

**ORAL ARGUMENT HELD APRIL 5, 2019  
DECISION ISSUED JULY 12, 2019**

No. 18-1170 (Consolidated with Nos. 18-1178, 18-1197, 18-1199)

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

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SHAMROCK FOODS COMPANY,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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Petition of Shamrock Foods Company for Rehearing  
or, in the Alternative, Rehearing En Banc

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## **STATUTES AND REGULATIONS**

All applicable statutes, etc., are contained in the Opening Brief for Petitioner Addendum. Petitioner incorporates herein the relevant statutory provisions listed in the Addendum to its Opening Brief.

## INTRODUCTION AND RULE 35 STATEMENT

The appellate panel in this matter found that the National Labor Relations Board somehow had no notice of an argument that one of the Board's own dissenting members expressly acknowledged. Petitioner Shamrock Foods Company ("Shamrock") therefore respectfully petitions for panel or *en banc* rehearing because the panel's decision (1) conflicts with this Circuit's jurisprudence concerning Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) ("Section 10(e)"), and (2) raises an issue of exceptional importance concerning the scope of appellate review in considering NLRB orders.

In its July 12, 2019 decision, the appellate panel in this matter adopted a blanket rule that appellants must file a pre-appeal motion to reconsider in ***any case*** where the NLRB finds a violation not alleged by General Counsel. In the administrative proceeding below, a two-member Board majority relied on a theory that General Counsel disclaimed at trial to find that Shamrock offered an unlawful separation agreement to a former employee. Dissenting from the majority opinion, Board Member Marvin E. Kaplan specifically noted that he would have dismissed that claim based on Shamrock's argument that General Counsel disclaimed the theory underlying the Board's decision. But, despite the Board's indisputable knowledge of Shamrock's position evidenced by Member Kaplan's dissent, the appellate panel held that Shamrock waived the issue under Section 10(e) by not filing a motion to reconsider with the Board.

Contrary to the panel's holding, this Circuit has held that Section 10(e) does not impose a blanket rule requiring a motion to reconsider as a precursor to an appeal of a

Board decision. *E.g., BPH & Co. v. NLRB*, 333 F.3d 213, 219–20 (D.C. Cir. 2003). Rather, according to this Circuit’s jurisprudence, “[t]he critical inquiry under section 10(e)...is ‘whether the Board received adequate notice of the basis for the objection.’” *Id.* (quoting *Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 143 (D. C. Cir. 1999)). The panel’s decision undeniably and irreconcilably conflicts with this precedent.

The panel’s acceptance of the Board’s Section 10(e) argument furthermore raises an issue of exceptional importance. The NLRA charges appellate courts with the “responsibility to examine carefully both the Board’s findings and its reasoning.” *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980). The dangers of allowing the Board to hide from such scrutiny behind artificial pleading requirements are on full display here. The Board has thus far escaped appellate review by incongruously arguing that it had no notice of an argument that one of its members accepted.

Accordingly, panel or *en banc* rehearing is necessary in this case to preserve the clarity of the Court’s precedent concerning Section 10(e) and its authority to review Board orders as the Act requires. Shamrock’s petition should be granted.

## **BACKGROUND**

On July 27, 2015, NLRB General Counsel issued a complaint alleging (among other purported violations) that Shamrock promulgated several overly broad work rules in a severance agreement offered to former employee Thomas Wallace. J.A. 19-20 (Compl. ¶ 5(r)). The severance agreement was not alleged to violate the Act in any other respect. At trial, General Counsel confirmed that it was pursuing this allegation solely on the theory of an overly broad work rule:

Q. (By the Administrative Law Judge) Is it your position that this is a rule?

A. (By Counsel for the GC) Our position's that this is a rule.

Q. Is it based just on this or is it based on --

A. It is based on this.

J.A. 724-25 (Tr. 688-89).

Based on General Counsel's affirmation, Shamrock argued in its post-hearing brief to Administrative Law Judge Jeffrey D. Wedekind that Wallace's severance agreement should be analyzed only as an alleged work rule. J.A. 1670, 724-25 (Shamrock Post-Hearing Br. at 15; Tr. 688-89). After the ALJ did not address the issue (J.A. 1624-25 (ALJ-JDW 43-44)), Shamrock presented the argument again to the Board in its exceptions to the ALJ's recommended decision:

The General Counsel affirmed during trial that [the severance agreement] allegation is based solely only on the theory of an overly broad work rule...Consistent with the General Counsel's statements at trial, the Complaint alleges only a work rule violation under Section 8(a)(1). (Compl. ¶ 5(r)). The severance agreement is not alleged to violate the Act in any other respect.

J.A. 1670 (Shamrock Post-Hearing Br. at 15).

The Board, in its decision, agreed with Shamrock's position that Wallace's severance agreement was not a "work rule." J.A. 1707 (D&O 3 at n.12). But, despite Shamrock's explicit argument that General Counsel disclaimed any alternative theory of a violation, the Board's two-member majority proceeded to find that the agreement was unlawfully overbroad. Dissenting from this holding, Member Kaplan specifically agreed with Shamrock's position and stated that he would have dismissed the claim

based on General Counsel's assurance that it was not pursuing any other theory. J.A. 1707 (D&O at 3 n.12).

After filing a petition for review in this Court, Shamrock raised the issue again in its principal brief on appeal. *See* Shamrock Opening Br. 22-23. In its response, the Board did not deny that its finding of a violation concerning Wallace's severance agreement was based on a theory that General Counsel affirmatively disclaimed. Instead, the Board argued that Shamrock waived the issue by appealing the Board's order without first filing a motion for reconsideration. NLRB Opening Br. at 58-60. On reply, Shamrock cited the relevant portions of its post-hearing and exceptions briefs during the administrative proceeding along with several decisions from this Circuit to demonstrate that the Board had been given sufficient notice of the issue before issuing its decision. Shamrock Reply Br. at 5-6.

Nonetheless, the panel that heard Shamrock's appeal accepted the Board's waiver argument. Rather than addressing or even referencing the undisputed fact that Shamrock presented its arguments to the Board in its exceptions brief, the panel espoused a blanket rule that an employer must file a motion to reconsider with the Board *in any case* where the employer claims that the Board based its decision on a ground not alleged by General Counsel. Op. at 3.

## ARGUMENT

### A. The Panel's Blanket Rule Conflicts With This Circuit's Jurisprudence.

This Court has rejected the type of blanket rule that the panel in this case purported to adopt under Section 10(e), *i.e.*, that a party must file a motion to reconsider

to preserve an argument that the Board decided a claim on grounds not raised by General Counsel. In *BPH & Co. v. NLRB*, 333 F.3d 213 (D.C. Cir. 2003), for example, the Board argued that the employer's failure to file a motion to reconsider precluded its argument on appeal that the Board's order was not supported by substantial evidence. This Court recognized that the Board's position elevated form over substance:

[D]espite the fact that the Company's attack on the Board's new application is made for the first time before us, the Board was sufficiently apprised, for the purpose of section 10(e), of the critical issue—whether the Board's ULP findings are supported by substantial evidence. Indeed, in the Company's brief to the Board, it argued that it did not violate the Act because it properly relied on the second decertification petition to withdraw recognition of the Union. It asserted that the decertification petition was not tainted because neither the Stipulation of Facts nor the allegations set forth in the Agreement constituted sufficient evidence upon which the Board could find it had caused employee disaffection with the Union...

*Id.* at 219-20 (internal citations and quotations omitted). The Court furthermore has recognized the paradox of the Board's position in this regard:

In short, the Board ironically says that even if it did not provide the Company with notice or an opportunity to litigate every violation found against the Company, the Board itself must have notice and an opportunity in the first instance to consider any resulting challenge to the fairness of its decision.

*NLRB v. Blake Const. Co.*, 663 F.2d 272, 283 (D.C. Cir. 1981).

Rather than adopting a blanket rule requiring a motion to reconsider in every case, this Court instead has held that “the critical question [under Section 10(e)] is whether the Board received adequate notice of the basis for the objection.” *Pa. State*

*Corr. Officers Ass'n v. NLRB*, 894 F.3d 370, 376 (D.C. Cir. 2018) (quoting *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016)); *BPH & Co.*, *supra* at 219-20. “Although briefing and argument before the Board are desirable...section 10(e) does not require such procedures.” *Pa. State Corr. Officers Ass'n*, 894 F.3d at 376. Rather, if the Board “responded to—and thereby acknowledged its awareness of—[] the relevant exceptions..., this is sufficient to satisfy Section 10(e).” *Id.* at 377; *see also Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 830 (D.C. Cir. 2012) (“Trump Plaza’s objections ‘were adequate to put the Board on notice’ that the Board’s treatment of the dissemination issue inexplicably departed from precedent.”); *Blake Const. Co., Inc.*, 663 F.2d at 284.

That is precisely what occurred here. Shamrock argued in its post-hearing brief that Wallace’s severance agreement should be analyzed only as a work rule because General Counsel denied any intention to pursue an alternate theory. J.A. 1670, 724-25 (Shamrock Post-Hearing Br. at 15; Tr. 688-89). After the ALJ ignored the argument, Shamrock raised it again before the Board in its exceptions. J.A. 1670 (Shamrock Post-Hearing Br. at 15). The fact that Shamrock presented this argument to the Board is confirmed most vividly by Member Kaplan’s dissent, where he agreed with Shamrock’s position and opined that it should have resulted in dismissal of the claim. J.A. 1707 (D&O at 3 n.12).

In short, Shamrock’s exceptions sufficiently apprised the Board of its argument that Wallace’s severance agreement should be analyzed solely as a work rule. The Board “responded to—and thereby acknowledged its awareness of” Shamrock’s argument through Member Kaplan’s dissent. These undisputed facts confirm that “the Board received adequate notice of the basis for [Shamrock’s] objection,” which is sufficient to

satisfy Section 10(e)'s requirements under the law of this Circuit. *See Pa. State Corr. Officers Ass'n, supra*. The panel's contrary holding on this point conflicts with binding precedent from this Court and should be vacated. Moreover, because the Board provided no other basis upon which to sustain its ruling, enforcement of the Board's Order on this issue should be denied.

**B. The Panel's Blanket Rule Improperly Restricts Appellate Review of Board Orders, Raising An Issue of Exceptional Importance.**

Congress vested the federal appellate courts with the authority to review Board actions. *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980). Such appellate review does not consist of "merely rubber-stamp[ing]" NLRB decisions. *Tradesmen Int', Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002). Rather, appellate courts bear the "responsibility to examine carefully both the Board's findings and its reasoning." *Peoples Gas System, Inc.*, 629 F.2d at 42. This Circuit therefore has repeatedly rejected attempts by the Board to shield its orders from legitimate appellate review. *E.g., Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981) ("[S]ection 10(e) does not shield the Board's resolution...from review"); *also see Local 900, Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 727 F.2d 1184, 1190-91 (D.C. Cir. 1984).

A brief review of recent Board appellate litigation reveals the Board's widespread effort to evade legitimate appellate review by arguing under Section 10(e) that parties waive arguments by not filing motions to reconsider prior to an appeal. Much like the present case, the Board claimed in *Tschiggfrie Props., LTD v. NLRB*, 896 F.3d 880, 885 (8th Cir. 2018), that the employer failed to raise an issue under the Board's burden-shifting *Wright Line* analysis despite the fact that the Board had addressed the issue in

its decision. In *Marathon Petroleum Co., LP v. NLRB*, --- Fed. Appx. ----, 2019 WL 3854505, \*6 (6th Cir. 2019) the NLRB claimed that the employer failed to challenge its obligation to bargain over a subcontracting decision, despite the employer's argument that it "was only obligated to 'discuss'" the issue with the union. In *Oncor Electric Delivery Company LLC v. NLRB*, 887 F.3d 488, 494-95 (D.C. Cir. 2018), the Board went so far as to argue that the employer did not sufficiently raise an argument under Section 10(e) simply because it neglected to cite relevant case law. *See also May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (objection that order was "not supported or justified by the record" sufficient to preserve a challenge that it was overbroad); *Camelot Terrace, Inc.*, 824 F.3d at 1085; *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1478-79 (1992).

The Board's arguments in the above referenced cases establish a determined, hyper technical effort under Section 10(e) to obstruct appropriate appellate review even in matters where the Board undeniably had notice and a sufficient opportunity to address an issue. As this Circuit has recognized, the wielding of Section 10(e) in this manner improperly sanctions the "triumph of technical pleading over fundamental fairness." *Blake Const. Co., Inc.*, 663 F.2d at 279. Given the preeminent position this Court holds in review of Board orders, *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965), this case presents an ideal opportunity for the Court to offer guidance to the other circuits regarding the legitimate requirements of Section 10(e) and the proper bounds of appellate scrutiny. Panel or *en banc* rehearing will thereby protect and preserve the substantive level of appellate review that Congress intended from the Board's widespread attempts to evade such oversight.

## CONCLUSION

For the reasons explained above, Shamrock's Petition for Panel and/or *En Banc* Rehearing should be granted.

Dated: August 26, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 2,269 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

August 26, 2019

/s/ Mark W. DeLaquil  
*Counsel to Shamrock Foods Company*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system on August 26, 2019. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system.

August 26, 2019

/s/ Mark W. DeLaquil  
*Counsel to Shamrock Foods Company*

## CERTIFICATE OF PARTIES

Pursuant to Circuit Rule 28(a)(1)(A), Petitioner certifies as follows:

### (A) Parties.

There are no *amici curiae* and the parties in this case are Shamrock Foods Company, National Labor Relations Board, and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC.

### (B) Rulings Under Review.

1. *Shamrock Foods Company and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC, 366 NLRB No. 107 (June 22, 2018).*

2. *Shamrock Foods Company and Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local Union No. 232, AFL-CIO-CLC, 366 NLRB No. 117 (June 22, 2018).*

### (C) Related Cases.

There are no known related cases pending in any other United States Court of Appeals or any other court in the District of Columbia.

August 26, 2019

/s/ Mark W. DeLaquil  
*Counsel to Shamrock Foods Company*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner, Shamrock Foods Company hereby states that it is a privately held corporation engaged in the business of food distribution. Shamrock has no parent company, and no publicly traded entity owns 10% or more of Shamrock's stock. Shamrock is incorporated in the state of Arizona and is licensed to do business in a number of states.

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 18-1170**

**September Term, 2018**

FILED ON: JULY 12, 2019

SHAMROCK FOODS COMPANY,  
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,  
RESPONDENT

BAKERY, CONFECTIONERY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION,  
LOCAL UNION No. 232, AFL-CIO-CLC,  
INTERVENOR

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Consolidated with 18-1178, 18-1197, 18-1199

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On Petitions for Review and Cross-Applications  
for Enforcement of Orders of  
the National Labor Relations Board

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Before: WILKINS, *Circuit Judge*, and GINSBURG and RANDOLPH, *Senior Circuit Judges*.

**J U D G M E N T**

The petitions for review and the cross-applications for enforcement were considered on the record from the National Labor Relations Board (Board), and the briefs and oral arguments of the parties. After full review of the case, the Court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

**ORDERED** and **ADJUDGED** that the petitions for review are **DENIED** and the cross-applications for enforcement are **GRANTED**.

Petitioner Shamrock Foods Company (Shamrock) is a wholesale foods distributor that operates a distribution center in Phoenix, Arizona. In late 2014, the Bakery, Confectionery, Tobacco Workers' and Grain Millers International Union, Local No. 232 (Union) attempted to

organize Shamrock's warehouse employees. In two separate decisions issued on June 22, 2018 – Cases 28-CA-150157 and 28-CA-169970 – the Board adopted in substantial part the decisions of two administrative law judges (ALJ) who found that Shamrock committed numerous unfair labor practices during the Union's organizing drive. Shamrock challenges both of the Board's decisions. The Board has filed cross-applications for enforcement of the decisions and orders.

In 28-CA-150157, the Board found that Shamrock violated Section 8(a)(1) of the National Labor Relations Act of 1935 (Act), Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169), by: (1) threatening employees; (2) soliciting employee complaints and grievances; (3) instructing employees to ascertain and disclose the union activities of others; (4) informing employees that supporting the union would be futile; (5) promising employees a benefit in order to discourage union support; (6) surveilling employees and creating the impression of surveillance; (7) promulgating an "unlawful work rule" in response to union activity, instructing employees to report employees who violated that rule, and threatening employees with legal prosecution if they violated that rule; (8) interrogating employees; (9) confiscating and prohibiting the distribution of union literature; and (10) granting a wage increase in order to discourage union support. The Board also adopted the ALJ's findings that Shamrock violated Section 8(a)(3) and (1) by disciplining Mario Lerma and violated Section 8(a)(1) by discharging Thomas Wallace. The Board agreed with the ALJ that parts of Wallace's separation agreement violated Section 8(a)(1), though on a different theory not alleged or litigated by the Board's General Counsel. *Shamrock Foods Co.*, 366 NLRB No. 117 (June 22, 2018).

In 28-CA-169970, the Board found that Shamrock violated Section 8(a)(3) and (1) of the Act by: (1) subjecting its employees to stricter enforcement of its previously unenforced break schedule; (2) subjecting Steve Phipps to closer supervision; (3) counseling Phipps; and (4) issuing a verbal warning to Michael Meraz. *Shamrock Foods Co.*, 366 NLRB No. 107 (June 22, 2018).

In its petitions, Shamrock challenges nearly all of the Board's findings. None of the challenges is persuasive.

*First*, we consider whether the Board erred in adopting the ALJ's decisions regarding the parties' subpoenas in 28-CA-150157. Two weeks before the ALJ's hearing, the General Counsel served Shamrock with a subpoena. The ALJ denied Shamrock's petition to revoke the General Counsel's subpoena as well as Shamrock's motion for a continuance. Shamrock failed to provide all of the subpoenaed documents. Because the subpoenaed information was "reasonably relevant to the matters at issue," J.A. 1048, the ALJ imposed evidentiary sanctions against Shamrock that prohibited Shamrock from presenting certain witnesses, limited Shamrock's cross-examination of the General Counsel's witnesses, and granted an adverse inference that the subpoenaed documents would have corroborated certain testimony.

We review the decision to impose evidentiary sanctions for abuse of discretion. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir. 1998). "The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying

party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party.” *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396-97 (2004), *enforced*, 156 F. App’x. 386 (2d Cir. 2005). We agree with the Board that the ALJ did not abuse his discretion in imposing sanctions and that the sanctions were proportionate to Shamrock’s failure to comply with the General Counsel’s subpoena.

Shamrock also takes issue with the ALJ’s decision not to sanction the Union or grant an adverse inference because the Union failed to produce recordings of meetings that Shamrock alleged Phipps had secretly made, in response to Shamrock’s subpoena. The Board agreed that the ALJ did not abuse his discretion in declining to sanction the Union because the recordings were not in the Union’s possession or control. We agree with the Board and do not find that the ALJ’s decision not to impose sanctions was an abuse of discretion.

*Second*, Shamrock argues that the Board erred in finding that parts of Wallace’s separation agreement violated Section 8(a)(1) because the General Counsel neither litigated that violation under the theory adopted by the Board nor charged it in the complaint. However, Shamrock failed to object to the Board’s finding in a motion for reconsideration before the Board; accordingly, this Court lacks jurisdiction to pass judgment on this issue. Section 10(e) of the Act provides that “[n]o 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.” 29 U.S.C. § 160(e). When an employer claims “it was denied procedural due process because the Board based its order upon a theory of liability . . . allegedly not charged or litigated before the Board,” it must file a motion for reconsideration. *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Shamrock failed to raise its arguments before the Board on a motion for reconsideration, and “extraordinary circumstances” do not warrant review here.

*Third*, we turn to the merits of Shamrock’s remaining contentions, which challenge the ALJs’ credibility determinations and factual findings undergirding Shamrock’s Section 8(a)(1) and (a)(3) violations. Section 7 of the Act protects employees’ rights “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.” 29 U.S.C. § 157. Section 8(a)(1) makes it an “unfair labor practice” to “interfere with, restrain, or coerce employees in the exercise of” their section 7 rights. *Id.* § 158(a)(1). Section 8(a)(3) makes it an “unfair labor practice” to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” *Id.* § 158(a)(3).

We review the Board’s decisions “under a ‘highly deferential standard,’” *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1119 (D.C. Cir. 2018) (quoting *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 650 (D.C. Cir. 2003)); however, we do not “merely rubber-stamp” the Board’s decision, *Tradesmen Int’l, Inc. v. NLRB*, 275 F.3d 1137, 1141 (D.C. Cir. 2002) (quoting *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1062 (D.C. Cir. 2001)). “The court will uphold the decision of the Board unless it was arbitrary or capricious or contrary to law, and as long as its

findings of fact are supported by substantial evidence in the record as a whole.” *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 440 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 977 (2018). Under substantial evidence review, we will not “displace the Board’s choice between two fairly conflicting views, even though [we] would justifiably have made a different choice had the matter been before [us] *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). We do not “second-guess ‘the ALJ’s credibility determinations, as adopted by the Board, unless they are patently unworkable.’” *CCI Ltd. P’ship v. NLRB*, 898 F.3d 26, 32 (D.C. Cir. 2018) (quoting *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 265 (D.C. Cir. 1993)).

Shamrock fails to show that the ALJs’ credibility determinations are patently unworkable or that the Board impermissibly adopted the ALJs’ thorough opinions. We agree with the Board that substantial evidence supports the factual findings undergirding its conclusions that (1) Art Manning is a supervisor who unlawfully surveilled union activity; (2) Kent McClelland’s May 8 letter promulgated an “unlawful work rule” in response to union activity; (3) Mark Engdahl’s January 28 and April 29 statements were unlawfully threatening and coercive; (4) Jake Myers unlawfully interrogated Wallace about his union views; (5) Joe Remblance unlawfully interrogated Phipps and Nile Vose; (6) Karen Garzon unlawfully interrogated two employees; (7) Natalie Wright unlawfully solicited grievances at a January 28 roundtable meeting; (8) Engdahl’s April 29 no-layoff commitment constituted an unlawful promise of employee benefits; (9) Shamrock’s May 2015 wage increase constituted an unlawful grant of employee benefits; (10) David Garcia unlawfully engaged in surveillance and created the impression of surveillance on May 1; (11) Shamrock unlawfully disciplined Lerma; (12) Shamrock unlawfully discharged Wallace; (13) Shamrock unlawfully enforced its break policy in January 2016; (14) Shamrock unlawfully subjected Phipps to closer supervision; (15) Shamrock unlawfully disciplined Phipps; (16) Shamrock unlawfully disciplined Meraz; and (17) Ivan Vaivao unlawfully solicited grievances at a February 5 meeting.

*Finally*, Shamrock argues that the Board abused its discretion by requiring the remedial notice be read to employees by its President/CEO or Vice President of Operations or by a Board agent in the presence of these company officials. We disagree. Section 10(c) of the Act grants the Board the power to remedy unfair labor practices by ordering an employer to “take such affirmative action . . . as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The Board’s power “is a broad discretionary one,” and the remedies should be based on the “enlightenment gained from [the Board’s] experience.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

In this case, the Board found that in addition to being posted, the notice should be read aloud “[g]iven the severity and scope of the Company’s unfair labor practices, and the fact that many of them were committed by high-level officials and/or at large and small mandatory meetings.” *Shamrock Foods*, 366 NLRB No. 117, at \*7. This remedy falls within the Board’s broad discretionary power, and we see no reason to disturb this aspect of the order. *See Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018) (“We have recognized that a public reading may be appropriate where, as here, upper management has been directly involved in multiple violations of the Act.”).

Because we find all of Shamrock's arguments barred or without merit, we deny Shamrock's petitions for review and grant the Board's cross-applications for enforcement.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for hearing *en banc*. See FED. R. APP. P. 41(b); D.C. CIR. R. 41.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Ken Meadows  
Deputy Clerk