

**Nos. 19-71501, 19-71766, 19-71804**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 751**

**Petitioner**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent**

**and**

**AIM AEROSPACE SUMNER, INC.**

**Intervenor**

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**AIM AEROSPACE SUMNER, INC.**

**Petitioner**

**v.**

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**and**

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**v.**

**AIM AEROSPACE SUMNER, INC.**

**Respondent**

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**ON PETITIONS 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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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on two petitions to review a Decision and Order issued by the National Labor Relations Board (“the Board”) and the Board’s cross-application for enforcement. The Board’s Decision and Order found that AIM Aerospace Sumner, Inc. (“the Company”) committed an unfair labor practice by promoting an employee who led the effort to decertify the International Association of Machinists, District 751 (“the Union”). It dismissed the remainder of the complaint against the Company, including the allegation that the Company unlawfully withdrew recognition from the Union.

The Board's Decision and Order issued on June 6, 2019, and is reported at

367 NLRB No. 148. (CER 16.)<sup>1</sup> The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Union’s petition for review was timely filed on June 17, 2019, as the Act places no time limit on such filings. The Company has intervened in support of the Board’s opposition to the Union’s petition for review.

The Company’s petition for review was timely filed on July 15, 2019. The Union has intervened in support of the Board’s opposition to the Company’s petition for review. On July 18, 2019, the Board timely filed a cross-application for enforcement of its Order against the Company.

This Court has jurisdiction under Section 10 (e) and(f) of the Act (29 U.S.C. §§ 160 (e), (f)), because the Board’s order is final and the unfair labor practice occurred within this Circuit.

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<sup>1</sup>“CER” references are to the Excerpts of Record Volumes filed by the Company. “UER” references are to the Excerpts of Record Volumes filed by the Union. “SER” references are to the Supplemental Excerpts of Record Volumes filed by the Board. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “UBr.” and “CBr.” references are to the opening briefs filed by the Union and the Company, respectively. References to both opening briefs use the page numbers found in the CM/ECF header.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by promoting employee Lori-Ann Downs-Haynes to reward her decertification efforts and to discourage membership in the Union.

2. Whether the Board had a rational basis for concluding that the Company lawfully withdrew recognition from the Union based upon an uncoerced decertification petition signed by a majority of the Company's employees, and therefore did not violate Section 8(a)(5) and (1) of the Act.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against the Company alleging, among other things, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 29 U.S.C. 158(a)(3) and (1)) when it promoted the leader of a campaign to decertify the Union, Lori-Ann Downs-Haynes, to reward her activities and to discourage membership in the Union. Additionally, the General Counsel alleged that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 29 U.S.C. 158(a)(5) and (1)) by withdrawing recognition from the Union based upon the decertification petition that Downs-Haynes circulated, which a majority

of the Company's employees had signed. The General Counsel alleged that the decertification petition was tainted because the Company coerced employees, in violation of Section 8(a)(1) of the Act. Finally, the General Counsel alleged that the Company committed a post-withdrawal refusal to bargain in violation of Section 8(a)(5) and (1) of the Act by unilaterally granting a wage increase.

Following a hearing, the administrative law judge issued a decision in which she found that the Company promoted Downs-Haynes as a reward for circulating the decertification petition, and thereby violated Section 8(a)(3) and (1). (CER 27-28.) The judge considered and rejected the possibility that the Company tainted the decertification petition by promoting Downs-Haynes. (CER 28-29.) Because the judge dismissed the remaining allegations that the Company coerced employees in violation of Section 8(a)(1), the judge concluded that the Company lawfully withdrew recognition from the Union and implemented a post-withdrawal wage increase. (CER 29.) Based on the foregoing, the judge dismissed all but one of the unfair labor practice allegations against the Company. (CER 29.)

The General Counsel and the Union each filed timely exceptions challenging the administrative law judge's partial dismissal of the complaint. (SER 99-122.) Notably, no party excepted to the legal test under *Master Slack Corp.*, 271 NLRB 78, 84 (1984), that the judge applied to determine that Downs-

Haynes' promotion did not taint the decertification petition. For its part, the Company filed timely exceptions challenging the administrative law judge's finding that the Company violated the Act by promoting Downs-Haynes. (SER 123-27.)

Chairman Ring and Members McFerran and Emanuel sustained the administrative law judge's finding that the Company violated the Act by promoting Downs-Haynes, and unanimously adopted the judge's dismissal of the allegations that the Company unlawfully granted greater access to decertification activists, made coercive statements and gestures, and tainted the petition by providing more than ministerial aid to the campaign. (CER 16.) While the Board majority agreed with the judge that the Company did not violate the Act by withdrawing recognition from the Union and subsequently granting a wage increase, Member McFerran would have found these acts unlawful because, in her view, Downs-Haynes' promotion tainted the decertification petition. (CER 17-19.)

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. Background; the Collective-Bargaining Agreement's Terms Including Wage Scales**

AIM Aerospace manufactures composites and ducting for the aerospace industry in three facilities located in Washington: Auburn, Renton, and Sumner. (CER 20.) On August 5, 2013, the Board certified the Union as the exclusive collective-bargaining representative of a bargaining unit of the Company's employees at the Sumner facility. Thereafter, the Union and the Company entered into a collective-bargaining agreement ("the CBA") effective April 25, 2014 through May 1, 2018. (CER 20; CER 578-667.)

The CBA's union security provision defines the rights and duties of employees vis-à-vis the Union. That section, 3.01, provides that employees may choose whether to become a member of the Union and pay dues. If an employee becomes a member, he or she must remain a member and pay dues for the length of the contract. (CER 20; CER 583.)

The CBA's wage provision sets a scale for wages and increases by job category. That section, 7.05, gives the Company discretion to pay above those rates for "legitimate business reasons," including "retention of needed skills, exceptional performance, consistent demonstration of skills above expectations,

excellent dependability, quality of work, leadership, mentoring and demonstrated collaborative behavior.” (CER 20; CER 587.)

**B. Wages at the Non-Union Auburn and Renton Facilities Surpassed Wages at Sumner, Prompting Bargaining Unit Employees to Discuss Wages and the CBA**

In February 2016, a private equity group purchased the Company, including all three facilities. Following the purchase, the Company made certain personnel and operational changes, including replacing the vice president, general manager, and human resources manager at the Sumner facility in early 2017, and implementing across-the-board increases to the wage scales at the non-union Renton and Auburn facilities in February 2017. (CER 20; CER 401-02.)

Following the wage increases at Renton and Auburn, wages became a topic of conversation among the employees at Sumner. On multiple occasions, when employees expressed dismay at their wages, Company representatives explained that the Company could not implement across-the-board increases because wage rates were set by the CBA. (CER 20-21; CER 78-79, 172-78, SER 1-7.)

**C. In May 2017, the Company Posted a Job Opening for a Receiving Clerk Position; It Rejected Employee Downs-Haynes in Favor of a More Experienced Candidate**

On May 21, 2017, the Company posted a job opening for a receiving clerk. (CER 24; CER 465, 569, UER 70-76.) The Company followed its regular practice of posting the position internally and externally. (CER 24; CER 501, SER 71.)

The Company received twenty-six applications, including twenty-four from external candidates and two from internal candidates: Lori-Ann Downs-Haynes and Laura Hobbick. (CER 24; CER 484, UER 65-67.) The Company did not interview either internal candidate. (CER 28.) Instead, on June 6 or 12, after receiving all twenty-six applications responsive to the posting, the Company hired an external candidate named Erwin Taylor. (CER 24; CER 486.) Taylor had previously worked as a logistics technician with warehouse responsibilities. (CER 24; CER 483, 487, UER 72-74.)

**D. In June 2017, Employee Downs-Haynes Initiated the Campaign To Decertify the Union and Circulated a Decertification Petition Among Her Coworkers**

In early to mid-June 2017, Downs-Haynes and her coworkers started talking about ousting the Union. (CER 21; CER 337, UER 58-64.) Downs-Haynes had joined the Union only because she believed membership was a condition of employment. (CER 21; CER 310.) When she learned that she had missed her opportunity to remain a nonmember and avoid paying dues, she felt upset. (CER 21, CER 310.) As the CBA-mandated dues increased, Downs-Haynes could not afford them. (CER 21; CER 310-11). By mid-June, she began speaking to her coworkers about ousting the Union. (CER 21; CER 310-11, 337.)

One coworker with whom Downs-Haynes discussed ousting the Union was Rebecca Cole. Ever since the Union had been certified, Cole had wanted to get rid

of it because she felt that the workers did not get anything in return for paying dues. (CER 21.) Cole had seen the decertification process play out at a previous job and was not willing to lead the campaign by circulating a decertification petition. (CER 21.) However, she was willing to draft the petition because she and other employees were tired of paying dues. (CER 21.) In the third week of June 2017, using a template from a website called “Union Facts,” Cole drafted the decertification petition, and Downs-Haynes agreed to collect signatures on it. (CER 21; CER 292-96.)

Downs-Haynes collected signatures on the petition from June 28 through July 20, 2017. (CER 21-23; UER 58-64.) She spoke to her coworkers about the decertification petition in various parts of the facility: in the break rooms (CER 209, 236-37), directly outside the facility (CER 110), and in work areas (CER 164). (CER 22.) Downs-Haynes spoke to her coworkers about the decertification petition at various times: during their break time (CER 236, 244), before and after work (CER 110), and while they were working (CER 164, 208-10). (CER 23.) She also enlisted second and third shift employees to help her collect signatures. (CER 21; CER 316.) When Downs-Haynes had a page full of signatures, she gave the petition to Cole, who would then give her another blank petition. (CER 21; CER 315.)

**E. The Company Learned of Downs-Haynes' Decertification Efforts and Made Every Effort to Remain Neutral**

The Company learned of Downs-Haynes' efforts to oust the Union in mid-June 2017, when Downs-Haynes scheduled a meeting with Human Resources Director Ruffcorn. Downs-Haynes complained that she had only received a 10-cent raise, complained about paying union dues, and said that she wanted to get rid of the Union. Ruffcorn said she could not comment on that. Thereafter, Ruffcorn informed Leigh Booth, Vice President of Human Resources, of the meeting and together they planned a training for supervisors. (CER 21; CER 434-35.)

On June 27, the Company held a meeting for supervisors and managers about the decertification campaign, during which the supervisors learned that Down-Haynes was collecting signatures on a petition. The Company trained supervisors to remain neutral, not assist the decertification effort, and direct any questions to Human Resources. (CER 21; CER 286, 352, 378, 437.)

On June 30, Downs-Haynes scheduled another meeting with Human Resources Director Ruffcorn and Vice President of Operations Mike Pratt. Downs-Haynes asked specific questions about the decertification process, but Ruffcorn and Pratt explained that they could not answer most of her questions, with two exceptions. First, when Downs-Haynes asked about the timeframe for submitting the signed decertification petition, Pratt explained the difference

between a three-year contract and a four-year contract.<sup>2</sup> Second, when Downs-Haynes expressed concern about being threatened for her anti-union activities, Ruffcorn told her to report any threats to Human Resources. Ruffcorn and Pratt declined to answer Downs-Haynes' other questions. When Downs-Haynes complained that union shop steward James Herness had been telling employees that the Company was not honoring the CBA regarding pay, Ruffcorn and Pratt told her they needed to remain neutral and could not offer her advice. (CER 21; CER 439-40, SER 17-20.)

Later in the day on June 30, Downs-Haynes returned to Human Resources and met with Ruffcorn and Booth. She complained that, while she had been discussing decertification in the lunch room, some other employees interrupted her and initiated a heated discussion. Booth told Downs-Haynes that the break rooms are open to all employees; that Downs-Haynes could ask other employees not to interrupt her; and that Downs-Haynes could not bother second- and third-shift employees during their shifts. Finally, Booth asked Downs-Haynes not to return to Human Resources except to discuss a work-related issue. (CER 21-22; CER 442-43, SER 17-20.)

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<sup>2</sup> With a three-year collective-bargaining agreement, there is a 30-day window during the last year when a decertification petition can be filed. With a four-year

Despite Booth's directive, on July 5, Downs-Haynes returned to Human Resources and met with Ruffcorn and Pratt. Downs-Haynes complained that shop steward Herness had threatened other employees. Ruffcorn responded that any employee who felt threatened should come to Human Resources. Additionally, Downs-Haynes stated that she had contacted the Board, which informed her that she needed signatures from 80 percent of employees in order to decertify the Union. As that information is incorrect, Ruffcorn provided Downs-Haynes with the website for the National Right to Work organization. When Downs-Haynes stated that she had created some anti-union flyers, Pratt responded that she could not post them but could hand them out. When Downs-Haynes asked for a list of dues-paying union members, Ruffcorn refused because she had to remain neutral. (CER 22; CER 443-45, SER 17-20.) Rather than provide a list of union members, Ruffcorn later provided Downs-Haynes and Cole with the number of employees in the bargaining unit. (CER 22; CER 496.)

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contract, employees can file a decertification petition during the entire last year. *Gen. Cable Corp.*, 139 NLRB 1123, 1125 (1962).

**F. The Company Promoted Downs-Haynes Into the Position For Which She Had Recently Been Rejected and Raised Her Wage Rate**

On June 26, 2017, the newly hired receiving clerk abandoned the job. (CER 24; CER 503.) The Company reposted the job on June 29.<sup>3</sup> (CER 24; CER 504, 544-45, 551-52.) Twenty additional external candidates applied. Several of those candidates had particularly relevant work experience. For example, “applicants Ballard and Plummer each had years of recent receiving, inventory control, and warehouse experience.” (CER 28; CER 340, SER 8-16.) Ballard’s application reflected over two years of experience working in the same job title as the Company had posted, shipping/receiving clerk. (SER 8-11). Plummer’s application reflected over six years of experience as a Maintenance Stores Clerk, where he was responsible for “receiv[ing] and ship[ping] various aircraft parts in accordance with company procedures and FAA regulations,” as well as documenting the shipment of hazardous materials. (SER 12-16.) In addition, Plummer had eighteen months of experience as a Logistics Analyst with a different employer, where he “reviewed and revised processes and procedures for

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<sup>3</sup> Although the posting produced 24 applicants for the first posting and 20 additional external applicants for the re-posting, Ruffcorn stated that the job was re-posted only internally after the initial hire abandoned the job: “We posted it back internally. We did not post it externally because we had such a bad response initially. So we posted it internally.” (CER 24; CER 45, 466.)

Warehouse, Shipping and Receiving which increased efficiencies and reduced labor overhead costs.” (SER 12-16.) Downs-Haynes’ resume does not reflect any relevant experience at the Company, although she had a single instance of filling in for the shipping receiving department. (CER 24-25; CER 340, UER 65-67.)

The Company’s stated practice is to give internal and external job applicants equal consideration. In this case, the Company chose not to interview any of the external candidates. (CER 24, 28; CER 468, 489-91, SER 35.) Instead, it only interviewed the two internal candidates: Hobbick and Downs-Haynes on June 30 and July 6, respectively. When the Company previously posted the position, both had applied but the Company had not invited either to interview. (CER 24; CER 468-71, 570-72.)

The Company selected Downs-Haynes for the position. (CER 25; CER 45.) For her single occasion of filling in at the Company’s shipping and receiving department, the Company credited her for one and a half years of experience. (CER 24-25; CER 340, UER 65-67.) With regard to her experience at prior employers, the Company credited Downs-Haynes with one year of experience for seven months of work as a warehouse associate, one year of experience for six months of work as a customer care specialist, and two years of experience for a little less than two years of work in customer service. (CER 24-25; CER 506, UER 65-67.)

When the Company selected Downs-Haynes for the receiving clerk position on July 11, 2017, it also increased her hourly wage by forty cents per hour, four times the raise that she had received in June. (CER 25; CER 434.) The Company implemented the raise retroactive to July 3, 2017. (CER 25; CER 508, 546-48.) According to Ruffcorn, the pay bump was based on Downs-Haynes' experience. (CER 25; CER 475.) Supervisor Aurelio told Downs-Haynes the increase was because the job required more responsibility. (CER 25; CER 546-48).

**G. Downs-Haynes and Cole Presented the Company with a Decertification Petition Signed by a Majority of Employees; the Company Withdrew Recognition From the Union**

On July 20, 2017, Downs-Haynes and Cole asked Ruffcorn if she could accept the signed decertification petition. After checking with the Company's legal department, Ruffcorn informed Downs-Haynes that she could. (CER 23; CER 406, 450.)

The following day, July 21, Cole delivered to Ruffcorn and Booth the decertification petition signed by 142 of the 272 bargaining unit employees. (CER 23; SER 75-98.) After verifying the authenticity of the petition's signatures, the Company by letter dated July 25, informed the Union that it was withdrawing recognition from the Union based upon a decertification petition signed by a majority of the bargaining unit employees. (CER 23; CER 568.)

**H. After Withdrawing Recognition From the Union, the Company Implemented a Wage Increase**

In early August 2017, the Company held an all-hands meeting led by Vice President Pratt. He informed the employees that the Company would be implementing a wage increase. The wages of employees who had been with the Company four years or fewer would be increased to match the wages at the Auburn and Renton facilities and all other employees would receive an across-the-board five percent increase. (CER 24.)

**III. THE BOARD'S CONCLUSIONS AND ORDER**

Based upon the foregoing, the Board (Chairman Ring and Members McFerran and Emanuel), in agreement with the administrative law judge, found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by promoting Downs-Haynes as a reward for her circulating the decertification petition and to discourage membership in the Union. (CER 28.) Additionally, the Board unanimously found that the Company did not violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by granting greater access to employees engaged in decertification activities or by making coercive comments or gestures that interfered with employees in the exercise of their rights protected by Section 7 (29 U.S.C. § 157). (CER 25-27.)

The Board further found, with Member McFerran dissenting, that the Company appropriately relied on the employee decertification petition signed by a majority of employees to withdraw recognition from the Union. The Board majority found no taint because the Company had not engaged in any misconduct directly related to the decertification petition, and the Union's loss of support could not be attributed to the Company's sole unfair labor practice of promoting Downs-Haynes. While the Board applied the causation test under *Master Slack Corp.*, 271 NLRB 78, 84 (1984), to determine that Downs-Haynes' promotion did not taint the decertification petition, Member McFerran would reject that test in favor of the conclusive presumption of taint under *Hearst Corp.*, 281 NLRB 764, 764 (1986), *enforced*, 837 F.2d 1088 (5th Cir. 1988).

In addition, although the complaint did not allege that the Company violated the Act by providing more than ministerial aid to the decertification effort, the Union argued that the Company's provision of information to the decertification leaders tainted the petition. The Board rejected the argument, finding that the limited aid that the Company did provide was merely ministerial and did not taint the decertification petition. (CER 29.)

Because the Board majority found the Company's withdrawal of recognition to be lawful, it also found the Company's post-withdrawal wage increase to be lawful and dismissed the allegation that the Company violated the Act by

unilaterally changing a term of employment without providing the Union with prior notice and an opportunity to bargain. (CER 16-19, 28-29.)

Accordingly, the Board, with Member McFerran dissenting in part, dismissed all the complaint's allegations, except for the unlawful promotion allegation. To remedy that violation, the Board ordered the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act. Affirmatively, the Board ordered the Company to post and electronically distribute a remedial notice to employees. (CER 16-17.)

### **SUMMARY OF ARGUMENT**

1. Substantial evidence supports the Board's finding that the Company discriminatorily promoted employee Downs-Haynes as a reward for leading the campaign to decertify the Union, in violation of Section 8(a)(3) and (1) of the Act. After the Company initially rejected Downs-Haynes for a more highly paid position of receiving clerk, she instigated the decertification campaign and began soliciting signatures on the petition. When the exact same position became vacant during the campaign, the Company departed from its practice of giving equal consideration to internal and external candidates, ignored candidates with significantly more experience, interviewed only two internal candidates, and promoted Downs-Haynes. Thus, the evidence clearly supports the Board's finding

that the hiring process was a pretext to reward Downs-Haynes for her anti-union activities. Downs-Haynes' extensive activities, the Company's undisputed knowledge of those activities, and the highly suspicious timing of the promotion further support the Board's conclusion that the Company's promotion of Downs-Haynes constituted unlawful discrimination, in violation of Section 8(a)(3) and (1) of the Act.

The Company wrongly asserts that its decision to ignore better qualified candidates and promote Downs-Haynes cannot be described as discrimination. That argument is not supported by the law given the Company's admission that it did not give equal consideration to all job applicants, or consistent with the Act's protection of job applicants from discrimination.

2. The Board had a rational basis for dismissing the allegation that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and subsequently granting raises. The Company took those actions based upon a decertification petition that was initiated, drafted, and circulated exclusively by employees. The Union asserts that the petition was tainted by Downs-Haynes' promotion and therefore could not be relied upon. The Board reasonably rejected that argument based on an analysis of any potential causation between the promotion and petition under *Master Slack Corp.*, 271 NLRB at 84. As the Board dismissed all the complaint allegations except the

promotion violation, it did not need to analyze whether any additional unfair labor practices tainted the decertification petition.

Further, the Board soundly rejected the Union's argument that (although not alleged as unlawful conduct itself) the Company tainted the petition by providing factual information about the process in response to campaign leaders' unsolicited inquiries. The Board's rational basis for concluding that the Company's provision of limited information constituted mere ministerial aid is rooted in well-settled law.

Finally, the Court is jurisdictionally barred from considering the Union's reliance on *Hearst Corp.*, 281 NLRB at 764, because the Union failed to raise the issue before the Board by excepting to the administrative law judge's application of the *Master Slack* test. In any event, the Board correctly applied well-settled law in not applying a presumption that the petition was tainted under *Hearst*, because the Company's unfair labor practice was not directly related to the petition.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY PROMOTING EMPLOYEE LORI-ANN DOWNS-HAYNES TO REWARD HER DECERTIFICATION EFFORTS AND TO DISCOURAGE MEMBERSHIP IN THE UNION**

#### **A. Standard of Review**

This Court upholds the Board’s order if the Board “correctly applied the law and its factual findings are supported by substantial evidence.” *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (citations omitted). In reviewing the Board’s application of the law, the Court accords “considerable deference” to the Board’s interpretation of the Act “as long as it is rational and consistent with the statute.” *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (internal quotation marks and citation omitted).

The Court treats the Board’s factual findings as conclusive if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980, 986 (9th Cir. 2005). Under that standard, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Local Joint Exec. Bd.*, 515 F.3d at 945.

Given the Board’s “special expertise” in the field of labor relations, the Court will defer to “reasonable derivative inferences drawn by the Board from the credited evidence.” *NLRB v. Carson Cable TV*, 795 F.2d 879, 881 (9th Cir. 1986) (internal quotation marks and citation omitted). Further, the Court will uphold the Board’s credibility determinations unless they are “inherently incredible or patently unreasonable.” *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995).

**B. Principles Applicable to Anti-Union Discrimination**

Section 7 of the Act guarantees that “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 shall also have the right to refrain from any or all of such activities.” 29 U.S.C. § 157. Section 8(a)(3) of the Act safeguards those rights by prohibiting “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). Thus, an employer violates Section 8(a)(3) and (1) by taking an adverse employment action

against an employee to discourage their pro-union activity.<sup>4</sup> *See NLRB v. Mike Yurosek & Son, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995). Additionally, an employer violates Sections 8(a)(3) and (1) by rewarding employees to encourage their anti-union activity. *See Remington Lodging & Hosp., LLC*, 363 NLRB No. 6 (2015) (employer violated Act by increasing scheduled shifts for employees who signed petition to decertify union); *Miramar Hotel Corp.*, 336 NLRB 1203, 1213 (2001) (employer violated Act by increasing wage rates of employees who led campaign to decertify union).

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that an employee's Section 7 activity was a "motivating factor" in the employment action, the Court must affirm that conclusion unless the record as a whole should have compelled the Board to accept the employer's affirmative defense that it would have taken

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<sup>4</sup> Section 8(a)(1) makes it unlawful "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]," 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

the same action even absent the protected activity.<sup>5</sup> *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *accord Mike Yurosek*, 53 F.3d at 267.

The Board may rely on direct evidence to establish unlawful motive, but because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980). Evidence showing an unlawful motive includes the employer's knowledge of its employees' union activities, its deviation from customary practices, its reliance on a pretextual explanation for the employment

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<sup>5</sup> The Company enumerates four elements the General Counsel must show: the employee's protected activity, the employer's knowledge, an adverse employment action, and a nexus between the protected activity and the employment action. (CBr. 31.) A more accurate statement is that the General Counsel must make a showing "sufficient to support the inference that protected conduct was a motivating factor in the employer's decision." *United Nurses Assoc. of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017). An unlawful motive may be established in several ways, including evidence of "the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the employer's action." *Id.*

Further, the *Wright Line* test does not require the General Counsel to show a "nexus" between the protected activity and the employment action. *See Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 & n.10 (2014) ("a 'nexus' is not an element of the General Counsel's initial burden") (quoting *The TM Group, Inc.*, 357 NLRB No. 98, slip op. at 1 fn. 2 (2011)), *enforced*, 801 F.3d 767 (7th Cir. 2015).

action, and the questionable timing of the action. *United Nurses Associations of California*, 871 F.3d at 779.

As an affirmative defense, to prevail an employer must show by a preponderance of the evidence that it would have taken the same employment action even in the absence of the employee's protected activity. *Dash v. NLRB*, 793 F.2d 1062, 1066 (9th Cir. 1986). However, where the employer's purported justification for its employment action is pretextual, then the employer fails as a matter of law to carry its burden at the second step of *Wright Line*. *Ozburn–Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016); *see also USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000) (“If the Board believes the employer's stated lawful reasons are non-existent or pretextual, the [employer's affirmative] defense fails.”). Courts are particularly “deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); *accord Clear Pine Mouldings*, 632 F.2d at 726 (the determination of motive is “particularly within the purview of the Board”).

**C. A Motivating Factor for the Company's Promotion of Downs-Haynes Was To Reward Her For Leading the Decertification Effort and To Discourage Membership in the Union**

Abundant record evidence supports the Board's finding that Downs-Haynes' protected activity was a motivating factor (CER 27) in the Company's

decision to promote her. The Board relied on Downs-Haynes' extensive anti-union activity in leading the decertification campaign, as well as the Company's uncontested knowledge of that activity. (CER 28.) The Company's knowledge is beyond dispute as early as mid-June, when Downs-Haynes met with Human Resources and discussed ousting the Union. (CER 21; CER 434-35.)

Additionally, the Board relied on the "highly suspicious" timing of Downs-Haynes' promotion, which occurred "while [her decertification] activities were in full swing." (CER 28.) After informing its supervisors of Downs-Haynes' activities during the June 27 training, the Company posted the available position on June 29 and the day after, on June 30, interviewed the only other internal candidate, Hobbick. (CER 24.) On July 5, approximately one week after Downs-Haynes began collecting signatures on the petition, she met with Human Resources Director Ruffcorn to ask questions about the decertification process. (CER 28.) The very next day, Ruffcorn interviewed Downs-Haynes for the receiving clerk position and, within a week, Ruffcorn awarded her the job. (CER 25, 28.)

The Company attempts to muddle the timeline by reference to various exhibits establishing the dates on which the job posting opened and closed. (CBr. 36-37; CER 549-52, UER 70-71, 75-76.) Other than the undisputed re-posting date of June 29, (CBr. 16), the Board did not rely on any of these dates in

reasoning that the timing of Downs-Haynes' promotion supports the Company's unlawful motivation. (CER 17-18.) The Company's admission that the dates it highlights are "irrelevant," (CBr. 36), demonstrates that its argument does not further the analysis. Similarly, the fact that Downs-Haynes requested a transfer to the receiving clerk position on June 6, two days after applying for the open job, only bolsters the Board's decision. (CBr. 25.) There is no doubt that Downs-Haynes wanted the job with which she was rewarded after she began pursuing the decertification campaign.

In addition to the timing of Downs-Haynes' promotion, the Board found that the Company's pretextual justification for the promotion shows the Company's unlawful motive. *See Electrolux Home Prods.*, 368 NLRB No. 34 (2019), 2019 WL 3562131 at \*3 (unlawful motive may be inferred where employer's stated reasons for employment action are pretextual and surrounding facts reinforce inference). As the Board emphasized, when the Company first considered applicants for the receiving position, it deemed Downs-Haynes

unworthy of even an interview because “she had less experience than [the successful candidate].” (CER 24.)<sup>6</sup>

Then, after the Company’s initial choice for the job abandoned the position in the midst of the decertification campaign, the Company seized the opportunity to re-post the position but departed from its practice of affording external candidates the same consideration as current employees. Incredibly, the Company chose to ignore all twenty of the new applicants, including candidates with “significantly more experience” such as Ballard and Plummer, both of whom had years of relevant receiving, inventory control, and warehouse experience. (CER 28; SER 8-16.) The Company instead interviewed just Downs-Haynes (and Hobbick), awarded the job to Downs-Haynes, and granted her a retroactive raise. And in a transparent attempt to justify these irregularities, the Company made matters worse by greatly inflating Haynes’ paltry experience in shipping and

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<sup>6</sup> While Ruffcorn contended that she had not received Downs-Haynes’ application when she awarded the job to the initial hire on June 6 or 12, the Board determined that this testimony lacked credibility. (CER 28.) This Court will not reverse the Board’s credibility determinations unless they are “inherently incredible or patently unreasonable.” *Retlaw Broad. Co.*, 53 F.3d at 1006. The Board’s credibility determination here is not “rank speculation” as the Company posits (CBr. 34); it is entitled to deference because it is rooted in the administrative law judge’s careful observation of “the demeanor of all the witnesses” (CER 25) and Downs-Haynes’ job application, dated June 4 (CER 573-576). *See Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 101 (D.C. Cir. 2000) (accepting Board’s determination to discredit testimony based on dated documentary evidence).

receiving by crediting her with five and half years of relevant experience. (CER 28; UER 65-67.)

Accordingly, substantial evidence supports the Board's finding that "the circumstances surrounding the re-posting do not add up if the goal was to secure the most qualified candidate, and only make sense if the Respondent was acting out of motivation to hire Downs-Haynes." (CER 28.)

**D. The Company Failed To Carry Its Burden of Proving that It Would Have Promoted Downs-Haynes in the Absence of Her Protected Activity**

The Board, with the approval of the courts, has held that a finding of pretext is sufficient to reject an employer's defense that it would have taken the same employment action in the absence of protected activity. *See Ozburn-Hessey*, 833 F.3d at 219. Here, the Board found that the Company's purported justification was pretext. (CER 28.) Accordingly, the Company failed to carry its burden of proving that it would have promoted Downs-Haynes in the absence of her protected activity.

In this case, the evidence fully analyzed by the Board further undermines the Company's defense. In addition to the evidence, discussed above, demonstrating that the Company's farcical hiring process was nothing more than a pretext to award the position to Downs-Haynes, the Board identified two major inconsistencies in the testimony offered by the Company.

First, the Board found that the evidence belied Ruffcorn's testimony about the hiring process. Ruffcorn testified that the Company re-posted the receiving clerk position internally, but not externally, because the original external posting had such a "bad response." (CER 28.) The Board found that "neither statement holds up." (CER 28.) The original posting can hardly be deemed to have had a bad response where it produced 24 external candidates, at least one of whom the Company determined sufficiently qualified to hire. (CER 28.) Furthermore, Ruffcorn's statement that the Company did not re-post the position externally is shown to be baldly false by the 20 additional applications from external candidates. (CER 28.) The Company's justification for ignoring all candidates but Downs-Haynes and Hobbick—that one bad apple rendered the entire pool of external applicants unworthy of consideration—"raises a red flag, particularly in light of the Respondent's practice of giving internal and external candidates equal consideration." (CER 28.) While the Board does not sit as an arbiter of the Company's hiring process, this Court has held that an employer's deviation from its own demonstrated practices is a "hallmark" of a pretext finding. *See United Nurses Ass'ns of California*, 871 F.3d at 779.

Second, the Company offered inconsistent reasons for giving Downs-Haynes a pay raise upon awarding her the position. Whereas one manager attributed the raise to Downs-Haynes' prior experience, another manager chalked

it up to the greater responsibilities of the receiving clerk position. (CER 28.) On top of those inconsistent explanations, the Company adds another in its brief: the receiving clerk position is simply paid at “a higher pay scale.” (CBr. 39.) The fact that the position is more highly paid, which the conflicting explanations attempted to obscure, reveals the Company’s true purpose and supports the Board’s conclusion: the Company promoted Downs-Haynes to reward her decertification activities.

The inconsistencies in the Company’s evidence, combined with the Board’s well-supported finding that the Company offered a pretextual justification for Downs-Haynes’ promotion, constitute substantial evidence that the Company failed to carry its burden of proving that the Company would have promoted Downs-Haynes in the absence of her protected activity. Because substantial evidence supports the Board’s findings that Downs-Haynes’ decertification activities were a motivating factor in the Company’s decision to promote her, and that the Company failed to prove it would have promoted her in the absence of those activities, the Board’s finding that the Company violated Sections 8(a)(3) and (1) is entitled to affirmance.

**E. The Board Correctly Found That the Company's Promotion of Downs-Haynes Constitutes Discrimination Within the Meaning of Section 8(a)(3)**

In an attempt to distract from its unlawful motivation, the Company contends that the Board erred by failing to “find a discrimination” within the meaning of Section 8(a)(3). (CBr. 24.) This is incorrect. The Board properly found that the Company unlawfully discriminated by promoting Downs-Haynes, thereby discouraging membership in the Union in violation of Section 8(a)(3) and (1). (CER 31.) The Company's contention, that its action could not be discrimination because it did not disfavor any similarly situated employees, is unavailing because the Company favored Downs-Haynes over all other applicants when it promoted her. To the extent the Company insinuates (CBr. 21, 27-30) that the Act does not protect job applicants against discrimination, or that the Act affords applicants a lesser level of protection than current employees, these insinuations have no support in the law. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 210 (1941). Meanwhile, the Company's argument, that it made a legitimate business decision to exclude external candidates and consider only current employees for the job (CBr. 33), tacitly acknowledges that the Company did discriminate. Thus, the question is not whether the Company departed from its customary practice of affording all candidates equal consideration in order to promote Downs-Haynes, but why it did so. (CER 28.)

Even if the Company's promotion of Downs-Haynes did not disfavor anyone else, a finding of unlawful discrimination under Board law does not require that an employment action impose disparate treatment on any other individuals. *See, e.g., Remington Lodging*, 363 NLRB No. 6 (2015), 2015 WL 5440681 at \*9 (employer unlawfully discriminated by increasing scheduled shifts for employees who signed petition to decertify union, even though no disadvantaged employees were identified); *Miramar Hotel Corp.*, 336 NLRB 1203, 1212 (2001) (employer unlawfully discriminated by rewarding retroactive pay increases to decertification leaders, even though no disadvantaged employees were identified).<sup>7</sup> Rather, Downs-Haynes' promotion constitutes unlawful discrimination because it discouraged membership in the Union and the purpose of the Act is to prevent employers from "interfering with, restraining, and coercing" employees in that way. (CER 31.)

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<sup>7</sup> The Company's contention that, *Miramar* is "simply not on point," strains credulity. (CBr. 29.) In that case, the employer granted to decertification leaders "raises to function both as 'rewards' for their prior efforts to that end and as inducements to 'encourage' them to continue their efforts." *Miramar*, 336 NLRB at 1211. The assertion that the raises were "gratuitous" (CBr. 29), as opposed to being accompanied by a promotion to a job that the decertification leader indisputably desired, is a distinction without a difference. Just because the Company's action in rewarding Downs-Haynes was less blatant than that in *Miramar* does not make the reward any less unlawful.

*Kansas City Power & Light Co. v. NLRB*, 641 F.2d 553 (8th Cir. 1981), cited by the Company (CBr. 24), is illustrative. There, after striking employees returned to work, the employer required all probationary employees to begin their six-month probationary periods anew. *Id.* at 556. The Board found such conduct to be discrimination in violation of Section 8(a)(3) and (1). *Id.* at 554. On appeal, the employer made the same argument as the Company does here, specifically, that “its conduct was not discriminatory and therefore could not constitute a violation of [Section] 8(a)(3)” because it imposed the same requirement on all probationary employees. *Id.* The court rejected the argument, refusing to require unequal treatment of different classes of employees as an element of discrimination. *Id.* at 556-57. Instead, the court compared the employer’s conduct before the strike with its conduct after the strike. *Id.* Because the employer had not previously required probationary employees to start their probationary period anew following absences, but began doing so only after they participated in the strike, the court concluded that the employer had engaged in unlawful discrimination within the meaning of Section 8(a)(3). *Id.* Noting that “such conduct, when considered from a common sense point of view, is bound to have a discouraging effect on present and future concerted activities,” the court enforced the Board Order. *Id.* at 559.

The same reasoning applies here. Prior to Downs-Haynes’ decertification campaign, the Company gave equal consideration to all candidates, which caused

it to reject Downs-Haynes' initial application. When presented with the opportunity to fill the exact same position after Downs-Haynes began pursuing decertification, the Company decided to ignore better qualified external candidates and reward Downs-Haynes with the position instead of following the same course of action as it had before the decertification campaign. Just like the employer's reversal of policy in *Kansas City Power & Light* discouraged protected activities, common sense dictates that the Company's promotion of Downs-Haynes could only have encouraged her to continue her campaign to decertify the Union. For those reasons, the Company unlawfully discriminated by promoting Downs-Haynes, thereby discouraging membership in the Union in violation of Section 8(a)(3) and (1).

**II. THE BOARD HAD A RATIONAL BASIS FOR CONCLUDING THAT THE COMPANY LAWFULLY WITHDREW RECOGNITION FROM THE UNION BASED UPON AN UNCOERCED DECERTIFICATION PETITION SIGNED BY A MAJORITY OF THE COMPANY'S EMPLOYEES AND THEREFORE DID NOT VIOLATE SECTION 8(a)(5) and (1)**

**A. Standard of Review**

As described above, the Board's factual findings are conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); accord *Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909, 918 & n.12 (9th Cir. 2006). Ultimately, however, where the Board dismisses

an allegation, the Court must uphold the Board's determination of lawful conduct unless it has no rational basis. *See Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978); *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (9th Cir. 1972); *accord Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 727 (D.C. Cir. 1990); *Kankakee-Iroquois Cnty. Emp'r Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987).

In other words, a reviewing court may reverse the Board's dismissal only where "the evidence required the Board" to find a violation of the Act.

*Amalgamated Clothing Workers v. NLRB*, 334 F.2d 581, 581 (D.C. Cir. 1964).

The application of the "rational basis" standard in dismissal cases essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'"

*Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-87 (D.C. Cir. 1991) (quoting 29 U.S.C. § 160(f)).

## **B. Principles Applicable to Withdrawal of Recognition of a Union**

The principles governing an employer's withdrawal of recognition from an incumbent union are well settled. Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. 29 U.S.C. § 158(a)(5). To promote the Act's policies of industrial stability and employee free choice, the Board will presume that, once chosen, a

union retains its majority status. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-86 (1996). The presumption of majority status is irrebuttable for up to three years during the term of a collective-bargaining agreement; after three years or upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *Id.* at 785-87.

Once the presumption has become rebuttable, “an employer may withdraw recognition only ‘where the union has actually lost the support of the majority of the bargaining unit employees.’” *Levitz Furniture Co.*, 333 NLRB 717, 717 (2001). An example of objective evidence showing that the union has “in fact” lost the support of a majority of employees “would be an uncoerced petition signed by a majority of the employees in the bargaining unit.” *Frankl ex rel. NLRB v. HTH Corp.*, 693 F.3d 1051, 1060 (9th Cir. 2012).

When an employer establishes that it had a facially proper basis for withdrawing recognition, it falls to the General Counsel to present evidence showing that the union’s decline in support was attributable, not to the employees’ free and uncoerced will, but to the employer’s unfair labor practices. *See Hotel, Motel & Rest. Emps. & Bartenders Union Local No. 19 v. NLRB*, 785 F.2d 796, 797-99 (9th Cir. 1986). The test for determining whether an employer’s unfair labor practices are likely to have tainted a showing of a union’s lack of support depends on whether, in context, the activity can reasonably be said to “be of such

a character ‘as to either affect the Union’s status, cause employee disaffection, or improperly affect the bargaining relationship itself.’” *Id.* at 799. The Board, with judicial approval, considers four factors to determine whether there is a causal link between a union’s loss of support and an employer’s unfair labor practices distinct from any unlawful assistance in the actual decertification petition:

(1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

*Master Slack Corp.*, 271 NLRB 78, 84 (1984); *see E. Bay Auto. Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007).

In sum, “the Board considers the seriousness of the violations and the totality of the circumstances.” *Louisiana-Pacific Corp.*, 858 F.2d 576, 576 (9th Cir. 1988). The task of assessing the import of unfair labor practices on employees falls peculiarly to the Board, whose “expert judgment” is entitled to considerable deference on review. *NLRB v. Gissel Packing Co.*, 295 U.S. 575, 612 (1969). In other words, the Board’s determination as to whether an unfair labor practice has tainted a subsequent withdrawal of recognition must be upheld unless shown to have “had no reasonable basis in law.” *Louisiana-Pacific Corp. v. NLRB*, 858 F.2d at 576.

We show below that, tested by these principles, the Board's dismissal of the allegation that the Company unlawfully withdrew recognition from the Union had a rational basis and is entitled to affirmance by the Court.

**C. The Board Reasonably Determined That the Company's Sole Unfair Labor Practice Did Not Taint the Petition**

At the outset, it should be noted that by the time the Company withdrew recognition from the Union in July 2017, the Union's presumption of continuing majority support had become rebuttable because more than three years had passed since the term of the collective bargaining agreement commenced in April 2014. (CER 20, 23.) Thus, upon receiving a petition stating that "the undersigned employees . . . do not want to be represented by IAM Local 751," (SER 75-98), and verifying that a majority of the employees in the bargaining unit had signed, (CER 452), the Company possessed objective evidence showing that the Union had "in fact" lost the support of a majority of employees. *See Frankl*, 693 F.3d at 1060. Accordingly, the Company was privileged to withdraw recognition from the Union so long as the petition was "uncoerced." *See id.*

Having found that the Company established a facially proper basis for withdrawing recognition, the Board reasonably concluded that the evidence failed to establish that the Union's decline in support was attributable to the Company's unfair labor practice, rather than the employees' free and uncoerced will. *See*

*Hotel, Motel & Restaurant Emps. & Bartenders Union Local No. 19*, 785 F.2d at 797-99. As a threshold matter, the Board thoroughly analyzed the evidence pertaining to allegations that the Company interfered with, restrained, or coerced employees in violation of Section 8(a)(1) of the Act, including by granting greater access to decertification activist Downs-Haynes and by blaming the Union for the lack of raises. After exhaustive analysis, the Board dismissed each allegation. The dismissal of those allegations is not challenged on appeal and is therefore waived. *See* Fed. R. App. P. 28(a)(8)(A) (argument section of brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“[A]n issue . . . not discussed in the body of the opening brief is deemed waived” and cannot be raised for the first time in reply brief). Therefore, the only unfair labor practice that could form the basis for a finding of taint is the Company’s unlawful promotion of Downs-Haynes.

The Board found that, because the Company’s promotion of Downs-Haynes could not reasonably be said to have caused a loss of support for the Union, it did not taint the decertification petition. In reaching that conclusion, the Board properly applied the four factors articulated in *Master Slack*, 271 NLRB at 84.

The Board recognized that the first *Master Slack* factor, “the length of time between the unfair labor practices and the withdrawal of recognition,” supports

inferring causation because the Company promoted Downs-Haynes “as she was actively gathering signatures in support of the decertification petition, and less than two weeks before [the Company] withdrew recognition of the Union.” (CER 29.) That, however, is the only factor to weigh in favor of a causal link between the Company’s violation and the Union’s loss of majority status.

The Board found that the remaining three *Master Slack* factors do not support causation and, therefore, favored finding the Company’s withdrawal of recognition lawful. First, the nature of the Company’s promotion of Downs-Haynes was not the type of violation that would have “a detrimental or lasting effect on employees.” Rather, it was a single personnel action, the details of which may not have been known to employees. Therefore, it was unlikely to have as significant effect as compared to other types of unlawful conduct, such as a general refusal to bargain. Second, because other employees “are not privy to the quantity or quality of other applicants,” they “would have no basis for assessing whether or not Downs-Haynes was legitimately selected.” Where the employees would not know if Downs-Haynes was deserving of the promotion over other unknown applicants, that action would not have a “tendency to cause employee disaffection from the union.” Third, Downs-Haynes’ promotion would not likely have an effect on employee morale, organizational activities, and membership in the union because the only other internal applicant had also signed the

decertification petition and was not selected for promotion. Where employees at best only knew of the two internal applicants and both wanted to oust the Union, it stands to reason that they would not necessarily see the promotion as connected to decertification. (CER 29.) *See Master Slack Corp.*, 271 NLRB at 84.

Accordingly, the Board took all the *Master Slack* factors into account and, on balance, found that the Company's sole unfair labor practice did not cause the Union's loss of support and therefore did not taint the decertification petition. Thus, the Board reasonably concluded that the Company lawfully withdrew recognition from the Union on the basis of the petition, which was signed by a majority of the Company's employees.<sup>8</sup> Other than the Union's contention that one of the Board's *Master Slack* findings contravenes *Hearst*, the Union's opening

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<sup>8</sup> Because the Company's withdrawal of recognition was lawful, the Board correctly reasoned that the Company no longer owed the Union any duty to bargain and the post-withdrawal unilateral wage increase therefore did not violate Section 8(a)(5) and (1).

Whereas the Union contends that the Board erred by considering the Company's post-withdrawal conduct to be "irrelevant" (UBr. 16 n.2.), the Board merely found that conduct irrelevant with respect to the withdrawal of recognition analysis. (CER 16 n.2.) The Board's reasoning in *Kuna Meat Co.*, cited by the Union (UBr. 16 n.2), is consistent with that holding. 304 NLRB 1005, 1012-13 (1991). There, the Board found that the employer unlawfully interrogated employees approximately sixteen days after it unlawfully withdrew recognition from their union. *Id.* The interrogation there could still be found unlawful because, unlike the unilateral change to wages here, it was not dependent on a bargaining obligation that was eliminated by a lawful withdrawal of recognition. *See id.*

brief does not challenge the Board's weighing of the *Master Slack* factors.

Accordingly, the Union has waived any challenge to those findings. *See Martinez-Serrano*, 94 F.3d at 1259.

**D. The Board Had a Reasonable Basis for Concluding That the Company Did Not Taint the Decertification Petition By Providing Campaign Leaders With Factual Information Upon Request**

Finding itself unable to prove that Downs-Haynes' promotion tainted the decertification petition, the Union resorts to arguing that the petition was tainted when the Company assisted the decertification effort by answering employees' questions about the process. An employer violates Section 8(a)(1) of the Act when it unlawfully assists a decertification effort, and the Board will find that type of unfair labor practice taints the resulting petition. *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998), *enforced sub nom. mem. NLRB v. R.T. Blankenship & Assocs., Inc.*, 210 F.3d 375 (7th Cir. 2000). An employer may defend against such an allegation by showing that it provided only accurate and factual information in response to employees' unsolicited requests, which is considered mere ministerial assistance under well-settled law. *Id.*; *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 544–45 (D.C. Cir. 2016) (“an employer does not violate the Act if it furnishes accurate information about, or ministerial aid to, the decertification process, and does so without making threats or offering benefits”).

Here, the Board's General Counsel did not allege that the Company unlawfully assisted the decertification effort by providing information to employees; the Union alone raised the argument. Nonetheless, the Board analyzed the issue and soundly rejected the notion that the Company tainted the petition by accurately answering employees' legitimate questions. It is undisputed that, in response to unsolicited inquiries by activists Downs-Haynes and Cole, the Company provided (1) information regarding the time period to submit a petition; (2) information about the number of employees in the bargaining unit; and (3) the National Right to Work website.<sup>9</sup> That is the full extent of the Union's contention; the Union does not allege that the Company made any threats or offered any benefits. In analyzing the import of the Company's actions, the Board relied on evidence showing that the Company provided those pieces of information reluctantly, after careful consideration, and accompanied by contemporaneous explanations that it had to remain neutral. (CER 21-22.) Significantly, the Board found that the decertification petition was initiated,

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<sup>9</sup> Because the Union failed to except to the administrative law judge's finding that the Company's provision of the National Right to Work website did not taint the decertification petition, Section 10(e) of the Act bars the Court from considering Union's challenge on that point. See pp. 50-52, below. The Union did preserve its challenges to the Board's findings regarding the Company's provision of information about the timing of decertification petitions and the number of bargaining-unit employees.

drafted, and circulated by employees Downs-Haynes and Cole, with assistance from employees on other shifts, and the Union has never disputed this finding. (CER 21.) The Company played no role at all until Downs-Haynes posed direct questions seeking factual information from Human Resources on June 30 and July 5. (CER 21-22.) At that point, the Company merely responded to Downs-Haynes' unsolicited inquiries.

The Board applied controlling law to those facts and found that the Company's conduct constituted no more than ministerial aid. Indeed, the Board has found only ministerial aid with greater employer assistance than here. *See E. States Optical Co.*, 275 NLRB 371, 372 (mere ministerial aid when employer's attorney provided employee with unit description, the number of signatures sufficient for a decertification petition, and assistance with its wording); *Ernst Home Centers, Inc.*, 308 NLRB 848, 849-50 (1992) (mere ministerial aid when employer provided language in response to an employee's request for some "verbiage" for a decertification petition); *Amer-Cal Indus.*, 274 NLRB 1046, 1051 (1985) (mere ministerial aid when employer provided blank decertification petition and address to which it should be mailed). Thus, the Board concluded that "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned," and reasoned that the ministerial aid at issue did not taint the decertification petition. (CER 29.)

The Union attempts to distinguish *E. States Optical Co.*, 275 NLRB at 372, and *Amer-Cal Indus.*, 274 NLRB at 1051, by arguing that the employer in those cases did not commit any unfair labor practices directly related to the decertification campaign. (UBr. 31-32.) That does not distinguish those cases from the Company's conduct here. As demonstrated below, pp. 52-55, the Company did not commit other unfair labor practices related directly to the decertification campaign, either, as its promotion of Downs-Haynes is a more attenuated unfair labor practice. In each of those two cases, the key to the Board's finding no taint was that the decertification petition was the result of the employees' uncoerced will, as it was in the instant case. See *E. States Optical Co.*, 275 NLRB at 372 (employer "played no role in [...] decision to initiate decertification proceedings" and "did not solicit any signatures for the petition"); *Amer-Cal Indus.*, 274 NLRB at 1051 (employees "independently decided to exercise their statutory right to decertify" and employer merely "provided the requested information").

Notably, the Union does not cite the third case relied upon by the Board, *Ernst Home Centers, Inc.*, 308 NLRB at 849-50, undoubtedly because it highlights the flaw in their argument. In that case, the Board found that the employer's ministerial aid—providing language to be used in a decertification petition—did not taint the petition, even though the employer had committed other unfair labor

practices. The employer's misconduct was extensive, including granting greater access to employees promoting decertification, interrogating employees about who had not signed the petition and why they had not signed it, urging employees to sign the petition, and promising more hours, better pay, and professional advancement if the union were ousted. *Id.* at 866. That demonstrates, contrary to the Union's position, that an employer's otherwise ministerial aid is not transformed into unlawful assistance simply by the existence of other unfair labor practices.

The Union offers two cases to argue that the Company tainted the petition, *James Heavy Equipment Specialists, Inc.*, 327 NLRB 910, 915 (1999), and *Guard Publishing Co.*, 344 NLRB 1142, 1144 (2005). (UBr. 31). In each case, the employer carried out a pervasive anti-union campaign and committed numerous unfair labor practices, including violations of Section 8(a)(1) that went to the heart of the decertification effort. In *James Heavy Equipment*, the Board found that the employer "instigated" the antiunion petition when it struck a deal to purchase equipment from the campaign leader in exchange for his efforts in circulating it. 327 NLRB at 915. In *Guard Publishing Co.*, the Board found that, shortly after dampening support for the union by unlawfully soliciting grievances and raising wages, the employer solicited employees to withdraw support from their union when it mailed pre-addressed forms to all bargaining unit employees which they

could sign to revoke their union authorizations. 344 NLRB at 1143. Critically, each of those employers proactively advanced the decertification campaign by coercing employees to renounce their union. The facts pale in comparison here, where the decertification campaign was propelled exclusively by employees, and there is no evidence that the Company played any role in instigating, soliciting signatures on, or circulating the decertification petition.

For those reasons, substantial evidence supports the Board's finding that the Company did not impermissibly provide assistance in response to unsolicited employee inquiries about decertification. Because the Company provided no more than ministerial aid to the decertification campaign, the Board had a reasonable basis to conclude that the petition was not tainted.

**E. The *Hearst* Presumption of a Tainted Decertification Petition Does Not Apply**

The Union contends that the Board erred by applying *Master Slack* and should have instead applied a conclusive presumption of taint under *Hearst*. That argument fails for two reasons. First, this Court is jurisdictionally barred from considering the argument because the Union failed to except to the application of *Master Slack* before the Board. Second, even if the Court does consider the Union's barred argument, *Master Slack* controls and *Hearst* is inapplicable.

**1. The Court Lacks Jurisdiction to Consider the Union's Argument that the *Hearst* Presumption of a Tainted Decertification Petition Applies**

For the first time at any point during this case, the Union contends (UBr. 26-30) that the Board should have applied *Hearst* to conclusively presume that the Company's misconduct caused the Union's loss of support. Because the Company did not raise its *Hearst* argument before the Board, or justify its failure to do so, this Court is jurisdictionally barred from considering it. *See* 29 U.S.C. § 160(e).

Section 10(e) of the Act, 29 U.S.C. § 160(e), 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.” That provision ensures “that the Board is given the opportunity to bring its experience to bear on the issue presented so that [the Court] may have the benefit of the Board's analysis when reviewing the administrative determination.” *NLRB v. International Bhd. of Elec. Workers, Local 952*, 758 F.2d 436, 439 (9th Cir. 1985) (Court could not review union objection that was not argued before Board). The failure to raise an issue before the Board precludes judicial review by the courts of appeal. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Here, no party argued to the Board that *Master Slack* is inapplicable, or that the *Hearst* presumption applies, in assessing whether Downs-Haynes' promotion

tainted the petition. The Board itself noted as much in its Decision and Order: “neither the General Counsel nor the Charging Party argues that *Master Slack* is inapplicable in assessing whether Downs-Haynes’ promotion tainted the petition.”<sup>10</sup> (CER 16 n.1.) And even following the issuance of the Board’s Decision and Order discussing the inapplicability of *Hearst*, the Union failed to file a motion for reconsideration to raise the argument it urges the Court to accept. *See Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (motion for reconsideration can preserve an issue for review where such motion is the first opportunity a party has to raise its objection); *see also* NLRB Rules and Regulations, 29 CFR § 102.48(c) (motions for reconsideration “must be filed within 28 days ... after service of the Board’s decision and order”). Accordingly, under well-established precedent, the Court lacks jurisdiction to consider whether *Hearst* required the Board to conclusively presume that Downs-Haynes’ promotion tainted the decertification petition. *See Woelke*, 456 U.S. at 665-66.

The Union’s otherwise barred claim is not preserved by the discussion of the issue in the Board’s Decision and Order as raised by dissenting Member

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<sup>10</sup> In its opening brief, the Union does not challenge the Board’s statement and therefore has waived any claim that it argued to the Board that *Master Slack* was not the appropriate analysis. *See Martinez-Serrano*, 94 F.3d at 1259.

McFerran. “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 § 10(e) bar; the Act requires the party to raise its challenges itself.” *HTH Corp. v. NLRB*, 823 F.3d 668, 673 (D.C. Cir. 2016); *see also Contractors’ Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (to preserve issue for appeal, 10(e) requires party to raise challenge itself).

In sum, because no party registered an objection to the Board’s *Master Slack* analysis, no party advanced the *Hearst* analysis before the Board, and no party filed a motion for reconsideration following the Board’s Decision and Order, Section 10(e) bars this Court from considering the Union’s claim that the Board was required to apply the *Hearst* presumption and erred by instead applying *Master Slack*.

**2. Even If the Court Considers the Union’s Jurisdictionally Barred Argument, *Master Slack* Controls and *Hearst* Is Inapplicable Because the Company Did Not Directly Instigate or Propel the Decertification Campaign**

In any event, *Master Slack* is undoubtedly the appropriate analysis. When assessing whether a decertification petition is tainted by an employer’s unfair labor practices, the Board employs one of two modes of analysis depending on whether the employer’s misconduct is directly related to the decertification campaign or not. *SFO Good-Nite Inn*, 357 NLRB 79, 80 (2011), *enforced*, 700

F.3d 1 (D.C. Cir. 2012). Where “there is no straight line between the employer’s unfair labor practices and the decertification campaign,” the Board applies *Master Slack* to determine the likelihood of causation. *Id.* By contrast, “when an employer has engaged in unfair labor practices directly related to an employee decertification effort, such as actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative,” the Board conclusively presumes that “the employer’s unlawful meddling tainted any resulting expression of employee disaffection.” *Id.* (citations deleted). The Board, with judicial approval, has emphasized that the *Hearst* presumption applies in this “narrow circumstance” alone. *SFO Good-Nite Inn*, 700 F.3d at 8 (quoting *SFO Good-Nite Inn*, 357 NLRB at 80).

The case law demonstrates *Hearst*’s narrow applicability. Without exception, the cases in which the *Hearst* presumption has applied dealt with direct employer involvement in the decertification petition or union-membership withdrawal:

- the employer solicited and instructed employees to sign the decertification petition and threatened to discharge an employee if he did not sign it, *Unite Here! Local 878 v. NLRB*, 719 F. App’x 599, 601 (9th Cir. 2017)

- the employer instigated and solicited drafting and circulation of the petition, *V & S Progalv, Inc.*, 323 NLRB 801, 808 (1997), *enforced*, 168 F.3d 270, 273 (6th Cir. 1999)
- the employer solicited an employee to withdraw from the union and aided employees by furnishing withdrawal forms and notaries during work time to help in processing of withdrawal cards, *Am. Linen Supply Co.*, 297 NLRB 137 (1989), *enforced*, 945 F.2d 1428 (8th Cir. 1991)
- the employer solicited employees to resign from union and conditioned return to work from strike on union resignation, *Manhattan Hosp.*, 280 NLRB 113 (1986), *enforced*, 814 F.2d 653 (2d Cir. 1987).

Significantly, the Union admits that the key to invoking the *Hearst* presumption is direct interference with the petition itself, stating that in *Master Slack*, “the union had not alleged any misconduct on the part of the employer *related to the circulation of the petition itself*.” (UBr. 20, emphasis in original). There is no support in the case law for presuming taint where an employer’s sole unfair labor practice did not directly advance the decertification petition. *See SFO Good-Nite Inn*, 357 NLRB at 80.

Here, the record clearly shows that bargaining unit employees alone initiated the decertification petition, collected signatures on it, and delivered it with no unlawful assistance from the Company. While Downs-Haynes may have felt encouraged when she received the promotion, this falls well short of the Company drafting the decertification petition, soliciting signatures on it, or facilitating its circulation; the promotion is precisely the type of attenuated

misconduct for which the Board formulated the *Master Slack* causality test.<sup>11</sup> See *SFO Good-Nite Inn*, 700 F.3d at 3. By the time the Company promoted Downs-Haynes, the decertification effort was already well underway. There is no evidence to show that the employees needed the Company's help or that their efforts had wavered at any point. To apply a conclusive presumption that the employees' petition was tainted because the Company unlawfully rewarded Downs-Haynes would improperly vitiate the employees' free choice to oust the Union and frustrate the purpose of the Act. See *Hearst Corp.*, 281 NLRB at 765 (purpose of narrowly applied presumption is to avoid tendency of misconduct propelling decertification to interfere with the free exercise of employee rights under the Act). For those reasons, the Board did not err by applying *Master Slack*.

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<sup>11</sup> The Union argues that the Board's finding that Downs-Haynes' promotion would not have a detrimental or lasting effect on employees under *Master Slack* "flies in the face of *Hearst Corp.*" (UBr. 23.) That argument ignores the distinction between *Master Slack* and *Hearst*: the former is a multifactor test to determine causation; the latter invokes a *presumption* of causation to hold an employer "responsible for the natural consequences of its unlawful conduct" that directly instigate or propel the decertification effort. (UBr. 23-24.)

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment denying the petitions for review and enforcing the Board's Order in full.

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# **STATUTORY ADDENDUM**

**STATUTORY AND REGULATORY ADDENDUM**

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## THE NATIONAL LABOR RELATIONS ACT

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

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

### **Section 8(a) of the Act (29 U.S.C. § 158(a) provides:**

It shall be an unfair labor practice for an employer--

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

\* \* \*

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

\* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.;

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

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . 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 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. . . . 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 Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any

United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . 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 . . . 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.

## RULES

### **Fed. R. App. P. 28(a)(8)(A) provides in relevant part:**

#### Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

. . .

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

## REGULATIONS

### **29 C.F.R. § 102.48(c) provides:**

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

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

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.



CERTIFICATE AS TO RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the National Labor Relations Board (“the Board”) certify that there are no known related cases pending in this Court. The Decision and Order under review has not previously been before this Court, or any other court.

/s/ David Habenstreit  
David Habenstreit  
Acting Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 4th day of November, 2019



point type, and the word processing system used was Microsoft Word 2010.

/s/ David Habenstreit  
David Habenstreit  
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National Labor Relations Board  
1015 Half Street, SE  
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(202) 273-2960

Dated at Washington, DC  
this 4th day of November, 2019



Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

/s/ David Habenstreit  
David Habenstreit  
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National Labor Relations Board  
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Dated at Washington, DC  
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