it—twice. Accordingly, the Board reasonably rejected Circus's claim of misconduct as false and pretextual and thus “wholly without merit.” *Wright Line*, 251 NLRB at 1084 n.5.

Moreover, Circus's argument “shortchanges [its] burden of proof” under *Wright Line*. *Inova*, 795 F.3d at 84. Circus needed to demonstrate not only that it reasonably believed Schramm refused to take the test but also that this purported “behavior would have caused [his] suspension and termination regardless of [his] protected conduct.” *Id.* (internal question marks omitted). Whether Circus reasonably believed Schramm refused to take the test, then, is irrelevant because that is not the actual motivation for his discharge. As the judge found, if Schramm's purported refusal to take the respirator test had been Circus's “true concern,” it would have let him take it during his testing period, as he offered to do. (JA 1076.)

Finally, Circus gains no more ground in arguing that it met its burden of showing it discharged Schramm for legitimate reasons because Cordell and Colin testified that Schramm would “lie” on the respirator test in order to fail it. (Br. 21, 45 n.12.) The Board affirmed the judge's determination to discredit Cordell and

Colin's testimony, finding it was "blatantly fabricated" (JA 1074), and Circus utterly fails to meet its heavy burden of disturbing that credibility ruling. Thus, the judge found there was "no dispute" that Schramm informed managers at the due-process meeting that he would take the respirator exam if returned to work. (JA 1074.) As the judge aptly noted, Cordell and Colin's contrary testimony "defies inherent probability" because it was unlikely that Schramm would defend himself by telling managers he would lie. (JA 1074; JA 72-73, 524.) As she also found, Colin's notes of the due-process meeting, which stated Schramm planned to lie, were not verbatim and were "seriously compromised" by Colin scratching out key words. (JA 1074; JA 547-48, 746.) The judge further relied on their unfavorable demeanor, finding that Cordell and Colin "hesitated" before claiming that Schramm said he would lie and "appeared to be grasping for a life raft when making their assertions." (JA 1074.) In short, given the judge's explicit and well-reasoned explanations for her credibility determination, and Circus's failure to show this determination to be hopelessly incredible, the Court should uphold the credibility resolution and with it, the Board's conclusion that Circus failed to show it would have suspended and discharged Schramm in the absence of his protected

concerted activity. *See Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1105 (D.C. Cir. 2019).⁷

D. The Board Acted Within Its Discretion by Deferring Questions of Seniority to Compliance

Section 10(c) of the Act provides that the Board, upon finding that an unfair labor practice has been committed, shall order the violator “to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act.” 29 U.S.C. § 160(c). This remedial power is “a broad, discretionary one, subject to limited judicial review.”

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964); *accord UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006).

The Board acted well within the bounds of its broad remedial authority. After finding that Circus unlawfully suspended and discharged Schramm, the Board ordered its standard remedy in such cases, directing Circus to reinstate him “to his former job, or if that job no longer exists, to a substantially equivalent

⁷ Similarly, there is no basis for Circus’s claim that the judge erred by disregarding the testimony of employees Romero and Tejada. (Br. 44 n.11.) As the judge explained, she found “no evidence” that Circus interviewed either employee. Accordingly, she concluded that their testimony could not have been a basis for Circus’s supposed belief that Schramm engaged in misconduct by purportedly refusing to take the respirator exam. (JA 1071 n.14.) In addition, she disregarded their testimony because it would not have corroborated the reports given to Cordell by Beeman and Simms. (JA 1071 n.14.)

position, without prejudice to his seniority or any other rights or privileges previously enjoyed,” and to “make Schramm whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.” (JA 1064.) As the Board noted, this language sets forth “its standard reinstatement and make-whole remed[y].”⁸ (JA 1063 n.4.) *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (approving the Board’s “conventional remedy of reinstatement with backpay”).

Circus misses the mark in asserting that the Board should not have ordered Schramm’s reinstatement “without prejudice to his seniority” because he was a temporary employee at the time of his unlawful discharge, presumably without any seniority rights. (Br. 53-54.) In making this claim, Circus reveals its fundamental misunderstanding of the well-accepted, two-stage process long utilized by the Board in unfair-labor-practice cases, with judicial approval. In the initial stage, the Board determines—as it did here—whether violations occurred and issues a remedial order. If a reviewing court upholds the Board’s unfair-labor-practice findings and enforces its order, and a controversy subsequently arises over the

⁸ *See* NLRB Casehandling Manual, Part III (Compliance), §10530.1 (the Board’s standard remedy in cases of unlawful adverse employment action “is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed.”).

terms of the remedy, the particulars can then be litigated in a subsequent compliance proceeding before the Board. 29 C.F.R. § 102.54-.59. *See also Sheet Metal Workers Int'l Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 500 (D.C. Cir. 2009) (describing the Board's compliance process). As the Board noted, disputes over specific matters—such as seniority and the impact of the parties' collective bargaining agreement, which permitted an extension of Schramm's temporary employment—are properly reserved for the compliance proceeding. (JA 1063 n.4.)

Circus's claim also shows its basic misunderstanding of the Board's Order. The Board did not, as Circus asserts, order it to reinstate Schramm to a full-time position with seniority. (Br. 53.) Rather, the Board ordered Circus to reinstate him to "his former job" or a substantially equivalent position "without prejudice to his seniority." (JA 1064.) And seniority is a matter best reserved for the compliance stage, where Circus "remains free to advance any appropriate arguments" about the nature of employees' contractual seniority rights and whether Schramm would have received them. *See Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996).

Specifically, as noted above, the parties' collective-bargaining agreement allowed Schramm's employment to be extended, and the record did not show that they would have declined to do so absent his unlawful discharge. (JA 1063; JA

213.) Moreover, but for his unlawful discharge, Schramm's employment could have continued even beyond the extension. If it had, Schramm would have become a full-time employee with seniority rights. (JA 213.) Further, the collective-bargaining agreement gives temporary employees a preferential right to be interviewed for full-time positions. (JA 188.) In these circumstances, Circus errs in asserting that Schramm's employment "would have ended with the completion of the project." (Br. 54.)

But more importantly, specific questions about how long Schramm would have remained employed and whether he would be entitled to seniority are exactly the type of determinations the Board, with Court approval, leaves to compliance. *See Sure-Tan*, 467 U.S. at 902 ("compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any," to which employees are entitled); *Great Lakes Chem. Corp. v. NLRB*, 967 F.2d 624, 629-30 (D.C. Cir. 1992) (rejecting as "premature" employer's argument that Board erred by ordering it to offer jobs to all former predecessor employees and leaving to compliance determination whether particular employees were unsuitable for rehire); *accord Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 537 (7th Cir. 2003) (leaving to compliance the details of the remedy to be provided to temporary employees); *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1291-92 (6th Cir. 1998) (leaving to compliance the determination whether a

temporary employee would have been retained beyond the end of project). The Court should enforce the Board's order with its standard reinstatement and make-whole remedy, leaving seniority for the compliance stage.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT CIRCUS UNLAWFULLY DENIED SCHRAMM'S REQUEST FOR A UNION REPRESENTATIVE

A. An Employer Violates the Act by Interviewing An Employee, After Denying His Valid Request for a Union Representative, without Advising Him that He May Leave or Voluntarily Remain Unaccompanied by a Representative

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court forcefully approved the Board's construction of Section 7 of the Act as creating "a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline." 420 U.S. 251, 256 (1975). Likewise, the Court endorsed the Board's clear guidelines that "shaped the contours and limits of the statutory right." *Id.* In doing so, the Court ensured both that employees are able to determine what they must do to invoke the right to a representative, and what options are available to an employer once that right is invoked.

Unquestionably, an employee's right to engage in Section 7 activity includes the right to be accompanied by a union representative to an investigatory interview

that the employee reasonably believes will result in disciplinary action.⁹

Weingarten, 420 U.S. at 256-60; accord *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992). As the *Weingarten* Court explained, the Board’s construction of the Act in this regard “effectuates the most fundamental purposes of the Act,” which “declares that it is the goal of national labor policy to protect ‘the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.’” *Weingarten*, 420 U.S. at 261-62 (quoting 29 U.S.C. § 151). Requiring an employee to attend such an interview alone “perpetuates the inequality [of bargaining power] that the Act was designed to eliminate,” and creates the potential that an employee “may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.” *Id.* at 262-63.

Just as an employee has a right to representation, the Supreme Court recognized that an employee’s exercise of this right “may not interfere with legitimate employer prerogatives” such as imposing discipline for employee misconduct. *Id.* at 258. Accordingly, when an employee asserts his *Weingarten*

⁹ Circus did not dispute before the Board, nor has it disputed in its opening brief, that Schramm reasonably believed that the investigatory due-process interview on December 13 could lead to discipline. (JA 1075.)

right to representation during an investigatory interview, the employer may lawfully proceed in one of three ways. It may: (1) grant the employee's request for representation; (2) give the employee the option of proceeding with the interview without representation; or (3) discontinue the interview and make a disciplinary decision based on the information already available or obtained through other means. *Weingarten*, 420 U.S. at 258-59; *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 148 (3d Cir. 1991). "Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented." *Washoe Med. Ctr., Inc.*, 348 NLRB 361, 367 (2006) (citations omitted). Here, Circus ignored the Board's clear *Weingarten* rule by refusing Schramm's request and continuing with the interview without advising him of his rights, thereby violating Section 8(a)(1) of the Act.

B. Circus Unlawfully Continued Questioning Schramm, Notwithstanding His Request for Representation

Substantial evidence supports the Board's finding that Circus, in violation of the Act, continued questioning Schramm after ignoring his request for a *Weingarten* representative. (JA 1063-64.) Schramm credibly testified that he telephoned the Union and left messages informing them that he had a due-process meeting and requesting assistance. When he arrived for the meeting, he saw that

his efforts had been in vain: no union representative had appeared. He then announced to the assembled company representatives, at the beginning of the meeting, that he “called the Union three times [and] nobody showed up, I’m here without representation.” (JA 1064; JA 301.) As the judge found in crediting his testimony, Schramm “convincingly provided context” for his statement when he explained that he had been looking for the union representatives before entering the meeting room. This context, the judge found, made it “inherently reasonable that his first remarks would be about expecting a union representative to be present in response to his messages.” (JA 1074.)

“The Board has consistently held that a request must only be sufficient to put the employer on notice that the employee desires representation.” *New Jersey Bell*, 936 F.2d at 149; *accord Consol. Edison Co. of New York, Inc.*, 323 NLRB 910, 916 (1997). Moreover, “[n]o magic or special words are required to satisfy this element of the *Weingarten* rationale. It is enough if the language used by the employee is reasonably calculated to apprise the Employer that the employee is seeking such assistance.” *Houston Coca Cola Bottling Co.*, 265 NLRB 1488, 1497 (1982).

Applying this long-held standard, the Board found that Schramm’s statement that he had called the Union and was at the meeting “without representation” was sufficient to put Circus on notice that he desired Union representation. Contrary to

Circus's suggestion (Br. 50), there is no requirement that employees, like contestants on *Jeopardy!*, make their requests in the form of a question. A statement, such as Schramm made here, is sufficient to put an employer on notice. For example, the Board has found that an employee who refused to sign a statement without "representation or legal advice" effectively requested representation under *Weingarten*. *S. Bell Tel.*, 251 NLRB 1194, 1196 (1980), *enforced in relevant part*, 676 F.2d 499 (11th Cir. 1982). *See also Modern Mgmt. Servs., LLC*, 361 NLRB 228, 230 n.3 (2014) (employee's statement that "I need someone to be with me" was sufficient to invoke *Weingarten* right), *enforced*, No. 14-1160, 2016 WL 3040484 (D.C. Cir. May 18, 2016), *reh'g en banc denied*, July 14, 2016); *Southwestern Bell Tel. Co.*, 227 NLRB 1223, 1223 (1977) (employee's statement that "I would like to have someone there that could explain to me what was happening" was sufficient to invoke *Weingarten* right).

Further, even if phrased as a question, the employee's request does not have to be precise. Thus, the Board and courts have found that questions such as "if he needed a witness," *Bodolay Packaging Mach., Inc.*, 263 NLRB 320, 325 (1982), or "should [she] have a union representative present," *New Jersey Bell*, 936 F.2d at 149, were sufficient to put the employer on notice that the employee desired representation.

Once he made his desire for a union representative known, as the Board found, Circus was required to “present Schramm with the choice of participating in the interview unaccompanied by his representative or having no interview at all; instead, it unlawfully continued with the interview without affording him representation.” (JA 1064 n.10.) Circus does not dispute that it failed to present these options to Schramm. Instead, it argues that because the Union did not send a representative to the meeting, Schramm’s “choice” of representatives was unavailable, and Circus had no further responsibilities unless and until Schramm made an affirmative request for an alternate. (Br. 50.) But while the Board has made clear that an employer has no responsibility to provide an alternate representative, it is required to give the employee the option of foregoing the interview entirely or continuing without a representative. *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 275 & n.12 (4th Cir. 2003); accord *GHR Energy Corp.*, 294 NLRB 1011, 1041 (1989), *enforced*, 924 F.2d 1055 (5th Cir. 1991) (table).

What an employer cannot do, as Circus did here, is ignore the employee’s request altogether and continue with the interview without giving the employee the procedural options specified in *Weingarten*. Schramm did not lose his *Weingarten* right simply because his chosen representative did not appear at the meeting, and Circus violated the Act by failing to inform him of his options before proceeding with the interview. (JA 1063-64.)

Finally, Circus's claim that "[t]he record shows that Schramm did not even mention [the Union] until after" the meeting is simply incorrect. (Br. 48.) The Board upheld the administrative law judge's determination to credit Schramm's testimony that, "at the beginning of the meeting," he told managers he had called the Union and was there without representation. (JA 1073-74.) Indeed, as the judge noted, human resources staff member Mower agreed that Schramm said he had called the Union but was there without representation, although she mistakenly believed he made the statement at the end of the meeting. (JA 1074.) Cordell testified only that Schramm did not "request a union steward," which is undisputed. (JA 1074; JA 106.) As the judge also observed, the notes taken by human resources staff member Colin failed to make any mention of the Union and were admittedly not verbatim. (JA 1074; JA 547-48, 746.) In these circumstances, the judge appropriately found Schramm's testimony more "inherently reasonable" than Mower's and noted that "[n]either the absence in Colin's notes nor Cordell's denial literally negates Schramm's statement that he called the Union and he was there without representation." (JA 1074.) Thus, Circus has provided no basis for disturbing the judge's credibility resolution, much less shown that it is "hopelessly incredible." *PruittHealth*, 888 F.3d at 1294.¹⁰

¹⁰ Circus gains no ground by noting the judge's decision not to credit Schramm's statement on cross-examination that he told a human resources employee he

In sum, Circus's primary arguments come down to credibility. In its view, the Board should have credited its witnesses over the General Counsel's. But such arguments are "almost never worth making." *Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000). As the Court has noted, a party that wishes to overturn credibility determinations that have been adopted by the Board must show, not only that the credited testimony "carries . . . its own death wound," but also that the "discredited evidence . . . carries its own irrefutable truth." *UAW v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). This Circus has failed to do.

wanted a union representative at the meeting. (Br. 49.) As she explained, she simply found that Schramm's statement on cross-examination, when viewed in context, was merely "a reiteration of his earlier statement that he had called the Union three times and no representative was present." (JA 1074.)

CONCLUSION

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

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May 2019

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CIRCUS CIRCUS CASINOS, INC. d/b/a)	
CIRCUS CIRCUS LAS VEGAS)	
)	
Petitioner/Cross-Respondent)	Nos. 18-1201, 18-1211
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-120975
)	

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 11,550 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 10th day of May, 2019

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)	

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 10th day of May, 2019

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

**STATUTORY AND REGULATORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair

labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and

enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board

with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.54-.59. Compliance Specifications

29 C.F.R. § 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional

Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to [§ 102.15](#) a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

29 C.F.R. § 102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

29 C.F.R. § 102.56 Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days

from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

29 C.F.R. § 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

29 C.F.R. § 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

29 C.F.R. § 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

**THE BOARD'S CASEHANDLING MANUAL, PART 3,
COMPLIANCE PROCEEDINGS**

Available at: https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/chm3_0.pdf (last visited March 18, 2019)

Section 10530.1.

When a respondent has unlawfully terminated an employee or taken other action to adversely change terms or conditions of employment, the standard Board remedy is that the employee be offered full reinstatement to the former position or, if that position no longer exists, to a substantially equivalent one, without prejudice to seniority or other rights or privileges previously enjoyed. The underlying remedial principle is that the employee be restored to circumstances that existed prior to the respondent's unlawful action or that would be in effect had there been no unlawful action. The following sections address procedures and issues in effectuating reinstatement.