

Nos. 18-1300 & 18-1322

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

**CONSTELLIUM ROLLED PRODUCTS
RAVENSWOOD, LLC**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Local Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

Constellium Rolled Products Ravenswood, LLC, was the Respondent before the Board and is Petitioner/Cross-Respondent before the Court. The Board is the Respondent/Cross-Petitioner before the Court; its General Counsel was a party before the Board. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 5668, was the charging party before the Board. There were no intervenors or amici before the Board, and there are none before the Court.

B. Ruling Under Review

The ruling under review is a Decision and Order of the Board in *Constellium Rolled Products Ravenswood, LLC*, 366 NLRB No. 131 (July 24, 2018).

C. Related Cases

This case has not previously been before this or any other court. Board counsel is not aware of any related cases.

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GLOSSARY

A.	The deferred appendix
Br.	Constellium's opening brief
Constellium	Constellium Rolled Products Ravenswood, LLC
SA.	The supplemental appendix
The Act	National Labor Relations Act, 29 U.S.C. § 151, et seq.
The Board	National Labor Relations Board
The Order	<i>Constellium Rolled Products Ravenswood, LLC</i> , 366 NLRB No. 131 (July 24, 2018)
The Union	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 5668

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**ON PETITION FOR REVIEW AND
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Constellium Rolled Products Ravenswood, LLC (“Constellium”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board

Decision and Order issued against Constellium on July 24, 2018, and reported at 366 NLRB No. 131. (A. 132-47.)¹

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”). 29 U.S.C. § 151, 160(a). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. 29 U.S.C. § 160(e) and (f). The Board’s Order is final with respect to Constellium. The petition and cross-application were timely because the Act places no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that Constellium violated Section 8(a)(3) and (1) of the Act by suspending and discharging Andrew Williams because of his protected activity—writing “whore board” on overtime signup sheets to protest a new overtime system. That question turns on the subsidiary issues of whether Williams was engaged in a continuing course of

¹ “A.” references are to the deferred appendix and “SA.” references are to the supplemental appendix. “Br.” references are to Constellium’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

protected concerted activity when he wrote those words and whether writing them caused him to lose the protection of the Act.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the Act and Board regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After investigating an unfair-labor-practice charge filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Services Workers International Union, Local 5668 (“the Union”), the Board’s General Counsel issued a complaint alleging that Constellium violated Section 8(a)(3) and (1) of the Act by suspending and discharging Williams for engaging in protected activity. (A. 138-39; A. 150-64.) Following a hearing, an administrative law judge issued a decision recommending dismissal of the complaint. Although he acknowledged that Williams’ writing the words “whore board” on two overtime signup sheets to protest a new overtime system was an expression of employees’ collective concern about a term and condition of employment, he then found that the notation was an unprotected act of vandalism to employer property. (A. 132, 144, 146-47.)

After considering the judge's decision and the record in light of the parties' exceptions and cross-exceptions, the Board rejected his recommendation of dismissal. Instead, the Board found that Williams was engaged in a continuing course of protected concerted activity when he wrote those words on the overtime signup sheets, and that his notation was not so egregious as to cause him to lose the protection of the Act.² (A. 132.) Therefore, the Board concluded Constellium violated Section 8(a)(3) and (1) of the Act by suspending and discharging Williams. (A. 135.)

II. THE BOARD'S FINDINGS OF FACT

A. Constellium's Operations and the Parties' Prior Overtime Scheduling Agreement

Constellium operates a rolled aluminum manufacturing facility in Ravenswood, West Virginia, where the Union represents a unit of production and maintenance employees. (A. 132; A. 11, 38, 283.) From 2006 until 2010, the parties had a written agreement governing the selection of employees to perform scheduled overtime work. (A. 132; A. 165-68.) Under the agreement, Constellium solicited employees (in person or by telephone) three days in advance to fill

² To the extent consistent with its Decision and Order, the Board otherwise affirmed the judge's rulings, findings, and conclusions. (A. 132.) The Board specifically affirmed the judge's finding that it was inappropriate to defer to an arbitrator's prior award (A. 132 n.2, 140-43), a finding Constellium does not challenge (Br. 12 n.6).

available overtime slots; employees who volunteered but failed to work their scheduled overtime were not subject to discipline. (A. 132; A. 11, 22, 25, 38-39.)

The agreement remained in effect after its expiration in May 2010, while the parties attempted to negotiate a new agreement. (A. 132; A. 11, 15, 19.)

B. Constellium Unilaterally Implements a New Overtime Scheduling System; Employees Respond by Filing Grievances, Boycotting Overtime, and Calling Overtime Signup Sheets a “Whore Board”

In April 2013, Constellium determined the parties were at impasse in negotiations for a replacement overtime agreement and unilaterally implemented a new overtime scheduling system. (A. 132; A. 12, 19, 33, 38, 169-75.) Under the new system, Constellium required interested employees to sign up seven days in advance on overtime sheets that it posted on a bulletin board outside a lunchroom and near a timeclock. (A. 132-33, 139 & n.2; A. 12, 22, 39, 232-33, 243-45.)

Constellium posted the overtime signup sheets weekly on Monday, removing them each Thursday. (A. 133; A. 39, 51.) Unlike before, employees who volunteered for overtime were subject to discipline if they failed to work scheduled overtime. (A. 132, 139; A. 12, 22.)

In response to Constellium unilaterally implementing the new overtime system, the Union filed an unfair-labor-practice charge and over 50 employees filed grievances. (A. 132; A. 13, 41, 176-231, 236-40.) In addition, many

employees, including Andrew Williams, organized a boycott and refused to sign up for overtime. (A. 132; A. 22-23, 25-26, 41, 55.)

Employees opposed to the new overtime system also began calling the signup sheets a “whore board,” implying that those who signed it had compromised their loyalty to the Union and their coworkers to benefit themselves and accommodate Constellium. The phrase “whore board” became a common expression at the facility at the facility—one used even by supervisors—in referring to the signup sheets. (A. 132; A. 22-23, 26, 33.) Constellium did not censor or discipline any employee for using that expression. (A. 132; A. 23-24, 26.) In addition, there was a general laxity at the facility towards profane and vulgar workplace language. (A. 132; A. 14, 20, 24, 26-27, 33.)

C. After Williams Writes “Whore Board” on the Overtime Signup Sheets, Constellium Suspends Him with the Intent of Discharge for “Insulting and Harassing Conduct,” Then Follows Through with the Discharge

Amid the ongoing labor dispute over the new overtime system, Williams was preparing to clock out at the end of his shift on October 2, 2013. (A. 133; A. 14, 27, 33-34.) At the time, four employees were socializing in the area as they also prepared to clock out. (A. 134 n.10; A. 35-36, 248.) After requesting a pen from a nearby coworker, Williams spontaneously wrote “whore board” at the top of two adjacently posted overtime signup sheets. (A. 132, 133 n.10; A. 27, 35, 50, 232-33, 248.) The writing did not obscure or otherwise render illegible any text on

the sheets and his conduct did not cause any disruption of work. The signup sheets, comprised of two pieces of paper, were scheduled to be removed the next day. (A. 133-34; A. 27, 35, 51-53, 232-33.)

During Constellium's subsequent investigation, Williams admitted in an interview that he wrote the words on the signup sheets. (A. 133; A. 27-28.) On October 10, Constellium suspended him for five days with the intent of discharging him for "willfully and deliberately engaging in insulting and harassing conduct on the job." (A. 133, 139; A. 234.) On October 22, Constellium sent Williams a letter officially terminating his employment. (A. 133; A. 235.) The letter did not specify the basis for his discharge. (A. 133 n.5; A. 235.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Pearce and McFerran, Member Emanuel dissenting) found that Constellium violated Section 8(a)(3) and (1) of the Act when it suspended and discharged Williams for writing "whore board" on the overtime signup sheets.³ (A. 132, 135.) The Board's Order requires Constellium to cease and desist from suspending, discharging, or otherwise discriminating against any employee for engaging in union or protected concerted

³ Constellium subsequently filed a motion for reconsideration (SA. 1-10), which the Board (Members McFerran, Kaplan, and Emanuel) denied on October 17, 2018 (A. 148).

activity and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act. (A. 136.)

Affirmatively, the Order requires Constellium to offer Williams full reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position and to make him whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge. Constellium must also remove from its files any references to his unlawful suspension and discharge, notifying Williams in writing of the expungement and that the suspension and discharge will not be used against him in any way. Finally, the Order requires Constellium to post a remedial notice. (A. 136-37.)

SUMMARY OF ARGUMENT

Based on settled law and ample testimonial and documentary evidence, the Board reasonably found that Constellium violated Section 8(a)(3) and (1) of the Act by suspending and discharging Williams for engaging in protected concerted activity. The protected concerted activity involved a course of conduct that culminated with him writing a harsh and arguably vulgar expression (“whore board”) on overtime sign-up sheets to protest a new overtime policy, in furtherance of a group concern over the unilateral change. As the Board explained, Williams’ conduct was a continuation and outgrowth of employees’ boycott of and opposition

to the new policy, which required them to use signup sheets commonly derided as a “whore board.” This finding comports with analogous cases where the Board has found that employees engaged in protected activity even when their conduct involved scratching intemperate remarks on permanent surfaces such as bathroom stalls.

Substantial evidence also supports the Board’s finding that Constellium suspended and discharged Williams for his impulsive act of writing the crude expression and not, as Constellium argues, for defacing company property (the two pieces of paper). Indeed, Constellium’s contemporaneous documentation squarely establishes that it suspended Williams with the intent of discharging him “for willfully and deliberately engaging in insulting and harassing conduct”—i.e., for writing the offensive words. Constellium therefore gains no ground in relying on after-the-fact testimony by its officials, who claimed they disciplined Williams because he defaced company property. Moreover, the Board reasonably rejected Constellium’s assertion that Williams’ conduct—marring two pieces of paper scheduled to be removed and replaced the next day—is “inherently unprotected” under the Act. As the Board explained, it has never held that employee graffiti is always an unprotected activity, and no such per se rule was established in *United Artists Theatre Circuit, Inc.*, 277 NLRB 115 (1985). To the contrary, Board

decisions before and after *United Artists* have found certain employee graffiti constituted a protected under the Act.

Having determined as an initial matter that Williams was engaged in protected concerted activity when he wrote on the overtime sign-up sheets, the Board correctly proceeded to analyze the case under *Atlantic Steel Co.*, 245 NLRB 814 (1979), finding that his conduct was not so egregious as to forfeit the Act's protection. Alternatively, at Constellium's behest, the Board applied a totality-of-circumstances test to find that Williams did not lose the Act's protection by writing the offensive expression on the sign-up sheets. On review, Constellium essentially ignores and certainly does not dispute any aspect of these analyses. Thus, it has waived any challenge to the Board's finding that under either test, Williams retained the Act's protection. In any event, ample evidence supports both findings.

Constellium's remaining arguments are without merit or jurisdictionally barred. First, a fair reading of the Board's decision shows no basis for its claim that the Board granted employees a new, affirmative right to use employer bulletin boards however they desire. Second, the Court lacks jurisdiction to consider Constellium's argument that the Board failed to accommodate equal employment opportunity and anti-harassment laws and policies. Constellium could have timely made that argument before the Board issued its decision, but it did not do so. Moreover, the Board properly rejected its belated attempt to raise the issue for the

first time in a motion for reconsideration. Simply put, Constellium failed to meet its burden of showing the requisite extraordinary circumstances for granting reconsideration because nothing prevented the company from presenting its claim at an earlier stage in the litigation.

STANDARD OF REVIEW

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court will uphold the Board's construction of the Act and its determination as to the appropriate legal analysis where they are "reasonably defensible." *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 307, 308-11 (D.C. Cir. 2003). Moreover, the Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 25 (D.C. Cir. 2011). The Court also applies the substantial evidence test to the Board's "application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted).

Accordingly, "a decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted

arbitrarily or otherwise erred in applying established law to the facts of the case.” *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008) (internal quotation marks omitted). Moreover, the question on review is not “whether record evidence could support the [employer’s] view of the issue, but whether it supports the [Board’s] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). The Court’s deferential review “does not change” where the Board disagreed with the administrative law judge. *Kiewit Power*, 652 F.3d at 25. Lastly, the Board’s assessment of witness credibility is given great deference and must be upheld unless it is “hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924 (D.C. Cir. 2005)).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT CONSTELLIUM VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING ANDREW WILLIAMS

Among the rights guaranteed by Section 7 of the Act is the right of employees “to form, join, or assist labor organizations” and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. To protect those rights, Section 8(a)(3) of the Act prohibits employers from discriminating “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization.” 29 U.S.C. § 158(a)(3). In turn, 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 rights guaranteed in [S]ection 7.” 29 U.S.C. § 158(a)(1). Unless an employee loses the protection of the Act by engaging in sufficiently egregious conduct, an employer violates Section 8(a)(3) and (1) by suspending and discharging him for engaging in union or protected concerted activity.⁴ *See Stephens Media*, 677 F.3d at 1251-53.

As shown below, the Board found that Williams was engaged in a continuing course of protected concerted activity when he wrote “whore board” on the overtime sign-up sheets, and that Constellium suspended and discharged him essentially for using that expression. The Board further found that under an *Atlantic Steel* or a totality-of-the-circumstances analysis, Williams’ act of writing on the sign-up sheets was not so egregious as to lose the Act’s protection. On review, Constellium mostly ignores these findings, arguing instead that it suspended and discharged Williams for defacing company property (the pieces of paper), which it maintains is inherently unprotected. The Board, however, appropriately rejected this argument. Instead, it reasonably decided to proceed by

⁴ A violation of Section 8(a)(3) produces a “derivative[.]” violation of Section 8(a)(1). *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016).

alternatively analyzing the case under *Atlantic Steel* and a totality-of-circumstances test to find that Williams did not forfeit the Act's protection.

As also shown below, there is no merit to Constellium's further claim that the Board's decision grants employees an open-ended right to use employer bulletin boards. Finally, the Court lacks jurisdiction to consider Constellium's belated claim that the Board's decision fails to accommodate equal employment/anti-harassment laws and policies.

A. Williams Engaged in Protected Concerted Activity by Communicating a Group Concern About Overtime; His Writing on the Signup Sheets Was a Continuation and Outgrowth of That Activity

It is settled, and Constellium does not dispute (Br. 22-31), that complaints regarding overtime are protected because they concern a term and condition of employment. *See Acme Die Casting, a Div. of Lovejoy Indus., Inc. v. NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994) (overtime schedule is a term and condition of employment); *Jasta Mfg. Co.*, 246 NLRB 48, 49 (1979) (employees engaged in protected protest of new overtime procedures, which "are clearly terms and conditions of employment"), *enforced mem.*, 634 F.2d 623 (4th Cir. 1980). It is similarly undisputed that an employee engages in concerted activity when "acting for, or on behalf of, other workers," or "acting alone to initiate group action, such as bringing group complaints to management's attention." *Kvaerner Phila. Shipyard, Inc.*, 347 NLRB 390, 392 (2006) (citing *NLRB v. City Disposal Sys.*,

Inc., 465 U.S. 822 (1984)). *Accord Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198-99 (D.C. Cir. 2005).

Moreover, as this Court has explained, “[d]etermining whether activity is concerted and protected within the meaning of [the NLRA] is a task that ‘implicates [the Board’s] expertise in labor relations.’ The Board’s determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable.” *Stephens Media*, F.3d at 1250 (alterations in original) (quoting *Citizens Inv. Servs.*, 430 F.3d at 1198). In reviewing that determination, the Court “construe[s] [S]ection 7 broadly when considering whether activities qualify as protected.” *Id.* at 1251.

Applying these principles to the record evidence, the Board reasonably found that Williams was engaged in a continuing course of protected concerted activity when he wrote “whore board” on the overtime sign-up sheets. (A. 133.) That finding is supported by substantial evidence showing his “act was a continuation and outgrowth of the employees’ boycott and opposition” to Constellium’s unilaterally implemented overtime system—one that employees, including Williams, opposed “in principle” and “also reasonably believed violated the existing terms and conditions of the expired” overtime agreement. (A. 133.) Indeed, Constellium does not dispute that until he wrote on the sign-up sheets,

Williams was engaged in a continuing course of concerted activity that was protected. (*See, e.g.*, Br. 26-27.)

Thus, as shown (*see* pp. 5-6), Constellium unilaterally implemented a new overtime system in April 2013 that was less favorable to employees than the prior agreement because it required them to sign up seven days in advance and imposed discipline if they failed to work scheduled overtime. The Union then filed an unfair-labor-practice charge and more than 50 employees filed grievances alleging, among other things, that the new system was unlawful because it was unilaterally implemented and contrary to existing practice under the prior overtime agreement. The record evidence also shows, and it is undisputed, that post-implementation, only a handful of employees volunteered for overtime. Instead, after discussing the new policy among themselves, many employees, including Williams, organized a boycott and refused to sign up. When asked, Mark Harmison, a manager in Williams' department (A. 38), acknowledged there was "a popular effort not to sign the [overtime] board" (A. 55). The credited evidence, moreover, demonstrates that employees began referring to the overtime signup sheets as a "whore board," an expression that became commonplace at the facility and used by supervisors as well. When Williams spontaneously wrote on the overtime sheets in October 2013, the widespread employee boycott of the commonly referred to "whore board" was ongoing. *See* p. 6.

The Board’s finding that, on these facts, Williams was still engaged in a continuing course of protected activity when he wrote “whore board” on the signup sheets comports with analogous cases where, as here, the protected content of the employee’s writing was at issue. (*See* A. 133 & n.8.) Indeed, the Board has found that an employee engaged in protected concerted activity when he literally scratched graffiti—a lengthy criticism of his employer’s racially discriminatory promotion policies—onto the metal divider in a restroom. *Honeywell, Inc.*, 250 NLRB 160, 160-62 (1980), *enforced mem.*, 659 F.2d 1069 (3d Cir. 1981). Similarly, the Board has found that an employee engaged in protected union activity when he wrote on a bathroom stall that workers needed a union to stop the employer’s drug testing program and “witch hunt.” *Port E. Transfer, Inc.*, 278 NLRB 890, 891-92, 894-95 (1986).

B. The Board Reasonably Found that Constellium Suspended and Discharged Williams for His Crude Language, and Rejected Its Claim that His Act of Writing on the Signup Sheets Was Inherently Unprotected Because He Defaced Company Property

As noted, Constellium’s own documentation establishes that at the time it suspended Williams it intended to discharge him “for willfully and deliberately engaging in insulting and harassing conduct”—namely, writing the expression “whore board” on the signup sheets. Soon thereafter, Constellium carried out its stated intention by discharging him. In seeking to avoid liability for these adverse employment actions, Constellium ignores its contemporaneous admission that it

disciplined Williams based on the content of his writing, which was part of a continuing course of concerted activity by employees opposed to Constellium's unilateral imposition of the new and more stringent overtime policy.

Instead, Constellium contends only that the method Williams used to communicate that concerted complaint about the overtime policy—writing directly on two pieces of paper—amounted to defacement of company property, which rendered his conduct “inherently” unprotected by the Act. (Br. 22-28.) The Board, however, reasonably rejected this argument, emphasizing that Constellium “disciplined Williams for the protected content of his writing” and “his supposed insulting and harassing conduct, rather than the defacement of property.” (A. 133 n.8; A. 64-65, 234.) Ample evidence supports that finding. Indeed, as noted, in its October 10 letter, Constellium squarely told Williams that it was suspending him with the intent of discharge for “willfully and deliberately engaging in insulting and harassing conduct on the job.” (A. 64-65, 234.) Moreover, in carrying out its stated intention, Constellium never disavowed that rationale, as its discharge letter

did not provide any other reason (or give any reason at all) for the adverse action.⁵

(A. 235.)

Constellium's attempted end run around this compelling evidence that it suspended and discharged Williams based on the content of his writing is clever but ultimately unsuccessful. A key problem for Constellium is that it waited until the unfair-labor-practice hearing to claim, via its witnesses, that it acted against Williams not for his "insulting and harassing" conduct but instead for "defacing company property." (Br. 27-28.) But try as Constellium might (it cites testimony by two company officials about a litany of rules Williams ostensibly violated), it cannot get around the complete absence of any contemporaneous documentation showing it suspended and discharged Williams for defacing property. (Br. 27-28, citing A. 48, 58, 60.) Constellium's attempt to undermine the Board's finding

⁵ In its fact statement, Constellium asserts that Williams made harassing remarks to a coworker on October 9, six days after writing on the sign-up sheets. (Br. 9, citing A. 47.) As the Board found, however, this assertion is based entirely on hearsay—a company official's claim that the employee (who did not testify at the hearing) supposedly reported the remarks to him. Williams was the only witness who testified directly about the supposed incident, and he squarely denied conversing with the employee or making such remarks. Accordingly, the Board credited his testimony to find "as a factual matter" that no such incident occurred. (A. 135 n.15, 145-46.) In any event, because Constellium does not rely on the alleged incident in the argument portion of its brief, it has waived any argument that might be premised on the allegation. *See PDK Labs. Inc. v. Drug Enf't Admin.*, 438 F.3d 1184, 1196 (D.C. Cir. 2006) (party waives claim by failing to provide supporting argument in opening brief; mere mention in fact statement does not preserve issue for appellate review).

therefore falls short. *See Bruce Packing*, 795 F.3d at 22 (question on review is not “whether record evidence could support the [employer’s] view of the issue, but whether it supports the [Board’s] ultimate decision”).

Furthermore, the Board reasonably rejected Constellium’s claim that the act of writing on the sign-up sheets amounted to defacing company property and thus was “inherently unprotected” under the Act. As the Board explained, “the writing did not obscure any text on the sign-up sheets” and did not cause any disruption of work. (A. 133; A. 27, 35, 51-53, 232-33.) Moreover, the “property” in question consisted of nothing more than two readily replaceable pieces of paper that were already “scheduled to be taken down the following day.” (A. 133; A. 39, 51-52.) Finally, by impulsively deciding to scribble on sign-up sheets that employees were already expected to write on if they wanted overtime, Williams was simply placing his message where it was “sure to be seen by coworkers who shared his views on the new overtime policy, coworkers who disagreed, and [Constellium] whose policy he opposed.” (A. 133.) And in doing so, he used a term widely bantered about by employees and supervisors alike in a work environment that tolerated a great deal of vulgar language.

Moreover, the Board rejected Constellium’s reliance (Br. 22-24) on *United Artists Theatre Circuit, Inc.*, 277 NLRB 115 (1985), for its assertion that the case established a “per se rule” that employee graffiti is always unprotected. As the

Board pointed out, it “has never held that employee graffiti is always unprotected,” evidenced by its decisions both before and after *United Artists* in which it found occasions where employee graffiti was a protected activity under the Act. (A. 133 (citing, as examples, *Port E. Transfer* and *Honeywell*).)⁶ And, in the nearly 35 years since *United Artists* issued, no Board or court decision has cited the case for the ostensible “rule” that all employee graffiti is per se unprotected.⁷

Thus, contrary to Constellium’s argument, the Board has not “changed its precedent.” (Br. 24-25 & n.8.) Simply put, there is no hard and fast rule that employee graffiti always is—or never is—a protected activity. Rather, the question of whether a particular instance of graffiti qualifies as protected activity depends upon the specific facts of the case. And this case, of course, involves

⁶ Constellium incorrectly argues (Br. 25-26) that *Port East Transfer* has no application here because the Board in that case applied its discriminatory motivation test set forth in *Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). The “threshold issue” in a *Wright Line* case—equally applicable here—is whether the employee engaged in protected activity. *Port E. Transfer*, 278 NLRB at 894; *accord Ozburn-Hessey*, 833 F.3d at 218.

⁷ As the Board also observed, even if the administrative law judge in *United Artists* “appeared to hold initially that the employee’s [graffiti] was inherently unprotected,” he “also relied on findings that would be consistent with an *Atlantic Steel* loss-of-protection analysis.” (A. 133 n.8.) Under that analysis, the activity is deemed protected by the Act, and the only question is whether circumstances caused the employee to forfeit that protection. *See pp. 24-25.*

writing on two soon-to-be-removed (and fungible) pieces of paper that employees were already expected to write on if they wanted overtime.

Constellium does not advance its “inherently unprotected” argument by relying on *Emerson Electric Co.*, 196 NLRB 959 (1972), or *Cashway Lumber, Inc.*, 202 NLRB 380 (1973).⁸ (Br. 23.) In *Emerson*, the Board found no violation where the employer discharged the employee for *insubordination*—writing pro-union messages on company materials despite having received a warning 17 days earlier not to do so again on pain of being suspended pending discharge. *Emerson*, 196 NLRB at 961-62. There was no evidence protected activity was the “real reason” for his discharge. *Id.* at 962. By contrast, as shown pp. 17-19, Constellium effectively admitted to suspending Williams with the intent of discharging him for conduct it deemed “insulting and harassing”—i.e., the protected activity of writing on the sign-up sheets. (A. 234.) Thus, unlike in *Emerson*, Constellium’s adverse employment actions against Williams were premised on his protected activity. (A. 133 n.8.) With respect to *Cashway*, there

⁸ Constellium likewise errs in citing dissimilar cases where employee *destruction* of company property was not found to be a protected activity. (Br. 23 (citing *Austal USA, LLC*, 349 NLRB 561, 566 (2007); *Will & Baumer Candle Co.*, 206 NLRB 772, 774 (1973)).) As shown, Williams did not destroy property. Indeed, his writing did not even obscure or render illegible the overtime sheets, ephemeral pieces of paper which were scheduled to be removed the next day. (A. 133-34; A. 51-52, 232-33.)

the General Counsel did not except to the administrative law judge's dismissal of the complaint allegation that the employer unlawfully threatened to discharge employees for posting union stickers on company property. *See Cashway*, 202 NLRB at 380 (General Counsel filed only a brief in support of judge's decision). Therefore, that portion of the judge's decision is not precedential. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003) (portion of administrative law judge's decision to which no exceptions were filed has no precedential value); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997) ("Findings adopted under such circumstances are not . . . considered precedent for any other case."); *see also* 29 C.F.R. § 101.12(b) (Board "automatically" adopts judge's decision if no exceptions are filed).

C. The Board Reasonably Found that Under an *Atlantic Steel* or Totality-of-the-Circumstances Test, Writing on the Signup Sheets Did Not Cause Williams To Forfeit the Act's Protection

Having found that Williams was engaged in a continuing course of protected concerted activity, which Constellium does not contest, the Board appropriately proceeded to examine whether, under the test articulated in *Atlantic Steel Co.*, 245 NLRB 814 (1979), he nonetheless forfeited the Act's protection by writing an "arguably vulgar" expression on the overtime signup sheets. (A. 133-35.) Alternatively, at Constellium's urging below, the Board also analyzed whether he lost the Act's protection under a totality-of-the-circumstances test. Applying both

tests, the Board found “the result is the same”—Williams retained the Act’s protection. (A. 133.)

Before the Court, Constellium does not dispute the Board’s reasoned determination to apply an *Atlantic Steel* analysis or its finding that, weighing the relevant factors under that test, Williams retained the Act’s protection. (*See* Br. 14 n.7, 22-37.) Similarly, Constellium does not contest the Board’s application of the totality-of-the-circumstances test or its finding that Williams did not lose the Act’s protection under that test. (*See id.*) Accordingly, Constellium has waived any challenge to the Board’s reliance on, and application of, those analyses. *See NY Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (arguments not made in opening brief are waived). In any event, as shown below, ample evidence supports the Board’s findings, which are consistent with precedent.

1. The Board reasonably found that on balance, the *Atlantic Steel* factors favor protection

It is well-established that an employee’s right to engage in Section 7 activity “may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *Kiewit Power*, 652 F.3d at 26. Consequently, an employee engaged in protected concerted or union activity loses the Act’s protection only if his conduct is “so egregious as to be indefensible.” *Stephens Media*, 677 F.3d at 1253. In determining whether conduct satisfies that standard, the Board weighs the following factors: (1) location where the conduct

occurred; (2) the subject matter of the conduct; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked in any way by an employer's unfair labor practice. *Atl. Steel, Co.*, 245 NLRB 814, 816 (1979); *accord Stephens Media*, 677 F.3d at 1253 (applying *Atlantic Steel*). The Board's foregoing "multifactor framework enables [it] to balance employee rights with the employer's interest in maintaining order at its workplace." *Triple Play Sports Bar & Grille*, 361 NLRB 308, 311 (2014). The Court will not disturb the Board's determination of whether an employee retains the Act's protection unless it is arbitrary, capricious, or unsupported by substantial evidence. *Stephens Media*, 677 F.3d at 1253; *Kiewit Power*, 652 F.3d at 27.

Substantial evidence supports the Board's determination that "[u]pon weighing the *Atlantic Steel* factors . . . Williams did not lose the protection of the Act" by writing "whore board" on the overtime sign-up sheets.⁹ (A. 135.)

⁹ The Board observed that it typically applies the *Atlantic Steel* test to situations involving "direct communications, face-to-face in the workplace, between an employee and a manager or supervisor." (A. 133-34 (quoting *Triple Play*, 361 NLRB at 311).) Recognizing the present "circumstances are different," the Board nonetheless found *Atlantic Steel* "may appropriately be applied here, so long as we keep in mind that our task is to balance the employee's statutory rights and the employer's interests in maintaining workplace order." (A. 134.) As noted above, Constellium does not challenge the Board's decision to apply *Atlantic Steel*. (See Br. 14 n.7, 22-37.)

Accordingly, the Board found Constellium violated Section 8(a)(3) and (1) of the Act by suspending and discharging Williams for that conduct.

The Board found that both the subject matter (factor 2) and nature of Williams' conduct (factor 3) favored continued protection. As to the former, the subject matter "strongly favor[ed] continued protection" because the evidence established Williams was protesting Constellium's unilateral implementation of the new overtime system. (A. 134.) Indeed, when he wrote on the signup sheets, Williams used the "same terminology" employed by coworkers as part of their ongoing, collective opposition to that new system. (A. 134.) Thus, as the Board noted, those employees, like Constellium, knew (or reasonably should have known) that Williams' use of the phrase was "directly related to that ongoing dispute and was a repetition of the employees' expressed frustration with the revised policy." (A. 134.) *See, e.g., Kiewit Power Constructors Co.*, 355 NLRB 708, 709-10 (2010) (subject matter favored protection where it was directly related to employees' protesting change in workplace policy), *enforced*, 652 F.3d 22 (D.C. Cir. 2011).

The nature of Williams' conduct also weighed in favor of continued protection. As the Board explained, the evidence showed "this one-time incident of graffiti was likely spontaneous, a circumstance that favors protection." (A. 134.) *See, e.g., Kiewit*, 355 NLRB at 710 (factor weighed in favor of protection

where employees' outbursts were "single, brief, and spontaneous reactions"). As the Board further emphasized, Williams was engaged "in an act of communication directed at his coworkers and his employer, not mere vandalism." (A. 134.)

Although, as the Board acknowledged, his "word choice was harsh and arguably vulgar, it reflected his and his coworkers' strong feelings about the ongoing dispute" over the new overtime system. (A. 134.) *See Stanford Hotel*, 344 NLRB 558, 564 (2005) ("offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service."). Moreover, as the Board noted, the record evidence established that Constellium did not discipline any other employees for similarly using the phrase "whore board." To the contrary, it had a "general tolerance" toward workplace profanity. (A. 134.) These circumstances cut strongly against defining Williams' expression as "particularly egregious" in nature. (A. 134.) *See Corr. Corp. of Am.*, 347 NLRB 632, 636 (2006) (finding no loss of protection based on profanity where similar language was common among employees and supervisors).

Addressing another *Atlantic Steel* factor, the Board found that the location of Williams' conduct (factor 1) was "neutral or lean[ed] marginally in favor of loss of protection." (A. 134-35.) On the one hand, there was "no question" other

employees would have seen Williams' writing, which marred the signup sheets that Constellium had a legitimate interest in maintaining free from defacement. (A. 134.) On the other hand, the signup sheets were temporary and could have easily been removed or replaced; in fact, the sheets Williams wrote on were scheduled to be removed the following day. As the Board also noted, there was no evidence that Williams' writing had disrupted work or interfered with the legibility or use of the signup sheets.

Turning to the final factor of provocation (factor 4), the Board found that it "should be treated as neutral." (A. 135.) Although not an unfair labor practice, Constellium's unilaterally implemented new overtime system "precipitate[d] a labor dispute," including a charge filed by the Union and numerous employee-filed grievances. (A. 134.) As the Board reasoned, Williams' act of writing on the signup sheets was therefore "an outgrowth and continuation of the employees' boycott," not "an expression of personal ire." (A. 134.) On the other hand, his writing was "not an immediate reaction" to an unfair labor practice or "some type of uncivil conduct." (A. 135.)

In sum, the Board found that "while the location factor [was] neutral or lean[ed] marginally in favor of loss of protection, it [was] outweighed by the subject matter and nature of Williams' protest, factors that favor[ed] continued protection." (A. 135.) Furthermore, even treating the neutral provocation factor as

instead favoring the loss of protection, the Board found it “would not tip the balance” toward Williams losing the Act’s protection. (A. 135.) As noted above, Constellium disputes no aspect of this eminently reasonable *Atlantic Steel* analysis.

2. The Board reasonably found that in the alternative, under the totality-of-the-circumstances test, Williams did not lose the Act’s protection

Alternatively, the Board found that Williams did not lose the Act’s protection under the totality-of-the-circumstances test, which Constellium originally asked the Board to apply. (A. 135.) Briefly, under the totality-of-the-circumstances test, “discipline based on employee misconduct that is the *res gestae* of protected activity is considered unlawful unless the misconduct was so egregious as to lose the protection of the Act.” (A. 135 (citing *Consumers Power Co.*, 282 NLRB 130, 132 (1986)).)

Echoing its *Atlantic Steel* analysis, the Board found, and the record establishes, that Williams’ act of writing “whore board” on the overtime sheets was “part of the ongoing employee protest over [Constellium’s] change to the overtime policy” and his conduct was “a single, brief act that appears to be impulsive, rather than deliberate.” (A. 135.) As the Board also found, there was “no evidence” his conduct interrupted production and Constellium “generally tolerated profanity in the workplace.” Moreover, as the Board noted, the company had not disciplined other employees for using the phrase “whore board.” (A. 135.) Accordingly, as

the Board found, “viewing all of the circumstances as a whole, rather than categorizing them into particular factors as *Atlantic Steel* contemplates, does not lead us to a different result”—Williams retained the Act’s protection. (A. 135.)

D. Constellium’s Assertion that the Board’s Decision Gives Employees the Right To Use Employer Bulletin Boards Is Without Merit

Constellium claims the Board’s decision effectively grants employees an “[a]ffirmative, Section 7 [r]ight” to use employer bulletin boards, despite contrary precedent. (Br. 29 (citing cases).) Not so. A fair reading of the decision does not support its claim that the Board granted employees an expansive, affirmative right to use their employer’s bulletin boards however they desire. Instead, as discussed (pp. 14-17), the Board narrowly found that under the facts of this case, Williams was engaged in a continuing course of protected activity when he wrote on the overtime sheets—by happenstance posted on a bulletin board—and that, as just discussed (pp. 23-30), the Act precluded Williams’ ensuing discipline because his conduct was not so egregious as to lose the Act’s protection. In so finding, the Board expressly recognized Constellium’s interests in maintaining order and its property but found that, “on balance, Williams’ Section 7 rights outweighed [those] interests.” (A. 135.)

In pressing its claim, Constellium conflates two distinct points—a statutory right to engage in certain conduct, versus the Act protecting some intemperate

conduct from discipline.¹⁰ By its own words, however, Constellium implicitly acknowledges the difference between those two points and that the Board’s decision involves only the latter, thus undermining its own claim. For instance, although Constellium begins by asserting that precedent holds “employees have *no affirmative Section 7 right*” to use company bulletin boards, it then pivots to arguing that the Board’s decision found an employee (Williams) “*had the statutory protection* to use an employer bulletin board to convey a message.” (Br. 29-30 (emphasis retained).) As shown, the Board’s decision rests on established principles affording protection to non-egregious conduct committed during the course of protected activity; it does not create a new employee right to commandeering employer property. Thus, hyperbole aside, the Board’s decision has not placed parties in a “purgatory of conflicting case law.” (Br. 31.)

¹⁰ By analogy, an employee may have no affirmative “right” under Section 7 to threaten a supervisor, but if the employee makes threatening remarks during the course of protected activity, then the Act *might* protect that employee from otherwise lawful discipline (provided the conduct was not so egregious as to lose the Act’s protection). *See, e.g., Kiewit Power*, 652 F.3d at 25-29 (during course of protected activity, employees told supervisor that if they were laid off, it was “going to get ugly,” and advised supervisor to bring “boxing gloves;” resulting discharges unlawful).

E. The Court Lacks Jurisdiction To Consider Constellium’s Claim that the Board Failed To Accommodate Equal Employment and Anti-Harassment Laws and Policies

The Court lacks jurisdiction to consider Constellium’s remaining argument—that the Board’s decision fails to accommodate unspecified federal and state laws and policies respecting equal employment opportunities and anti-harassment.¹¹ (Br. 31-37.) Of course, in professing concern for these matters, Constellium appears to forget that it routinely tolerated vulgar language—including the expression “whore board”—by employees and supervisors alike. But it is Section 10(e) of the Act that proves fatal to Constellium’s argument.

Under Section 10(e) of the Act, “[n]o 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.” 29 U.S.C. § 160(e); *see Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008) (citing Section 10(e)). This provision “is an example of Congress’s recognition” that to facilitate “orderly procedure and good administration[,] . . . courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection

¹¹ Contrary to its suggestion, nothing in the Board’s decision foreclosed Constellium from removing the overtime sheets after Williams wrote on them. (Br. 37.)

made at the time appropriate under its practice.” *Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1284 (D.C. Cir. 1990) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). Accordingly, to urge an objection before the Board under Section 10(e), a party must present its arguments “in a procedurally valid way.” *Parkwood*, 521 F.3d at 410.

Constellium did not do so. Specifically, it could have raised its argument in its cross-exceptions to the judge’s decision or its answering brief to the General Counsel’s exceptions to the judge’s failure to find an unfair-labor-practice violation. (*See* A. 90-94, 96, 112-30.) Constellium’s complete failure to raise the issue at these earlier appropriate times in the proceeding below bars consideration of its claim on review.

Furthermore, Constellium did not preserve the issue, and cannot sidestep this jurisdictional bar, by noting that it raised the argument for the first time in a motion for reconsideration following the Board’s issuance of its Order, which agreed with the General Counsel’s exceptions and found the violation. (A. 132.) Simply put, Constellium was not entitled to sit back and wait to raise its argument for the first time in a motion for reconsideration. (*See* SA. 6-9.) As the Board explained in its Order denying the motion, Constellium failed to “demonstrate[] extraordinary circumstances warranting reconsideration under Section 102.48 of the Board’s Rules and Regulations.” (A. 148 (citing 29 C.F.R. § 102.48(c)(1)).) *See*

Parkwood, 521 F.3d at 410 (under its regulations, “the Board will only entertain a motion for reconsideration in ‘extraordinary circumstances’”). Nothing prevented Constellium from raising its claim about equal employment and anti-harassment laws before the Board issued its decision. Accordingly, as the Board correctly found, Constellium failed to show extraordinary circumstances for holding back its claim and waiting to raise it for the first time in a motion for reconsideration.

Thus, the Board’s decision to deny Constellium’s motion for reconsideration is consistent with Section 102.48(c)(1) of the Board’s Rules and Regulations and not plainly erroneous. *See Parkwood*, 521 F.3d at 410 (where the Board denies reconsideration for lack of extraordinary circumstances, the Court “must defer to the Board’s interpretation of its own regulations [if] that interpretation is neither plainly erroneous nor inconsistent with the regulations.”). Indeed, Constellium does not argue otherwise.

Under similar circumstances, the Court in *Parkwood* determined that it lacked jurisdiction to consider a party’s claim. There, the General Counsel filed an exception to the judge’s decision seeking a bargaining order, but the employer failed to respond in its answering brief. *Id.* Instead, it was not until after the Board agreed with the exception and included a bargaining order in its decision that the employer sought to challenge the order by moving for reconsideration, claiming it conflicted with circuit precedent. *Id.* The Court, however, concluded that waiting

to raise that argument until a motion for reconsideration was “too late,” and deferred to the Board’s sound decision to deny the motion because it presented no extraordinary circumstances warranting Board reconsideration. *Id.*

The Court’s observation in *Parkwood* that the employer “could have alerted the Board” to its claim before the Board issued its decision is equally applicable here. *Id.* Constellium could have timely raised its equal employment opportunities/anti-harassment claim in its answering brief and thus “urged” them before the Board in a procedurally valid way, thereby preserving the issue for appellate review. Constellium’s failure to do so bars the Court’s consideration of its claim.

CONCLUSION

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

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ADDENDUM

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**Relevant Provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69:**

Sec. 7 [Sec. 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 of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8(a) [Sec. 158(a)] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Sec. 10 [Sec. 160]

(a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where 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 [subchapter] or has received a construction inconsistent therewith.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] 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 [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to 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) [Review of final order of Board on petition to court] 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 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, United States Code [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.

**Relevant Provisions of the National Labor Relations Board's
Rules and Regulations
29 C.F.R. §§ 101-103**

§ 101.12. Board decision and order.

(b) If no exceptions are filed, the administrative law judge's decision and recommended order automatically become the decision and order of the Board pursuant to section 10(c) of the Act. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

§ 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.

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

CONSTELLIUM ROLLED PRODUCTS)
RAVENSWOOD, LLC)

Petitioner/Cross-Respondent)

v.)

NATIONAL LABOR RELATIONS BOARD)

Respondent/Cross-Petitioner)

Nos. 18-11300 & 18-1322

Board Case No.
09-CA-116410

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,944 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
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Dated at Washington, DC
this 6th day of June 2019

**UNITED STATES COURT OF APPEALS
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)	
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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
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Dated at Washington, DC
this 6th day of June 2019