
Nos. 15-1426 & 15-1499

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

DHSC, LLC d/b/a AFFINITY MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

NATIONAL NURSES ORGANIZING COMMITTEE

Intervenor

**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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)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	08-CA-090083
Respondent/Cross-Petitioner)	
)	
and)	
)	
NATIONAL NURSES ORGANIZING COMMITTEE)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, Amicus. DHSC, LLC d/b/a Affinity Medical Center (“Affinity”) is the petitioner before the Court. The Board is the respondent before the Court. National Nurses Organizing Committee (“the Union”) is the intervenor before the Court. Affinity, the Board’s General Counsel, and the Union appeared before the Board in Case 08-CA-090083.

B. Ruling Under Review. The case involves Affinity’s petition to review a Decision and Order the Board issued on April 30, 2015, reported at 362 NLRB 654.

C. Related cases. The ruling under review has not previously been before the Court or any other court.

/s/ David Habenstreit

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Dated at Washington, DC
this 16th day of August 2019

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition of DHSC, LLC d/b/a Affinity Medical Center (“Affinity”) to review, and the cross-application of the National

Labor Relations Board (“the Board”) to enforce, an April 30, 2015 Board Decision and Order (362 NLRB 654) issued against Affinity.

The Board had jurisdiction under Section 10(a) of the Act. *See* 29 U.S.C. § 160(a). The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). Affinity’s petition and the Board’s cross-application were timely; the Act imposes no time limitation for such filings. Before the Court, the National Nurses Organizing Committee (“the Union”) has intervened on the Board’s behalf.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board’s finding that Affinity violated Section 8(a)(3) and (1) of the Act by:

(a) discharging Ann Wayt for her union activity;

(b) reporting Wayt to the Ohio Board of Nursing; and

(c) issuing a written warning to Wayt?

2. Does substantial evidence support the Board’s finding that Affinity violated Section 8(a)(1) of the Act by withdrawing union access to the facility?

3. Does substantial evidence support the Board’s finding that Affinity violated Section 8(a)(1) of the Act by threatening, more closely scrutinizing, and retaliating against employees for submitting union-created “assignment despite objection” (ADO) forms?

4. Was Affinity's challenge to the complaint's validity forfeited before the Board, leaving the Court without jurisdiction to consider it?

5. Is the Board entitled to summary enforcement of those portions of its Order remedying its otherwise uncontested finding that Affinity violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union?

RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions.

STATEMENT OF THE CASE

On the heels of a union election, Affinity disciplined, discharged, and reported to the Ohio Board of Nursing, Ann Wayt, a 23-year experienced nurse who was an ardent union supporter and activist. It also refused to recognize and bargain with the Union after the certification issued. The Union filed unfair-labor-practice charges challenging Affinity's disciplinary actions, refusal to recognize the Union, and other actions taken in the wake of the election, claiming that anti-union sentiment motivated Affinity. The Board's Acting General Counsel issued a complaint alleging that Affinity had committed unfair labor practices. Following a five-day hearing, an administrative law judge issued a decision and recommended order finding that Affinity had largely violated the Act as alleged. Affinity filed exceptions with the Board.

On review, the Board issued a Decision and Order, affirming the judge's decision with some modification. Specifically, the Board held that Affinity violated Section 8(a)(3) of the Act by discharging, disciplining, and otherwise discriminating against Wayt on the basis of her union support, and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. Further, the Board held that Affinity violated Section 8(a)(1) by threatening and retaliating against employees for exercising their Section 7 rights, and by banning the Union from its facility in retaliation for its representational activity.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Parties Enter a Consent-Election Agreement

Affinity is an acute-care facility in Massillon, Ohio, owned by a parent company, Community Health Systems. The Union sought to represent Affinity's registered nurses, a unit of approximately 213 employees. On August 22, 2012, the parties executed a consent-election agreement, agreeing that the Regional Director would resolve all representation matters and that his determinations would be final. (A.382; A.370-75.)¹

¹ "A." refers to the parties' joint appendix filed on August 2, 2019. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

Wayt began working at the Massillon, Ohio hospital, now Affinity Medical Center, in 1987. Affinity managers considered Wayt to be a “very good nurse,” (A.264), and granted her a prestigious award for job performance in 2008. In September 2011, Affinity opened an orthopedic ward and recruited Wayt. Wayt transferred to the orthopedic ward and reported to Paula Zinsmeister, clinical manager for the orthopedic unit. At the time of her transfer, Wayt had never before received discipline. (A.684; A.112, 116-19, 146, 183-84.)

B. One Week Before the Election, the Union Circulates a Flyer with Wayt’s Photo and Displays a Poster Board Version of the Flyer; Managers Discuss the Flyer

On August 22, the week before the election, the Union distributed a flyer with pictures of 35 unit employees who supported the Union. Eight of the depicted employees worked in the orthopedic unit. Wayt’s photograph—prominently displayed on the front page—was accompanied by a written quote explaining her union support. Wayt’s quote, one of three, was the only one from an orthopedic unit nurse. The Union reformatted the flyer into a 3x4 foot poster. The Union displayed the poster daily in Affinity’s cafeteria the week before the election. Wayt also supported the organizing campaign by attending luncheons and union meetings. She spoke with her coworkers about unionizing, both in and outside the orthopedic unit, where union support was high. (A.684; A.122, 127-28, 180-82, 436-39.)

At a managers' meeting the week before the election, managers circulated and discussed the flyer. Many managers, including Zinsmeister, saw Wayt's picture on the flyer and knew of her union support. (A.684; A.90, 92, 99-100, 101, 110.)

C. On August 28, Wayt Works a Busy Shift; Ms. P Is Admitted to the Orthopedic Ward

On August 28, the day before the election, Wayt started her shift at 7:00 a.m. The 10-patient capacity unit had 9 patients and was busy. Another nurse and patient care technician Sam Burgett were also on staff that day. At 8:47 a.m., Laura Jenkins, an emergency room nurse, notified Wayt that a 10th patient, Ms. P, who was admitted that morning after fracturing her hip, would be transferred from the emergency department to the orthopedic unit. (A.684; A.103, 129-31, 143.)

Jenkins and Wayt agreed that Ms. P should have a sitter, a caregiver who provides supervision and companionship, upon transfer to ensure Ms. P's safety because she appeared confused, tried to remove her hospital gown, and pulled on equipment. Wayt told Jenkins that the sitter needed to be available as soon as Ms. transferred because there was no spare staff to stay with her. (A.684; A.131.)

Susan Kress, Director for Critical Care Services, was covering for Zinsmeister, Wayt's supervisor, who was on vacation. At 9:15 a.m., Kress and another nurse brought Ms. P to the orthopedic unit. Several minutes later, Rhonda

Smith, a cardiovascular unit nurse, arrived to assume sitter responsibilities.

Around 9:30 a.m., Kress left Ms. P's room and did not return the rest of the day.

Around that time, Burgett performed the first hourly "rounding" on Ms. P.

Rounding includes checking on the patient's pain level, positioning, toilet needs, and call button, phone, and water accessibility. Burgett rounded on Ms. P again at 10:00 a.m. (A.684-85; A.57-88, 131-33, 209, 214, 493.)

D. Around 10:00 a.m., Wayt Enters Ms. P's Room for the First Time; Nurse Lesjack Temporarily Relieves Nurse Smith as Sitter; Smith Returns; a Combination of Wayt, Burgett, and Two Sitters Perform Ms. P's Rounding During Wayt's Shift

At about 10:00 a.m., Wayt entered Ms. P's room, gave paperwork to Smith, and talked to Ms. P's family. Around 11:00 a.m., Burgett rounded again on Ms. P, and Jonalee Lesjack, another cardiovascular nurse, relieved Smith during Smith's lunchbreak. Lesjack saw Wayt in Ms. P's room around 11:00 a.m. and noon when Wayt put tubing on the IV pump and spoke with Ms. P's son. Around noon, Smith resumed sitter duties and performed hourly rounding. Around the same time, Wayt administered morphine to Ms. P. (A.685-86, 687; A.133-35, 137-38, 157, 162, 164, 210, 239, 242, 366, 439, 453-60, 494.)

Smith rounded on Ms. P at 1:00 p.m. and 2:00 p.m. During the 2:00 p.m. rounding, Smith discovered that Ms. P needed a diaper change and summoned Wayt. Wayt dispatched Burgett to assist with Ms. P's needs. At 3:00 p.m., Smith

again performed the hourly rounding. Around the same time, Wayt stopped by Ms. P's room and spoke with Smith regarding a relief sitter. The relief sitter arrived around 4:15 p.m. and performed hourly rounding. At 4:30 p.m., Wayt administered a second dose of morphine to Ms. P. According to Ms. P's chart, the relief sitters rounded hourly on Ms. P for the remainder of Wayt's shift. (A.685-86, 687; A.138-41, 215-16, 228-29, 430, 493.)

E. The Union Wins the Election; Kress Audits Ms. P's Chart and Begins an Investigation

On August 29, the nurses voted 100-96 in favor of the Union. That same day, Smith complained to her manager, Jeremy Montabone, that she was not timely relieved as Ms. P's sitter the day before. Montabone conveyed Smith's concerns to Kress. After consulting with Jason McDonald, Director of Orthopedic and Therapy Services, Kress began an investigation and reviewed Ms. P's chart, concluding it had inaccuracies. According to Kress, Wayt failed to document a cough noted by the night nurse, a skin tear, and a bruise, but documented a head-to-toe assessment at 9:00 a.m., prior to Ms. P's arrival on the ward. (A.682, 686-687; A.106-07, 232, 246-49, 263, 453-60.)

Kress did not speak with Wayt regarding these perceived errors and, instead, took her concerns to Chief Nursing Officer ("CNO") Bill Osterman. She also told

Osterman that Smith complained that no one had timely relieved her and only the sitters were with Ms. P. (A.687; A.250, 315.)

On August 30, Kress interviewed Smith and Burgett, focusing on when and how often Wayt had checked in on and rounded on Ms. P. Smith told Kress the same thing she told Montabone—the sitters were doing all the work and no one was checking on Ms. P. Burgett said he had been too busy on August 28 to remember much. (A.687; A.110, 242-44, 250-53, 259.)

F. Wayt Has a Disagreement with the Pharmacy Director

On August 30, John Perone, Pharmacy Director, noticed a discrepancy in the narcotics quantities in the Pyxis machine, which dispenses and keeps an accurate medication count. According to the log sheets, Wayt was the last person to access the machine. Although Perone could have corrected the discrepancy without Wayt's assistance, he demanded that Wayt immediately rectify the discrepancy. Wayt told Perone that she would fix it at the end of her shift because she was busy with patient care, which was consistent with policy permitting corrections at various times, including the end of a shift. Perone insisted and ordered her to do so immediately. Perone then emailed Zinsmeister and CNO Osterman, complaining about Wayt's attitude. Later that day, Wayt apologized to Perone. (A.687; A.143-45, 204, 205, 496, 497, 508-12.)

G. Affinity Issues Wayt a Written Warning Concerning the Perone Incident; Zinsmeister and McDonald Determine Wayt Falsified Records; Affinity Recommends Termination

On September 5, Perone emailed Vice-President of Human Resources Angie Boyle and recounted his interaction with Wayt, omitting her same-day apology. Zinsmeister, back from vacation, learned of the incident and spoke with Perone but did not interview Wayt. After consulting with McDonald, Zinsmeister and McDonald decided to issue a written warning. At the same time, Zinsmeister had assumed the lead on the investigation into Ms. P's treatment and conferred with McDonald and Kress regarding that incident. (A.687-88; A.265, 306, 316, 495.)

McDonald gave Wayt a written warning stating that Wayt would not cooperate in the narcotics quantities reconciliation, that Perone fixed it without her input, and that she failed to comply with policy. It did not mention her same-day apology and was issued without speaking to Wayt about the incident. (A.688; A.308, 495.)

During the same meeting, McDonald notified Wayt that Affinity was auditing Ms. P's chart. Chart auditing frequently occurred and would not necessarily have signaled to Wayt that there was an investigation into substandard patient care or falsification of records. McDonald asked Wayt to initial places on the chart as part of the audit; Wayt complied. Neither McDonald nor Zinsmeister informed Wayt that Affinity was investigating falsification of Ms. P's chart and

patient neglect. They likewise asked her no questions concerning Ms. P's treatment. (A.688; A.173-74, 270-71, 282-85, 403-29.)

Following the September 5 meeting, McDonald and Zinsmeister met with CNO Osterman and told him that Wayt had falsified Ms. P's chart. CNO Osterman referred them to Boyle to begin the termination process. (A.688; A.272-73, 317-20, 339.)

On September 6, Boyle emailed Bud Wood, Division Human Resources Director, with a summary of Affinity's findings and recommendation concerning Wayt. Boyle asked for feedback on what she described as "falsification of a medical record." According to Boyle's email, Wayt had documented that she performed a head-toe assessment before Ms. P's arrival, and three witnesses stated that Wayt never conducted an assessment or entered Ms. P's room until noon. (A.688; A.343, 443-52.)

H. Headquarters Pushes Back on Termination; Zinsmeister Beefs Up the Discharge Recommendation Without Conducting Additional Interviews; Affinity Suspends Wayt

On September 10, Wood forwarded Boyle's email to Veronica Benson, Regional Director at Affinity's parent company and corporate headquarters, Community Health Systems. Benson observed preliminarily that "[i]t is not uncommon to have some time discrepancies such as 9ish, 9:30 or so." Benson also characterized the documentation as "substandard" and questioned whether the errors were falsification or "plain slopplaziness." Benson expressed interest in knowing Wayt's age, tenure, prior disciplinary record, and response to the allegations, as well as Affinity's handling of past similar events. Benson wrote that the incident, as presented, was "a weak case for termination." After receiving Benson's email, Wood told Boyle that Affinity needed to answer Benson's questions. (A.688; A.443-52.)

On September 11, Zinsmeister emailed CNO Osterman without speaking to Wayt or conducting further inquiry into the August 28 events. Zinsmeister expressed concern that: (1) Wayt waited until noon to see Ms. P, and the sitter and Kress verified that Wayt did not enter the patient's room before noon; (2) Wayt documented the head-to-toe assessment at 9:00 a.m. despite two nurses indicating she never entered the room before noon; and (3) at noon, Wayt administered pain medication but did not return to the room before 3:30 p.m., including to reassess

Ms. P's pain level. According to Zinsmeister, the issue was not time discrepancies, but "falsification of a medical record and the omission of care." Zinsmeister recommended discharge and indicated that McDonald agreed. (A.688-89; A.431-35.)

That same day, CNO Osterman forwarded Zinsmeister's email to Boyle, who sent it to Wood and Benson. An hour later, Benson replied, "[g]iven this information, I would support termination and notification of the State Board of Nursing." Wood responded to Boyle and Benson: "Agreed—tell [hospital counsel] that is how we wish to proceed and have him specify who should be present at that time." (A.689; A. 443-52.)

On September 12, McDonald and Zinsmeister instructed Wayt to meet with them the next day regarding a "safety issue." Wayt asked to bring a union representative. McDonald initially denied the request, but Boyle, after receiving a call from union organizer Michelle Mahon, directed McDonald to allow a union representative. (A.689; A.115, 147-48, 344.)

On September 13, Zinsmeister and McDonald met with Wayt and her union representative. When questioned about information in the chart, Wayt indicated that she based her documentation on an examination of Ms. P. Wayt acknowledged forgetting to do a skin assessment, which was consistent with the chart. McDonald told Wayt that four witnesses reported that Wayt did not enter

Ms. P's room before noon. Wayt denied these accounts and emphasized that she had gone into the room at the times recorded on the chart, specifically at 10:00 a.m. and 11:00 a.m. McDonald and Zinsmeister told Wayt that she was suspended pending further investigation and that Affinity would complete the investigation by September 17. (A.689-90; A.91, 93-96, 150-51, 169, 367, 430, 453-60.)

I. The Union Defends Wayt; Lesjack and Smith Confirm that Wayt Entered Ms. P's Room Before Noon; Affinity Discharges Wayt, Reports Her to the Ohio Board of Nursing, and Bans Mahon from the Facility

Affinity conducted no further investigation between the September 13 meeting and September 17, when Boyle called Wayt and told her to come in for a meeting the following day. Affinity intended to discharge Wayt at that meeting, but before it took place, the Union asked Boyle if it could submit information in Wayt's defense. Boyle agreed and postponed the meeting. (A.690 & n.29; A.465-68.)

On September 19, union organizer Mahon submitted a letter notifying Affinity that there was another sitter (whose name Wayt did not know) present who had relieved Smith during the lunch hour and had returned from the restroom as Wayt was completing the head-to-toe assessment. McDonald and Zinsmeister then spoke with nurses Lesjack (the relief sitter) and Smith. On September 24, Lesjack signed a statement, which she did not prepare, acknowledging that Wayt

had been in Ms. P's room around 11:00 a.m. Lesjack's statement did not corroborate Wayt's claim that Lesjack had used the restroom during the time she relieved Smith. Smith likewise signed a statement on September 24, indicating that Wayt had been in Ms. P's room around 10:00 a.m. Smith did not know whether Wayt had performed the head-to-toe assessment during her lunch break. (A.690; A.430, 465-68.)

On September 24, Affinity notified Wayt that Mahon's letter violated the patient privacy provisions of HIPAA. On September 26, Affinity discharged Wayt for "substandard patient care and falsification of patient documentation." That same day, Affinity filed a complaint against Wayt with the Ohio Board of Nursing, and permanently excluded Mahon from the facility for allegedly violating HIPAA. (A.690; A.403-29, 440.)

J. The Union Is Certified; Affinity Refuses to Recognize and Bargain with the Union; Kress Threatens Nurses and Retaliates Against Them

On October 5, after having overruled Affinity's election objections for failure to submit supporting evidence, the Regional Director, under the terms of the consent-election agreement, certified the Union. At the time of the certification, the Board lacked a quorum, and relying, in part, on that ground, Affinity refused to recognize and bargain with the Union. (A.682; A.370-76.)

The Union had created an “assignment despite objection” (“ADO”) form for nurses to document assignments or situations they felt might compromise patient safety or care or jeopardize their nursing license. The Union encouraged nurses to submit such forms. Affinity refused to accept them. (A.696; A.191-92, 202, 329, 441-42.)

On January 3, 2013, Kress, who supervises both the intensive care and cardiovascular units, discovered ADO forms in her mailbox and said: “I feel like slapping these on your forehead so you can walk around and look how stupid you look with them.” (A.696; A.256-57.) Immediately thereafter, Kress directed an intensive care unit nurse to the cardiovascular unit, making intensive care unit nurses responsible for three patients instead of two, a situation Affinity tries to avoid. (A.696; A.365) Kress then told another nurse that if she completed an ADO form, Kress would “smash it through [her] forehead.” (A.696; A.175-76.)

That same day, Kress scoured the nurses’ charts and, after finding a chart completed by a prominent union supporter and member of the bargaining council, Kress said, “I’m going to have a lot of fun writing this one up.” (A.696; A.177.) Kress knew that the nurse was responsible for completing many of the submitted ADO forms. (A.696; A.258.)

III. THE BOARD'S CONCLUSIONS AND ORDER

Before the Board issued its decision, but after Affinity filed its exceptions and supporting brief, Affinity submitted a letter notifying the Board of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), wherein the Supreme Court determined that President Obama invalidly appointed three Board members, rendering the Board without a quorum between January 4, 2012, and August 5, 2013. (Letter, dated Aug. 1, 2014.)² Affinity claimed that *Noel Canning* invalidated the certification (issued by the Regional Director) and the issuance and prosecution of the complaint (by the Acting General Counsel). The Board rejected those arguments. (A.678 n.1.)

Turning to the merits, the Board (Chairman Pearce and Members Johnson and McFerran) found, in agreement with the administrative law judge, that Affinity violated Section 8(a)(3) and (1) of the Act by discharging, disciplining, or otherwise discriminating against employee Wayt based on her union support. (A.678.) The Board upheld the judge's finding that Affinity violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

² Because Affinity's supplemental authority letter is not part of the official record, the Board has simultaneously with this brief filed a motion to lodge the letter. That motion also seeks to lodge Affinity's Exceptions brief, also not part of the record, because the Board cites it herein, *see* p. 53.

(A.678.) The Board also agreed with the judge that Affinity violated Section 8(a)(1) of the Act by denying access, previously granted, to union representatives, in retaliation for their representational activities on behalf of bargaining-unit employees and by restraining, coercing, or interfering, by threats and retaliation, with the employees' union activities.³ (A.678 & n.4.)

The Board's Order requires Affinity to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of their statutory rights.

(A.679.) Affirmatively, the Order directs Affinity to offer Wayt reinstatement, make Wayt whole for loss of earnings and other benefits, withdraw the complaint/report/ referral made to the Ohio Board of Nursing, reimburse Wayt for any legal expenses related to defending herself before the Ohio Board of Nursing, and remove from its files any reference to the unlawful written warning and discharge. (A.678-79.) The Order requires Affinity to bargain with the Union, upon request, and to rescind the prohibition on the Union's and Mahon's access.

(A.679.) The Order requires Affinity to post a remedial notice and mandates that Affinity's highest-ranking management official read the notice aloud to employees

³ The Board agreed with the judge's dismissal of the allegation that Affinity violated Section 8(a)(1) of the Act by threatening Wayt with termination for asserting her right to union representation in an investigatory interview. (A.678.) The Union does not challenge the dismissal.

or allow a Board agent to do so in the presence of the highest-ranking management official. (A.679.) Finally, the Order extends the union's certification by one year.

Affinity filed a motion for reconsideration, asking the Board to remand the case for the judge to consider one of Affinity's affirmative defenses and to rescind certain remedial portions of the Order. The Board denied Affinity's motion.⁴

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that Affinity violated Section 8(a)(3) and (1) by discharging Wayt. The credited evidence demonstrates that Wayt engaged in protected activity by agreeing to appear in the Union's flyer and poster and by advocating for the Union with her colleagues at work, luncheons, and meetings. Affinity managers knew of her activity, having seen her on the flyer and discussed it. Regarding animus, Affinity began the investigation into Wayt's conduct the day after the union election, conducted a

⁴ After Affinity filed its petition for review, the parties moved to put the case in abeyance pending the Court's resolution of *Hospital of Barstow, Inc. v. NLRB*, which addressed a regional director's authority to conduct an election pursuant to a consent-election agreement in the absence of a Board quorum. Once the Court decided *Barstow* and upheld that authority, *see* 897 F.3d 280 (D.C. Cir. 2018), the Court removed the case from abeyance, and it proceeded to briefing. The Court's decision in *Barstow* resolved the issue of the Regional Director's authority in this case, and in any event, Affinity raised no such challenge in its opening brief. *See* p. 56 n.17.

one-sided, results-oriented investigation, and had not previously discharged similarly situated nurses.

Affinity's challenges to the Board's finding of unlawful motivation are unpersuasive and run counter to the credited evidence. For example, Affinity weakly claims that Wayt did not engage in enough union activity and that there was no evidence that managers held the flyer in their hands. It also claims that decisionmakers were unaware of her conduct, but overlooks that those with knowledge instigated, advanced, and controlled the investigation and recommended her discharge. Affinity does not undermine the strong evidence of animus by minimizing the disparate impact evidence or by insisting its incomplete investigation was proper.

Further, Affinity cannot show a lack of substantial evidence supporting the Board's finding that Affinity failed to prove its affirmative defense. Because Affinity relied on an inadequate investigation marred with inconsistencies, the Board determined that Affinity could not have acted with a reasonable good-faith belief.

2. For nearly the same reasons, substantial evidence supports the Board's finding that Affinity violated Section 8(a)(3) and (1) for reporting Wayt to the Ohio Board of Nursing. Affinity offers only a cursory, unsupported assertion that CNO Osterman harbored no union animus and that the disparate treatment

evidence is unpersuasive. Its challenges fall far short of providing a basis for the Court to set aside the Board's finding.

3. Again, applying many of the same factual findings, substantial evidence supports the Board's finding that Affinity violated Section 8(a)(3) and (1) for issuing Wayt a written warning. Affinity's misplaced challenge to Perone's knowledge ignores that Zinsmeister and McDonald, who were aware of Wayt's protected union activity, decided the disciplinary action. And Affinity's confused challenge to the disparate treatment evidence does not undermine the Board's finding.

4. The credited record evidence clearly establishes that Affinity withdrew union access to the facility as a retaliatory measure and its own witness conceded as much. Affinity's baseless challenge simply urges a different view of the testimony—a request ill-suited for the Court.

5. Substantial evidence also supports the Board's finding that Affinity violated Section 8(a)(3) and (1) based on threats toward nurses who submitted the ADO forms intended to convey the nurses' concerns regarding working conditions to supervisors. Affinity's attempt to recast the forms as unprotected activity because they were disliked by management and perceived as troublesome or "agitating," is unavailing.

6. Affinity's challenge to Acting General Counsel Solomon's authority to issue and prosecute the complaint, based on Section 3(d) of the Act, is not properly before the Court because Affinity failed to raise it before the Board in its exceptions, exceptions brief, or motion for reconsideration. Section 10(e) of the Act bars the Court from considering it. In any event, Affinity's challenge based on an appointment under Section 3(d) fails because President Obama appointed Solomon under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 et seq. (FVRA). *See SW General, Inc. v. NLRB*, 796 F.3d 67, 71 & n.2 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). And finally, Section 10(e) likewise bars Affinity's newly minted claim, which it never raised to the Board, that Solomon's appointment is also invalid under FVRA.

7. Substantial evidence also supports the Board's finding that Affinity refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1). Indeed, Affinity does not contest the substantiality of the evidence; rather, it resists enforcement based on an untimely challenge to the validity of the complaint. Assuming the Court agrees that Affinity forfeited the challenge before the Board and that it is therefore not properly before the Court, the Board is entitled to enforcement concerning those portions of its Order finding that Affinity refused to recognize and bargain with the Union.

STANDARD OF REVIEW

This Court “accords a very high degree of deference to administrative adjudications by the [Board].” *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the Board’s findings unless they are “unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to fact.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). “Substantial evidence” for purposes of the Court’s review of factual findings, consists of “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). The Court will reverse the Board’s findings of fact “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Id.*; *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (same). In other words, 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); *Universal Camera*, 340 U.S. at 477; 29 U.S.C. § 160(e).

Moreover, when reviewing for substantial evidence, the Court “do[es] not ask whether record evidence could support the petitioner’s view of the issue, but

whether it supports the [agency's] ultimate decision.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). And the Court “accepts all credibility determinations made by the [administrative law judge] and adopted by the Board unless those determinations are ‘patently insupportable.’” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT AFFINITY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING WAYT FOR HER UNION ACTIVITY

Affinity discharged leading union activist Wayt after 23 years of exemplary, unblemished employment three weeks after the election that resulted in the nurses voting in favor of the Union. As shown below, the Board reasonably found that Affinity seized on certain charting errors and Wayt’s failure to do a skin assessment as a pretext to discharge her for engaging in protected activity.

A. Applicable Principles

Section 7 of the Act guarantees employees the right “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. Section 8(a)(3) of the Act implements Section 7 by prohibiting employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29

U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) by discharging or taking other adverse employment actions against employees for engaging in activities protected by Section 7. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).⁵

In *Transportation Management*, 462 U.S. at 397-98, the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1088-89 (1980), *enforced on other grounds*, 662 F.2d 889 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that the adverse action would have been taken even in the absence of the protected activity.

Transp. Mgmt., 462 U.S. at 397, 401-03; *accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). An employer must establish its

⁵ A violation of Section 8(a)(3) carries a "derivative" violation of Section 8(a)(1), which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees" in the exercise of rights guaranteed in Section 7 of [the Act]." 29 U.S.C. § 158(a)(1); *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

affirmative defense by a preponderance of the evidence. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995). If the employer's proffered reasons for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer has failed to establish its affirmative defense, and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084.

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Evidence of unlawful motivation includes the employer's knowledge of protected activity, *Tasty Baking*, 254 F.3d at 125, hostility toward protected conduct, including the commission of other unfair labor practices, *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000), the timing of the adverse action, *Davis Supermarkets*, 2 F.3d at 1168, and disparate treatment of employees, *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1075 (D.C. Cir. 2016).

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.*, 56 F.3d 228-29. 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*, 827 F.3d at 1072.

B. Wayt's Protected Activity Was a Motivating Factor in Affinity's Discharge Decision

Substantial evidence supports the Board's finding that Wayt's discharge was unlawfully motivated. As shown below, the evidence demonstrates that Wayt engaged in protected union activity, and Affinity knew of that activity. Affinity's animus toward that activity is evident in the discharge's timing, the inadequate investigation, the disparate treatment of Wayt, and the pretextual reasons offered to support discharge.

1. Wayt engaged in protected concerted activity

There can be no question that Wayt engaged in protected activity. The Board found (A.694) based on the uncontested record evidence that Wayt advocated for the Union. Most visibly, shortly before the election, she allowed the Union to place her picture and words on a widely distributed pro-union brochure. The Union, with her permission, reformatted the brochure into a large poster and displayed it daily in the cafeteria the week preceding the election. Contrary to Affinity's claim, the Board did not use the flyer as a "standalone litmus test" of Wayt's activity (Br. 22), and this assertion ignores Wayt's public union support, her conversations with nurses about unionization, and her attendance at luncheons and union meetings during the organizational drive. Under these circumstances, substantial evidence supports the Board's finding of protected activity.

Affinity acknowledges (Br. 20-21) that Wayt engaged in protected activity—as it must, given the flyer and the poster—but vaguely claims her activity was not sufficiently substantial. In doing so, Affinity ignores record evidence or invites the Court to reweigh the Board’s factual findings. Either way, the Court should reject the challenges.

Affinity asserts (Br. 21) that Wayt’s prominence on a pro-union flyer was a “one-time appearance,” that she never had conversations with any of her coworkers about union support, and that there was only “paltry evidence” of her union support. These claims ignore that Wayt testified without contradiction that she often spoke to her fellow nurses about unionizing, that they “talked about it a lot,” and that she attended numerous union meetings and luncheons. (A.122-26.)

Affinity continues (Br. 21) its misguided attempt to minimize Wayt’s union activity by adding that Wayt never wore a union button or lanyard, never distributed the flyer, and did not appear in all the union flyers. Affinity’s lack of case support for the notion that protected activity must include displaying union insignia, physically distributing flyers, or being depicted in all organizing literature is understandable—none exists. Further, contrary to Affinity’s claim (Br. 22), the Board properly found (A.684) that the orthopedic unit had high union support; Wayt testified that support in her unit was 99%. (A.123.)

The cases cited by Affinity (Br. 20) do not salvage the otherwise unsustainable challenges to the Board's finding of protected activity. None establishes that an employee must be the most prominent union supporter to receive the Act's protections; rather, they stand for the unremarkable proposition that the Board will not find a violation in the absence of evidence concerning unlawful motivation. *See, e.g., Efficient Med. Transp.*, 324 NLRB 553 (1997) (dismissing unlawful discharge allegation where record lacked any evidence of animus, notwithstanding the fact that the employee was a known union supporter); *Merrill Transp. Co.*, 224 NLRB 150, 153 (1976) (dismissing discriminatory discharge allegation based "upon all the evidence and the reasonable inferences to be drawn therefrom" because the record lacked any evidence of animus).⁶ These cases are inapposite to the facts here, where Wayt engaged in prolific protected activity and the underlying record is, as discussed below, replete with union animus.

⁶ Affinity also cites *Lockheed Martin Info. Sys. & Global Solutions*, 2011 WL 683827 (NLRB Feb. 25, 2011), but that case is an unreviewed administrative law judge's decision and is thus not Board precedent given that the Board never assessed the judge's findings.

2. Affinity knew of Wayt's union activity

Equally unassailable is the Board's finding (A.694) that hospital representatives knew of Wayt's protected activity. This finding was based on substantial evidence, not a "bevy of assumptions" (Br. 25). CNO Osterman, McDonald, and Kress all testified that they had seen her photo on the flyer. And Zinsmeister attended the meeting during which managers circulated and discussed the flyer. Accordingly, substantial evidence shows that Affinity was very well aware of Wayt's union activity.

Affinity's challenges (Br. 22-24) to its managers' knowledge is confused, at best. Affinity alternately claims (Br. 22) that someone at corporate headquarters made the final discharge decision or that Boyle did, and, either way, neither individual knew of Wayt's protected activity. This claim ignores that the Board rejected (A.689 n.24) Affinity's attempts to establish who made the final discharge decision, instead determining that the record did not identify the final decisionmaker. Affinity's argument also conveniently disregards that those with knowledge of Wayt's union activity (Kress, Osterman, McDonald, and Zinsmeister) controlled the investigation, marshalled the facts presented to Boyle and management at headquarters, and recommended Wayt's discharge.

Under similar circumstances, the Court has rejected a lack-of-knowledge defense. In *Inova*, the employer tried to escape liability based on the ultimate

decisionmaker not knowing of the employee's protected activity. In rebuffing the employer's challenge, the Court emphasized that those with knowledge recommended discharge, and the decisionmaker relied on this advice. *Inova*, 795 F.3d at 83. According to the *Inova* Court, the discharge decision "was directly set in motion and driven by those managers' animus-motivated conduct." *Id.* As such, "[t]he Board reasonably found [the employer] responsible for an unfair labor practice because [its] high-level managers used the authority that [the employer] gave them to take measures based on discriminatory animus that caused and were intended to cause the dominoes to fall exactly as they did." *Id.*; see also *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). The same is true here. Those responsible for Wayt's investigation, for obtaining the facts, and for recommending discharge acted with well-established union animus, and the ultimate decisionmaker relied on the recommendations of biased individuals.

Affinity weakly attacks (Br. 23-24) the Board's finding that Zinsmeister knew about Wayt's union support because the record does not establish that Zinsmeister "specifically held a copy of the flyer in her own hands," or that Wayt's name was mentioned in the meetings. To suggest that level of evidence is necessary and that an adverse inference is required (Br. 24) is yet another assertion

unsupported by law and, importantly, ignores Zinsmeister's undisputed presence at the meeting where the flyer was circulated and discussed. Finally, Affinity engages in misdirection (Br. 25) by attacking the judge's inference concerning Zinsmeister's knowledge of the election results. Independent of this inference, the judge found, and the Board affirmed, that Zinsmeister had knowledge of Wayt's protected activity. Whether substantial evidence supports the judge's inference about Zinsmeister's understanding of the Union's victory is irrelevant as to whether the Acting General Counsel established Zinsmeister's knowledge of Wayt's protected activity.

3. Affinity exhibited animus toward Wayt's union activity

Substantial evidence also supports the Board's finding that Affinity acted with animus in discharging Wayt. Here, the Board found "strong circumstantial evidence" that Affinity "retaliated against Wayt for her support of the Union." (A.678 n.4.) According to the Board, the formidable record evidence included: "the timing of discipline, the inadequate and indifferent nature of [Affinity's] investigation of Wayt's alleged misconduct, disparate treatment, and the pretextual nature of the allegations against her."⁷ (A.678 n.4.)

⁷ The Board found (A.694) that the unlawful written warning, discussed below (pp. 46-48), constituted additional evidence of discrimination.

With respect to timing, the Board found (A.694) that the events could hardly have been more proximate. The investigation prompting Wayt's discharge began the same day as the election and within one week of her name, picture, and quoted statement having been prominently displayed on a pro-union flyer and large poster. *See Tasty Baking*, 254 F.3d at 125 (timing of the adverse action is relevant to animus determination). The Court has long recognized that close proximity supports an inference of unlawful discrimination. As the Court has explained, "timing is a telling consideration in determining whether employer action is motivated by anti-union animus." *Reno Hilton*, 196 F.3d at 1283.

Further, as the Board found (A.694), what hospital managers did not do evidences the investigation's incompleteness and supports an animus finding. They did not initially inform Wayt what conduct was being investigated; they did not interview Lesjack before making the final decision to discharge Wayt; they did not correct demonstrably false statements, including the falsity that two, three, or four witnesses could aver that Wayt had not entered Ms. P's room until noon; they did not offer Wayt an opportunity to respond to the allegations prior to the discharge decision; they did not adhere to their own disciplinary policy, which calls for consideration of an employee's disciplinary record; and they did not consider, despite Benson's directive, Wayt's 23 years of "unblemished employment." (A.693-94.) One-sided investigations that produce biased

recommendations are probative of unlawful motivation. *See Inova*, 795 F.3d at 84. Notably, Kress, who “harbored great animus towards the Union,” started the investigation “on her own volition” and never “bother[ed] to ask [Wayt] for an explanation of her conduct.”⁸ (A.693.)

The Board also relied on (A.693) disparate treatment evidence. For example, Affinity has only ever once before discharged a nurse on the first offense. The nurse had photographed a deceased patient after the patient’s eyeballs had been removed for a transplant. As the Board found, this offense is “not remotely comparable to anything Wayt [was] alleged to have done or omitted.” (A.691.) Aside from this incident, and until Wayt’s discharge, Affinity had *never* terminated a nurse for a first offense.

Additionally, the Board found (A.693) that Affinity had treated other nurses who engaged in more serious misconduct more leniently. For example, Affinity did not discharge nurse EB who falsified patient records around the same time as Wayt’s alleged offenses. EB erroneously indicated that she had performed a physical assessment—the precise allegation for which Affinity discharged Wayt. Unlike Wayt, EB had a prior discipline history. Unlike Wayt, EB had also

⁸ Affinity, downplaying (Br. 31) Kress’ role in the discharge, glosses over Kress having sparked the process leading to Wayt’s discharge and having committed other unfair labor practices, including retaliating against employees for their union activity. *See* pp. 50-52.

indicated that she had administered certain medications that she had not, in fact, given to the patient. And, most importantly, unlike Wayt, EB was not discharged.

Instead, Affinity issued two written warnings for her extensive pattern of misconduct. In short, the credited evidence shows that Affinity had far more calibrated responses to nurses who had “falsified records and nurses whose conduct seriously threatened the health and even the lives of patients.” (A.691.)

And the Board found that these discrepancies in discipline represent “strong indicia of discriminatory motive.”⁹ (A.693); *see Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 936-39 (D.C. Cir. 2011) (holding that the Board reasonably concluded that an employer failed to meet its rebuttal burden when it enforced a policy against the discharged employee, but not others).

⁹ Although the judge found (A.693) that Affinity’s frivolous election objections, refusal to bargain, refusal to accept the ADO forms, and Kress’ reaction to the forms constituted direct evidence of animus, the Board determined that the overwhelming circumstantial evidence of animus, outlined above (pp. 32-35), “is alone” sufficient to establish discriminatory motive. (A.678 n.4.) Affinity’s challenges (Br. 25-27, 30-31) to the direct evidence findings are therefore irrelevant. In any event, the Board rejected (A.678 n.3) Affinity’s defense to its failure to support its election objections and its failure to bargain by relying on precedent that the Court has repeatedly enforced. *See, e.g., Barstow Community Hosp.*, 361 NLRB 352, 352 n.3 (2014) (rejecting defense that ad hoc agreement required arbitration of election objections), *enforced*, 897 F.3d 280 (D.C. Cir. 2018); *Fallbrook Hosp.*, 360 NLRB 644, 644 n.2 (2014) (same), *enforced*, 785 F.3d 729 (2015); *San Miguel Hosp. Corp. v. NLRB*, 697 F.3d 1181 (D.C. Cir. 2012) (rejecting challenge to Health Care Rule). This precedent undercuts Affinity’s claim that its refusal to bargain was justified.

4. Affinity's challenges to the Board's finding of animus are meritless

Affinity encourages (Br. 28-29) the Court to engage in a piecemeal review of the Board's animus findings, an approach the Court should reject as contrary to established law, which requires an overall, comprehensive review of substantiality of the evidence in the record, and the Board's clearly stated conclusion in this case that it based its finding of unlawful motivation on many different factors. Affinity wrongly asserts (Br. 28) that the Board followed a per se rule that the timing between protected activity and adverse action will establish unlawful motivation. Nor did the Board rely "solely" (Br. 28) on timing in this case, as is made clear by the discussion above (pp. 32-35). And Affinity's suggestion (Br. 29) that the timing of the investigation, which set in motion Wayt's discharge, is irrelevant because the election results were not yet certified is beyond the pale. Nothing in Board law supports the idea that animus is only unlawful in response to a certified union victory.

Next, Affinity recycles its claim (Br. 31-34), rejected by the Board, that the disparate treatment evidence is inapposite because it compares *errors* in patient care and *omissions* in patient care. Affinity does not explain why the two situations are sufficiently distinct to render any comparison impossible, nor is it obvious given that the two situations prompt concerns about patient well-being. In

the absence of an explanation, Affinity's attack is insufficient to set aside the Board's finding that the disparate treatment evidence weighs in favor of unlawful motivation.

Further, the record does not support Affinity's demand (Br. 32-33) that the Court disregard one of the most probative comparators (nurse EB), because, according to Affinity, EB was also a known union supporter. While EB's picture once appeared with Wayt's photo, EB later asked that her photo be removed, and the Union complied. The record does not establish which version of the flyer (with or without EB's photo) was circulated and discussed at the managers' meeting, nor does it independently establish that any manager knew of EB's former union support. Equally unpersuasive is Affinity's theory (Br. 33) that EB's disciplinary record is irrelevant because her discipline was after Wayt's discharge. The timing of EB's discipline does not detract from the probative nature of the comparison—a similarly-situated nurse received a more moderate punishment than Wayt. And Affinity's remaining claims (Br. 34) ask the Court to reweigh the facts and adopt its version of Wayt's misconduct. The Court is not to consider, however, whether the evidence could support Affinity's view of the issues, but whether it can be read to support the Board's ultimate conclusion. *See Bruce Packing*, 795 F.3d at 22 (noting that the Court “do[es] not ask whether record evidence could support

[another] view of the issue, but whether it supports the [agency's] ultimate decision”).

None of Affinity's challenges (Br. 35-38) to the Board's finding of a perfunctory investigation has merit. Affinity claims (Br. 35) that Lesjack “was not relevant to the investigation” when Affinity originally decided to discharge Wayt. Given that Wayt's discharge involved events occurring during her treatment of Ms. P, Affinity's irrelevancy claim is stunning. Lesjack was Ms. P's sitter during the approximate time that Affinity alleged that Wayt lied about entering the room and about conducting a head-to-toe assessment. Lesjack was, therefore, decidedly relevant to a full and fair investigation. If Affinity was unaware that Lesjack could help piece together the timeline of Ms. P's care until much later in the process, this ignorance only further evinces the substandard nature of the investigation.

Moreover, Affinity needed only to review the sitter checklist form to learn that Lesjack was in Ms. P's room during the day and at the relevant time that it was investigating Wayt's alleged offenses. A thorough and unbiased investigation aiming to address and correct patient safety concerns would certainly have included interviews of nurses with knowledge of the subject patient's treatment. Therefore, contrary to Affinity's claim, Lesjack did not “emerge as a relevant witness” (Br. 35) after September 19; rather, Affinity ignored her relevance until then.

Affinity also errantly relies on (Br. 35-36) what the judge found, and the Board agreed, were “patently obvious . . . simpl[e] mistakes” in chart entries, “not attempts to deceive anyone.” (A.690.) Indeed, Regional Director Benson from Affinity’s parent company doubted that the errors were deliberate deceptions rather than sloppy recordkeeping. And Affinity touts (Br. 36) Smith having informed hospital managers that she had not seen Wayt perform a head-to-toe assessment between 9:00 a.m. and 11:00 a.m., but ignores that Smith also confirmed that she had seen Wayt in Ms. P’s room at 10:00 a.m.—a direct contradiction to “facts” outlined by Zinsmeister and agreed to by McDonald that formed the basis for their discharge recommendation.¹⁰ Smith’s interview provided both inculpatory and exculpatory information, but Affinity seized only on the former.

Affinity likewise identifies no reason (Br. 37-38) to set aside the Board’s finding that it denied Wayt a meaningful opportunity to respond to the allegations against her. To be clear, on September 5, McDonald and Zinsmeister—in a separate disciplinary meeting—told Wayt that they were auditing Ms. P’s chart. They knowingly withheld that they were investigating whether Wayt had falsified

¹⁰ Affinity argues (Br. 37) that Wayt’s 10:00 a.m. visit was not “rounding” because Smith said it was not. The Board rejected (A.691) Affinity’s semantics game, noting that Smith’s normal duties do not include hourly rounding, that Smith claimed to have performed hourly rounds on Ms. P that were not demonstrably different from Wayt’s conduct, and that it was undisputed that Wayt was at Ms. P’s bedside at least three times between 10:00 a.m. and noon.

records and provided substandard care. By September 11, and without having spoken to Wayt about the specific allegations despite Regional Director Benson stating an interest in “seeing the response to the allegation by the subject,” (A.443-52), Affinity decided to discharge Wayt. Declining to hear Wayt’s response to serious allegations against her is particularly egregious when considered alongside an “investigation” that revealed critical falsehoods (specifically, that Wayt had not entered Ms. P’s room until noon) and that left probative questions unanswered (specifically, whether Lesjack could fill in the timeline because Smith had indicated that Wayt may have done the assessment when she went to lunch). And Affinity’s assertion (Br. 38) that it provided Wayt an opportunity to respond on September 13 is unsupported by the credited evidence.¹¹

Lastly, contrary to Affinity’s claim otherwise (Br. 38), the Board based (A.688-89) its finding that Affinity departed from its own disciplinary policy on both Benson’s email seeking additional information, specifically, Wayt’s age, tenure, and disciplinary record, *and* Affinity’s Discipline and Termination Policy, which provides that appropriate disciplinary action “depends on many factors, including the employee’s prior disciplinary record” (A.513-18.) And as noted above, Affinity cannot liken (Br. 39) the photographing of a deceased patient

¹¹ Zinsmeister’s September 13 meeting notes do not corroborate Affinity’s claim. (A.403-29.)

after eyeball removal to Wayt's charting mistakes on a busy day in the orthopedic unit.

In short, substantial evidence supports the Board's finding that Wayt's union activity was a motivating factor in Affinity's decision to discharge her. On the record as a whole, and with due deference given to the Board's findings based on the credited evidence, Affinity provides no basis to disturb the Board's finding of unlawful motivation.

C. Affinity Failed to Prove It Would Have Taken the Same Action in the Absence of Wayt's Protected Union Activity

The Board reasonably found (A.694) that Affinity failed to meet its burden of demonstrating that it would have discharged Wayt absent her protected activity. Affinity needed to show that, despite a finding of unlawful motivation, “[it] *would* have fired [Wayt], not that it *could* have done so.” *Bally's Park Place*, 646 F.3d at 937 (emphasis in original; internal quotation marks omitted). Against the backdrop of an inadequate investigation riddled with factual errors and gaping holes, Affinity has not demonstrated that it would have discharged a top-rated, 23-year experienced nurse had she not engaged in protected activity. Indeed, according to the Board (A.694), Affinity's shoddy investigation precluded the formation of a reasonable good-faith belief that Wayt engaged in the alleged offenses. Further, the Board rejected (A.694) Affinity's affirmative defense based

on the same reasons supporting its discriminatory motive finding. Accordingly, the Board concluded “that Wayt’s misconduct was a pretext to retaliate against her for her union activities.” (A.694); *see, e.g., U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “dooms [the employer’s] defense”), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007).

Affinity’s challenges (Br. 40-45) to the Board’s rejection of the defense are unpersuasive. First, Affinity asserts (Br. 40) that the Board wrongly found that Affinity discharged Wayt for not entering Ms. P’s room until noon, rather than its alleged reasons—failure to assess Ms. P and falsification of documents. Contrary to Affinity’s claim, Zinsmeister’s September 11 email recommending discharge clearly set forth the reasons for discharge: Ms. P “was never seen by [Wayt] until noon” and “two other sitter witnesses, an RN sitter [Smith] and an RN Director [Kress] in the room at admission, [] verified that [Wayt] did not come in to the room from the point of admission until noon.” (A.403-29.) The Board found further (A.689) that Zinsmeister’s September 13 meeting notes corroborated the email and that the disciplinary action was not to the contrary.¹² (A.430.)

¹² Affinity errantly maintains (Br. 43) that September 26 was the discharge decision date. However, substantial evidence supports the Board’s determination that as of September 11, Affinity had decided to discharge Wayt.

Affinity's repeated claim (Br. 40) that Wayt's failure to conduct a head-to-toe assessment prompted her discharge rings hollow given the Board's finding (A.694) that Affinity acted with "insufficient knowledge" at the time it decided to discharge Wayt. At the time of its decision, Affinity had not spoken to Lesjack to determine whether she had seen Wayt perform an assessment. Indeed, as the Board found (A.694), the record does not show whether Wayt failed to perform a head-to-toe assessment. According to the Board (A.694), the incomplete and indeterminate investigation prevented Affinity from forming a reasonable good-faith belief as to Wayt's alleged misconduct.¹³

Once again, Affinity's remaining claims ask the Court to re-weigh the facts. The Board properly rejected (A.691) the assertion that Wayt falsified medical records by indicating that rounding occurred between 1:00 p.m. and 3:00 p.m. inasmuch as patient care technician Burgett had rounded on Ms. P, and Wayt could properly chart that information. And the Board did not ignore (Br. 43) that Affinity requested a neutral observer, HIPAA Privacy Officer Kline, to review Ms.

¹³ Affinity's remand request (Br. 41) to determine whether Wayt conducted a head-to-toe assessment is baseless. The proper inquiry is whether the employer holds a reasonable good-faith belief of misconduct, not whether, in fact, the conduct occurred. Affinity conducted an incomplete investigation that prevented the collection of relevant facts and, based on that inadequate investigation, the Board properly determined that Affinity could not have held a reasonable good-faith belief of misconduct. The Board has decided the appropriate issue, and remand is unnecessary.

P's chart and, in doing so, did not tell Kline that it suspected Wayt had falsified records. Rather, the Board was unpersuaded that Kline's role overcame the weight of the evidence showing a decision based on unlawful motivation. Nor did the Board ignore the events between September 12 and 26. The Board understood that Affinity planned to discharge Wayt without further investigation until the Union submitted the letter on Wayt's behalf. At that point, Affinity briefly delayed imposition of the discharge, but did not meaningfully investigate the allegations.

In sum, given the scant evidence to substantiate a reasonable good-faith belief, the Court should uphold the Board's rejection of the affirmative defense and its finding that Affinity's stated reasons for Wayt's discharge were pretextual.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT AFFINITY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REPORTING WAYT TO THE OHIO BOARD OF NURSING

On September 26, 2012, CNO Osterman filed a complaint with the Ohio Board of Nursing that lodged the same misconduct allegations that Affinity cited for Wayt's termination. This violation is clearly linked to the unlawful discharge, and much of the overlapping evidence supports both violations.

Affinity offers no new challenges regarding Wayt's protected activity or its knowledge. Therefore, for the reasons outlined above (pp. 27-32), substantial evidence supports the Board's finding that Wayt engaged in protected activity and that CNO Osterman knew of that activity. Substantial evidence likewise supports

the Board's finding that Affinity exhibited union animus. The circumstantial evidence of animus discussed above (pp. 32-35) applies with equal force to Affinity's reporting of Wayt. Moreover, it bears emphasizing that the Board found (A.690-91) that the information Affinity provided to the Ohio Board of Nursing was riddled with inaccuracies and that the only other nurse Affinity ever reported was the nurse who photographed a deceased patient after eyeball removal.

Affinity offers an unsupported single-sentence assertion (Br. 46) that CNO Osterman did not report Wayt because of her union support. The strong circumstantial evidence of pervasive union animus exhibited by hospital managers, including CNO Osterman, belies this self-serving statement. Further, Affinity cannot defeat (Br. 47 n.12) a finding of unlawful motivation based on the irrelevant fact that it did not "broadcast" its reporting of Wayt. Regardless of whether the reporting was "confidential," Affinity took adverse action against Wayt for unlawful reasons.

Affinity baselessly argues (Br. 45) that the disparate treatment evidence is inapplicable. A review of other nurses' offenses that triggered only proverbial slaps on the wrist rather than jeopardizing their licenses and livelihoods reveals that Affinity meted out far more severe punishment to Wayt. Wayt and those treated more mercifully differed in one significant way: Wayt openly supported the Union and worked to help get it elected. Moreover, Affinity's attempted

justification of reporting Wayt based on an alleged violation of the law (Br. 46) ignores the credited record evidence showing that Affinity did not treat similar violations by other nurses similarly and asks the Court to reject the Board's finding, to which great deference is owed, that Wayt made charting errors on a busy day rather than deliberately falsifying patient records.

Affinity advances no new argument concerning that it would have acted similarly in the absence of protected activity. For the reasons outlined above (pp. 41-44), the Board rejected that defense, and the Court should uphold that finding. Substantial evidence therefore fully supports the Board's finding that Affinity violated Section 8(a)(3) and (1) for reporting Wayt.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT AFFINITY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ISSUING WAYT A WRITTEN WARNING

On September 5, 2012, McDonald and Zinsmeister issued a written warning to Wayt for her conduct concerning reconciliation of the Pyxis machine, which the Board found (A.694) was yet another adverse action that Affinity took against Wayt in retaliation for her protected union activity. For the reasons outlined above (pp. 27-32), substantial evidence supports the Board's finding that Wayt engaged in protected activity and that McDonald and Zinsmeister knew of that activity. Affinity does not offer a new challenge regarding Wayt's protected activity, but highlights (Br. 47) Pharmacy Director Perone's lack of knowledge regarding

Wayt's protected activity. Perone's knowledge is irrelevant; Zinsmeister and McDonald were responsible for the warning, both of whom admittedly knew about Wayt's union activity.

Substantial evidence also supports the Board's finding that Affinity exhibited animus toward Wayt's union activity. The circumstantial evidence of animus discussed above (pp. 32-35) in large part equally applies to the issuance of the written warning. Additionally, the Board found (A.694) that Affinity, as it did in the discharge process, engaged in a perfunctory investigation. Indeed, McDonald and Zinsmeister followed their former pattern and prepared the warning without speaking with Wayt. And the Board observed (A.694) that Affinity conceded that Wayt did not violate policy by delaying the reconciliation. Like Affinity's other actions toward Wayt, the warning "was predicated on other assertions that may also be inaccurate." (A.694.) The fact that Wayt apologized to Perone is not, contrary to Affinity's view (Br. 48), dispositive of having admitted the allegations against her.

Moreover, the Board considered (A.694) that Perone had previously reported other allegations of unprofessionalism. Despite prior reports, however, the record contains no instance of discipline, excepting Wayt's written warning, based on Perone's report. (A.694.) The lack of any similar discipline further supports a finding of union animus.

Affinity challenges (Br. 48-49) the disparate treatment evidence by claiming that Wayt was allegedly disciplined for a “combination” of two offenses—unprofessional conduct and failure to comply with the known expectations of her supervisor—and the Board considered only similar instances of unprofessional conduct. Affinity’s challenge is unpersuasive. First, the written warning references unprofessional conduct, attitude, and failure to comply with hospital policy, not supervisory expectations. (A.495.) Second, the Board found, and Affinity does not contest, that hospital policy permitted Wayt to reconcile the discrepancy at the end of her shift. As such, the warning centered on unprofessional conduct and attitude, rendering the evidence of disparate treatment concerning similar instances of unprofessional conduct eminently relevant and persuasive.

Like the reporting violation, Affinity offers no new challenge to the Board’s rejection that it would have acted similarly in the absence of protected activity. Therefore, for the reasons outlined above (pp. 41-44), the substantial evidence supports the Board’s finding that Affinity failed to prove its affirmative defense.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT AFFINITY VIOLATED SECTION 8(a)(1) OF THE ACT BY WITHDRAWING UNION ACCESS TO THE FACILITY

An employer violates Section 8(a)(1) of the Act by unlawfully changing its practice of permitting the union to access its facility if anti-union animus motivated

the exclusion. *See, e.g., S. Md. Hosp. Ctr.*, 293 NLRB 1209 (1989) (employer violates Section 8(a)(1) by selectively and disparately denying nonemployee union organizers access to its cafeteria). Here, the Board found (A.694), and Affinity does not contest, that Affinity allowed the Union to access its cafeteria, certain break rooms, and conference rooms between early July and late September 2012. The Board found further that after the Union won the election and the Board certified the Union, Affinity excluded the Union from its facility “for reasons unrelated to its legitimate business concerns, but rather for reasons calculated to inhibit employees’ union activities.” (A.694.)

Affinity claimed it imposed the exclusion because of an alleged HIPAA violation by union representative Mahon. The Board however rejected (A.694) this defense based on HIPAA Privacy Officer Kline’s explicit testimony that Affinity took harsher measures because Mahon’s September 19 letter had been sent to union officials. (A.362-63.) Further, according to the Board, nothing in Mahon’s letter presented Affinity “with a nondiscriminatory reason to take any action against either Wayt or Mahon.” (A.695.) Indeed, the Board found that the letter alone lacked sufficient information to identify the patient without resorting to other sources of information, and the record lacked any suggestion that “anyone reading the letter would have a motive to seek other information with regard to the patient’s identity.” (A.695.) Under these circumstances, the Board concluded that

Affinity's decision to exclude access "was motivated by antiunion animus and retaliation for Mahon's defense of Wayt." (A.695.) Substantial evidence amply supports that decision.

Affinity's sole challenge (Br. 51) to the Board's finding rests on its contrary view of Kline's testimony, which it urges the Court to adopt rather than the judge's finding. Under the deferential standard of review, however, the Court defers to the Board's credibility determinations, *see Inova*, 795 F.3d at 80, and need only consider whether the Board's view of the evidence supports its ultimate decision—not whether that evidence could support Affinity's, *see Bruce Packing*, 795 F.3d at 22. In this regard, the Board's view of Kline's testimony is entitled to deference and is entirely reasonable. Accordingly, the Court should affirm the finding.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT AFFINITY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING, MORE CLOSELY SCRUTINIZING, AND RETALIATING AGAINST EMPLOYEES FOR SUBMITTING ADO FORMS

An employer violates Section 8(a)(1) by making statements that, "considering the totality of the circumstances . . . [have] a reasonable tendency to coerce or to interfere with [Section 7] rights." *Fort Dearborn Co.*, 827 F.3d at 1072. Under well-established Board precedent, an employer also violates Section 8(a)(1) by threatening to subject employees to closer scrutiny because of protected activity. *Id.*; *Oldfield Tire Sales*, 221 NLRB 1275, 1276 (1975). Here, the Board

found (A.696), and Affinity does not contest, that Kress immediately reacted negatively to finding completed ADO forms in her mailbox. Kress admitted to threatening to slap the ADO forms on nurses' foreheads, threatening to smash the forms through a nurse's forehead, and to reassigning a nurse from the intensive care unit, leaving those nurses each to handle three patients rather than two. The Board also found (A.696) that Kress identified a prominent union supporter and gloated that she would enjoy "writing this one up." Under these circumstances, the Board properly found that Kress had engaged in coercive conduct intended to curtail Section 7 rights, namely, the nurses' completion and submission of ADO forms.

Affinity posits (Br. 51-52) that completing an ADO form is unprotected activity and the Board did not find that it was protected. Affinity is wrong. The Board determined that nurses used the forms "whenever they believe an assignment comprises patient safety." (A.696.) And the Board found that taking grievances concerning working conditions outside an established chain of command did not strip the activity of its protected status. *See, e.g., Yellow Ambulance Svc.*, 342 NLRB 804, 821-22 (2004) (finding that activity did not lose protected status because the employee conducted it outside the normal chain of command); *Consolidated Freightways Corp.*, 257 NLRB 1281, 1283, 1287-88, 1292 (1981). Affinity's unsupported insistence otherwise—that the forms were

meant only to “agitate”—is insufficient to disturb the Board’s finding. Further, the fact that Affinity did not accept the ADO forms (Br. 52) does not render their submission unprotected; whether an employee’s stated grievance regarding working conditions is protected does not hinge on whether the employer chooses to listen or respond to that communication.

VI. AFFINITY’S CHALLENGE TO THE COMPLAINT’S VALIDITY WAS FORFEITED BEFORE THE BOARD, LEAVING THE COURT WITHOUT JURISDICTION TO CONSIDER IT

Section 10(e) of the Act provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e). That statutory prohibition creates a jurisdictional bar against judicial review of issues not raised to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) precludes court review of a claim not raised to the Board); *accord Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1107 (D.C. Cir. 2019). Further, Section 10(e) accords with the general principle that “[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.” *Local 900, IUE v. NLRB*, 727 F.2d 1184, 1191-92 (D.C. Cir. 1984) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

Here, at the start of the unfair-labor-practice case, Affinity stated in its answer to the complaint that Acting General Counsel Solomon lacked authority to issue and prosecute the complaint, citing as grounds the Board's lack of a quorum, and asserting, with no supporting grounds, that his "appointment was unlawful." (A.34.) Soon thereafter, in a motion to dismiss filed with the administrative law judge prior to the hearing, Affinity argued that Solomon's "authority must be governed by Section 3(d) of the Act," 29 U.S.C. § 153(d), which provides for a 40-day acting period (and which expired before the complaint issued in this case), "rather than the Federal Vacancies Reform Act," 5 U.S.C. § 3345 et seq. (FVRA), which provides for an initial 210-day acting period (and during which the complaint here issued). (A.47.)

After the judge denied the motion, Affinity abandoned its challenge to the complaint based on Section 3(d) before the Board, failing to include it in its exceptions filed with the Board, its brief in support of exceptions, and its motion for reconsideration of the Board's decision in which it raised numerous other issues. (A.642-77, 699-707.)¹⁴ The Court therefore lacks jurisdiction to consider

¹⁴ As discussed above (p. 17), Affinity filed a letter with the Board while the case was pending and after it had filed exceptions wherein it notified the Board of the Supreme Court's decision in *Noel Canning*. To reiterate, Affinity's stated position was that *Noel Canning* invalidated Solomon's issuance and prosecution of the complaint because the Board lacked a quorum. This letter, therefore, cements

Affinity's untimely attempt (Br. 16-19) to resurrect the challenge on appeal. *See, e.g., H&M Int'l Transp., Inc. v. NLRB*, 719 F. App'x 3, 4-5 (D.C. Cir. 2018) (challenge to the Acting General Counsel's authority "made in the answer to the complaint but not renewed in an exception to the decision of the ALJ is forfeit," and subject to the Section 10(e) bar).

However, even if were properly before the Court, which it is not, Affinity's argument that "the Acting General Counsel's authority must be governed by [Section 3(d) of] the Act rather than FVRA" (Br. 18), would be readily dispensed with. As the Court indicated in *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017), the President can opt to appoint under the FVRA or the Act, and in this instance, "[t]he President cited the FVRA as the authority for Solomon's appointment." *Id.* at 71 & n.2; *see also* 137 S. Ct. at 937 ("The President directed Lafe Solomon to serve temporarily as the NLRB's acting general counsel, citing the FVRA as the basis for the appointment. *See* Memorandum from President Barack Obama to L. Solomon (June 18, 2010).").

Finally, similarly barred from review is Affinity's summarily mentioned claim, now raised for the first time, that "even under the FVRA, the Acting General Counsel served invalidly" when the complaint issued. (Br. 19.) Affinity

Affinity's forfeit before the Board of any Section 3(d) challenge to the complaint's validity.

did not raise this claim to the Board and cannot do so now.¹⁵ *See Marquez Bros. Enters., Inc. v. NLRB*, 650 F. App'x 25, 27 (D.C. Cir. 2016) (holding that “typical NLRA exhaustion doctrine applies” to FVRA challenges to Solomon’s service as Acting General Counsel); *Creative Vision Res., LLC v. NLRB*, 872 F.3d 274, 292 (5th Cir. 2017) (rejecting untimely challenge to Solomon’s authority); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 120-21 (2d Cir. 2017) (same); *1621 Route 22 W. Operating Co. v. NLRB*, 825 F.3d 128, 142 (3d Cir. 2016) (same).

VII. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THOSE PORTIONS OF ITS ORDER REMEDYING ITS OTHERWISE UNCONTESTED FINDING THAT AFFINITY VIOLATED SECTION 8(a)(5) AND (1) BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative of his employees”

¹⁵ The Board’s sua sponte defense (A.678 n.1) of Solomon’s authority to issue and prosecute the complaint does not save Affinity’s otherwise forfeited challenge. A party “may not rely on arguments raised in a dissent or on a discussion of the relevant issues by the majority to overcome the [Section] 10(e) bar; the Act requires the party to raise its challenges itself.” *Enter. Leasing Co. v. NLRB*, 831 F.3d 534, 551 (D.C. Cir. 2016) (quotation marks omitted); *Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061 (D.C. Cir. 2003) (Section 10(e) does not support notion that parties themselves do not have to raise issues so long as Board members engage in a discussion). And, once again, Affinity’s supplemental authority letter to the Board confirms that Affinity predicated its challenge to the complaint solely on a quorum challenge.

29 U.S.C. §158(a)(5).¹⁶ The Act defines the duty to bargain collectively as the obligation “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment” 29 U.S.C. § 158(d). The Board found, and Affinity does not contest, that it refused to recognize and bargain with the Union after the Board certified the Union.

Before the Court, Affinity attempts to revive an argument it forfeited before the administrative law judge and did not raise before the Board regarding the authority of the Acting General Counsel to have issued and prosecuted the complaint in this case. But, as shown (pp. 52-56), the Court is jurisdictionally barred from considering that challenge. Affinity does not otherwise independently challenge the merits of the Board’s finding that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union, nor does it challenge the Board’s issuance of an affirmative bargaining order. In the absence of such challenges, the Board’s finding that Affinity unlawfully refused to recognize and bargain with the Union must be upheld and its related remedial portions of the Order enforced.¹⁷ *See Flying Food Group v. NLRB*, 471 F.3d 178,

¹⁶ Violations of Section 8(a)(5) result in derivative violations of Section 8(a)(1). *See Metro. Edison*, 460 U.S. at 698 n.4.

¹⁷ Affinity also fails to brief several of the 16 issues listed in its Statement of Issues (Br. 3-4). A party’s brief must contain its contentions “with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and

181 (D.C. Cir. 2006) (Board entitled to summary enforcement of uncontested portions of its order).

parts of the record relied on.” Fed. R. App. Proc. 28(a)(8)(A). Affinity has thus waived the issues that it failed to pursue, specifically Issues 1, 2, 4, and 5. *See Altman v. SEC*, 666 F.3d 1322, 1329 (D.C. Cir. 2011); *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993) (“An issue is waived if it is not both raised in the statement of issues and pursued in the brief.”); 16AA Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3974.1 (“to assure consideration of an issue by the court, the appellant must both raise it in the ‘Statement of the Issues’ and pursue it in the ‘Argument’ portion of the brief”).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny Affinity's petition and grant the Board's application for enforcement.

Respectfully submitted

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ADDENDUM

National Labor Relations Act, as amended, 29 U.S.C. §§ 151, et seq.**Section 3(d) (29 U.S.C. § 153(d))**

There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

Section 7 (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 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 158(a)(3) of this title.

Section 8(a)(1) (29 U.S.C. § 158(a)(1))

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

Section 8(a)(3) (29 U.S.C. § 158(a)(3))

It shall be an unfair labor practice for an employer 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: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 8(a)(5) (29 U.S.C. § 158(a)(5))

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) (29 U.S.C. § 158(d))

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 10(a) (29 U.S.C. § 160(a))

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in 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 predominantly 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 subchapter or has received a construction inconsistent therewith.

Section 10(e) (29 U.S.C. § 160(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 proceedings, as provided in 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 questions 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.

Section 10(f) (29 U.S.C. § 160(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.

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

DHSC, LLC, d/b/a AFFINITY MEDICAL CENTER)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1426, 15-1499
)	
NATIONAL LABOR RELATIONS BOARD)	Board Case No.
)	08-CA-090083
Respondent/Cross-Petitioner)	
)	
and)	
)	
NATIONAL NURSES ORGANIZING COMMITTEE)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,760 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 16th day of August 2019

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CERTIFICATE OF SERVICE

I hereby certify that on August 16, 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.

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Dated at Washington, DC
this 16th day of August 2019