Nos. 18-3695 & 19-1157

In the United States Court of Appeals
For the Eighth Circuit

DOLGENCORP, LLC
Petitioner–Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent–Cross-Petitioner.

On Cross-Petitions for Review and Enforcement of
National Labor Relations Board Case No. 14-CA-223328

PETITION FOR PANEL REHEARING

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INTRODUCTION

Under well-established principles, "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). When an administrative decision fails to explain its basis with sufficient clarity, this Court must grant the petition for review and remand for clarification. *Id.*

This panel's opinion acknowledges that the Board's analysis of certain conduct at issue in the Auxvasse election—specifically a loan offered by one employee to another—"lacks ideal clarity." Slip op. at 14. This panel affirmed, however, concluding that the Board could be "reasonably discerned" to have applied the test traditionally applied to third-party "electioneering conduct": whether the conduct "substantially impair[ed] the employees' exercise of free choice." *In re Cornell Forge Co.*, 339 NLRB 733, 734 (2003).

Petitioner Dolgencorp, LLC ("Dollar General") respectfully requests rehearing on this point. Neither party—including the Board itself—interpreted the Board's decision in the same way as this Court. Moreover, this Court's analysis rests on the incorrect assumption that there is a well-established standard applicable to all nonthreatening third-party conduct and misreads two cases cited by the Board,

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conflating the electioneering standard with the general standard applicable to all election challenges (impairment of the election's fairness).

Because the basis for the Board's decision regarding the loan cannot be "reasonably discerned," this Court should vacate and remand to the Board for clarification.

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BACKGROUND

This case concerns a union election among six employees at a Dollar General store in Auxvasse, Missouri. By a margin of four votes to two (a single vote could have changed the outcome of the election), the employees voted to join United Food and Commercial Workers, Local 655. Before the Board and on appeal, Dollar General argued that the election results should have been set aside because of misconduct by employee Adam Price, including threatening to slash the tires of one employee and offering $100 (as a loan or a gift) to another.

This petition for rehearing focuses on the offer of money by Price. The Hearing Officer overruled Dollar General's objection to this conduct after "crediting the testimony of Price that the context of offering $100 was not contingent on voting yes in the upcoming election." JA125.

The Regional Director overruled Dollar General's exceptions to the Hearing Officer's recommendations. Here is the Regional Director's full analysis of this objection:

> The Hearing Officer credited Price's version of this conversation. Price testified that around the time that the authorization cards were signed, Price offered to lend employee Joanna Durlin $100. I find that such conduct is not objectionable. The cases cited by the Employer are not instructive in this regard. In *Tio Pepe, Inc.*, 263 NLRB 1165, 1165 n. 4 (1982), the Board, pursuant to a remand from the Fourth Circuit, noted, "[In a]ccepting the court's holding as the law of the case, we are required to find that the captains, whether they are supervisors within the meaning of the Act or rank-and-file employees, made offers of financial benefit in exchange for union support and so engaged in

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> objectionable conduct requiring that the results of the election be set aside." Such a holding, based on instruction from the Fourth Circuit, holds no precedential value in the instant case. In *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 278 (1973), the Supreme Court concluded that a union's offer to waive initiation fees for only those employees who signed authorization cards before the election impaired the employee's free choice and constituted objectionable conduct.

JA80.

Dollar General petitioned the Board for review, arguing that an offer of financial benefits requires setting aside an election, regardless of whether it was made by the union, the employer, or a third party: "It makes no difference whether the offer or promise of financial benefit was made by an agent of one of the parties or an employer." JA33; *see also* JA41 ("[T]he fact that he made the offer at all in an effort to influence the election is sufficient to find that the election results should be set aside."). The Board denied Dollar General's request for review. JA13.

Dollar General petitioned this Court for review of the Board's decision, and the Board cross-petitioned for enforcement of the Board's order. Following briefing and oral argument, on February 13, 2020, in an opinion authored by Judge Grasz, this Court denied Dollar General's petition for review and granted the Board's cross-petition for enforcement.

Although the opinion notes that the Board's analysis "lacks ideal clarity,"[1] it found that "the Board's rationale can be reasonably discerned" and concluded that the Board applied "the standard applicable to nonthreatening third-party conduct." Slip op. at 14–15.

Dollar General respectfully petitions for rehearing.

[1] Because the Board denied review of the Regional Director's decision, this Court treated the Regional Director's decision as the decision of the Board.

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ARGUMENT

"If [an] administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *Chenery*, 332 U.S. at 196. A court cannot "be compelled to guess at the theory underlying the agency's action" nor "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 196–97.

Because this Court must guess at the theory underlying the Board's action, this Court should grant rehearing and grant Dollar General's petition for review.

I. Neither Party Shared This Court's Interpretation of the Board's Decision.

One fact, standing alone, should give this Court pause before finding the Board's rationale to be reasonably discernable: Neither party—including counsel for the Board—discerned the same rationale for the Board's decision as this Court.

Dollar General understood the Board to have found the offer to loan money permissible (not merely harmless) because it was not a quid pro quo offer and because it was made by a fellow employee. Petitioner Br. 51-53; *see also* NLRB Br. 45 (arguing that financial benefits are objectionable only if offered by a party as a quid pro quo for union support).

The Hearing Officer appeared to accept this rationale, recommending overruling the objection based solely on the determination that "offering $100 was not contingent on voting yes in the upcoming election." JA125.

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Like Dollar General, the Board's counsel did not understand the Board *(i.e.*, the Regional Director) to have applied the third-party electioneering standard to evaluate Price's offer. The Board's brief invoked the *Westwood Horizons Hotel* standard, which applies to threats by third parties. According to the Board, the election could be overturned only if "Price's offer of money to Durlin created a 'general atmosphere of fear and reprisal rendering a free election impossible.'" NLRB Br. 42 (quoting *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984)). Before this Court, the Board's counsel never argued that its decision rested (or should have rested) on the standard applicable to electioneering by third parties.

Similarly, the Union, in opposing Dollar General's request for review to the Board, also understood the Regional Director to have applied the *Westwood Horizons Hotel* standard:

> Price, however, was not a Union agent and was not offering money as a union agent. Instead, his conduct is analyzed under the *Westwood Horizons Hotel* standard. That standard requires the conduct of the third party to be so aggravated as to create a general atmosphere of fear and reprisal, rendering a fair election impossible. An offer of money to one person is hardly the sort of conduct that would create such an atmosphere.

Opp. to Req. for Review 16–17.[2]

[2] Available at http://apps.nlrb.gov/link/document.aspx/09031d458279a0e1.

No party understood the Board (i.e., the Regional Director) to have applied the rationale discerned by this Court. This fact, alone, suggests that the Board failed to explain its reasoning adequately and warrants remand for clarification.

II. This Court's Analysis of the Basis for the Board's Decision Was Incorrect.

This Court's understanding of the Board's reasoning rests on three grounds: (1) the Board's statement that it was examining Price's conduct using its standards "for third-party conduct," (2) the Board's statement that Price's offer was "not objectionable," and (3) the Board's discussion of two cases. None of these grounds provides a reliable basis to infer that the Board applied the electioneering standard.

A. Stating That the Board Applied the Standard "for Third-Party Conduct" Does Not Indicate That the Board Adopted and Applied the Electioneering Standard.

The Regional Director's decision notes that he would "examine [Price's] alleged conduct using the Board's standards for third-party conduct." JA79 (citing *Cornell Forge Co.*, 339 NLRB 733). But this statement—which is far removed from the Regional Director's discussion of the offer of money—does not indicate **what** third-party standard the Board applied.

The Hearing Officer included a similar recitation, stating that he would apply the "standards for third-party conduct" under *Cornell Forge*, but he proceeded to describe (and, presumably, apply) "the third-party standard" as the *Westwood Horizons Hotel* test:

> I have examined the alleged objectionable conduct using the Board's standards for third-party conduct. *Cornell Forge Co.*, 339 NLRB 733 (2003). It is well settled that where the challenged conduct is committed by nonagent employees, it is evaluated under the third-party standard. **Under this standard**, the objecting party must establish that the third-party conduct during the election was so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible. *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).

JA120 (emphasis added). But *Westwood Horizons Hotel* did not set forth the electioneering standard—it set forth the standard for threats by third parties. Mere citation to *Cornell Forge* does not indicate that the electioneering test was applied.

At a minimum, in light of the similarity between the Hearing Officer's recommendation and the Regional Director's analysis, it is plausible that the Board is correct that the Regional Director applied the *Westwood Horizons Hotel* standards. But as discussed in Dollar General's briefs, that would be irrational. On its face, the *Westwood Horizons Hotel* standard cannot apply to the conduct at issue here: offers of money do not lead to "fear and reprisal." Reply Br. 21.

This Court's opinion appears to assume that there is a well-established standard "applicable to nonthreatening third-party conduct." Slip op. at 15. There is not. *Cornell Forge* does not set forth a general standard for "nonthreatening third-party conduct" but instead discusses the standard for third-party "electioneering conduct." *Cornell Forge Co.*, 339 NLRB at 734. The Board has consistently characterized the *Cornell Forge* test—whether the electioneering "substantially impair[ed] the employees' exercise of free choice"—as concerning electioneering

conduct (such as employees speaking in favor of the Union) and has never characterized the test as governing all "nonthreatening third-party conduct."

There is no established test in the Board's jurisprudence for when financial inducements to third parties will require setting aside an election. The issue appears to have arisen on only one prior occasion, in *Tio Pepe, Inc.*, 263 NLRB 1165 (1982), which (as discussed below) does not adopt the electioneering standard.

This Court is thus left to speculate regarding what standard the Board applied to Price's offer of a loan to Durlin. It may have been (as the Board suggests) the *Westwood Horizons Hotel* test. It may have been (as Dollar General understands the decisions below) a per se rule that financial inducements from third parties are not objectionable unless they involve an express quid pro quo. Or the Board may have (and this Court understood it to have) adopted the electioneering standard. But the mere reference to "third-party standards" does not provide sufficient clarity regarding which test the Board applied.

B. The Statement That Price's Conduct Was "Not Objectionable" Is Ambiguous.

This Court's analysis also relied, in part, on the statement that Price's offer to lend Durlin $100 "[wa]s not objectionable." JA80; *see also* slip op. at 15 (concluding that the Board must have meant that the offer "was not objectionable because it did not substantially impair Durlin's free choice in the election").

The finding that the conduct was "not objectionable" is ambiguous. It may mean that the conduct, although wrongful and impermissible, did not rise to the level of wrongdoing that would require setting aside an election. *See* slip op. at 15 (describing *Cornell Forge* as "finding prounion employees' nonthreatening speech was 'not objectionable' because it did not 'substantially impair [other] employees' exercise of free choice'" (quoting *Cornell Forge*, 339 NLRB at 734)). But "not objectionable" may also mean that the Board (erroneously) viewed the conduct as proper and as a legitimate tactic in elections.

The Board's decisions use the term "objectionable" both ways. *Compare PPG Indus., Inc. & United Auto. Workers*, 350 NLRB 225, 226 (2007) ("Third-party threats rise to the level of objectionable conduct where they are so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." (internal quotation marks omitted)), *with RJR Archer, Inc.*, 274 NLRB 335, 345 (1985) ("None of the above objectionable acts or conduct individually, nor any of the above conduct taken collectively, demonstrates that the Union engaged in such misconduct or that the conduct of employees or other persons created a general atmosphere of fear and reprisal so as to render a free choice of representative impossible.").

The Board's description of Price's conduct as "not objectionable" fails to provide clarity regarding its reasoning.

C. The Mere Reference to *Tio Pepe* and *Savair Manufacturing* Does Not Indicate that the Board Adopted and Applied the Electioneering Standard.

Finally, this Court suggested that understanding the Board as adopting the electioneering standard is "consistent with the Board's discussion of two prior cases in its analysis of the loan offer." Slip op. at 15.

But neither case indicates that the Board adopted the electioneering standard for third-party financial inducements. In *Tio Pepe, Inc.*, 263 NLRB 1165 (1982), the Board acquiesced to the Fourth Circuit's "holding as law of the case," which required the conclusion that "offers of financial benefit in exchange for union support" constituted "objectionable conduct requiring that the results of the election be set aside." *Id.* at 1166 n.4.

The Board's quotation of the Fourth Circuit—that "an offer of financial benefit for union support . . . would have significantly impaired the fairness of the election, " *id.* (quoting *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 966 (4th Cir. 1980))—does not adopt the electioneering standard for third-party financial misconduct.

Whether conduct "impair[ed] the fairness of the election" is the general standard for setting aside an election. "The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, 174 NLRB 282, 282 (NLRB

1969), *enforced sub nom. Polymers, Inc. v. NLRB*, 414 F.2d 999 (2d Cir. 1969). This overarching "fairness" standard applies to all challenges to elections. *E.g.*, *NLRB v. Precision Indoor Comfort Inc.*, 456 F.3d 636, 638 (6th Cir. 2006) ("Because union election proceedings are not directly reviewable by the courts, an employer desiring a judicial determination of the fairness of an election must refuse to bargain with the union." (citation omitted)).

Whether conduct impaired employees' exercise of free choice is not the same as whether misconduct impaired the fairness of the election. This Court erred in conflating the two. *See* slip op. at 15 (characterizing *Tio Pepe* as applying the "impairment-of-free-choice" standard). The Board's citation to *Tio Pepe* does not provide a basis to infer that the Board adopted and applied the electioneering standard to third-party financial inducements.

If anything, *Tio Pepe* indicates that the Board has not distinguished between first-party and third-party financial inducements. Although the offers in *Tio Pepe* were made by fellow employees—"captains"—neither the Fourth Circuit nor the Board considered questions of agency or suggested that a special standard applied because the inducements were not made by the union or employer. Instead, the Fourth Circuit suggested, the only question was whether "the captains [had] the power to effectuate their promise by reducing their own share of the tips." *Tio Pepe*, 629 F.2d at 971.

Nor did *Savair Manufacturing* "appl[y] the same impairment-of-free-choice standard." Slip op. at 15. Like *Tio Pepe*, the decision in *Savair Manufacturing* discussed the general right to "a 'fair' election." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1973); *see also id.* at 276-77 ("the fair and free choice of bargaining representatives"). Indeed, *Savair Manufacturing* involved alleged misconduct by a union, *id.* at 272–74, and says nothing about third-party misconduct generally or the standard by which third-party financial inducements are evaluated. The case cannot be read as adopting or applying the electioneering standard.

The Board's brief discussion of *Tio Pepe* and *Savair Manufacturing*—cases that neither cite, nor discuss, nor apply the electioneering standard for third-party misconduct—provides no basis to infer that the Board applied this standard to Price's offer of money in this case.

III. This Court's Authority to Modify an Order of the Board Does Not Justify Affirming the Board When Its Reasoning Cannot Be Reasonably Discerned.

Finally, the panel's opinion notes that there is "less danger of transgressing *Chenery* because the Act explicitly provides reviewing courts the authority to modify an order of the Board." Slip op. at 16. The opinion cites *Pattison Sand Co., LLC v. Federal Mine Safety & Health Review Commission*, which involves the authority of the Federal Mine Safety and Health Review Commission to modify an order issued by the Mine Safety and Health Administration. 688 F.3d 507, 509 (8th

Cir. 2012). And the modification involved remedial measures that "lessen[ed] [the] severity by limiting the scope of the order or by permitting its experts access to the mine." *Id.* at 516.

This Court's power to modify the orders of the Board also concerns remedial measures. *See* 29 U.S.C. § 160(f) (granting authority "to make and enter a decree enforcing, modifying, and enforcing as so modified"). Section 160(f) does not suggest that this Court could affirm the Board based on findings not made by the Board in the first instance or affirm the Board when the basis for the Board's decision is not reasonably discernable.

CONCLUSION

Dollar General appreciates the time and attention that this panel has already given to this case, but the opinion errs in finding the Board's reasoning discernable.

As the opinion acknowledges, the Board's analysis "lacks ideal clarity." Slip op. at 14. Dollar General briefed its challenge to the Board's decision as best it understood it. Slip op. at 16. This Court disagreed with Dollar General's characterization, but the opinion's analysis of the Board's rationale rests on false premises, including (1) that the Board has adopted a well-established standard for all nonthreatening third-party conduct, which it has not, and (2) that this standard was applied in *Tio Pepe* and *Savair Manufacturing*, which it was not.

There is no basis to infer that the Board adopted and applied the electioneering standard to the third-party financial inducement offered in this case. Because this Court was forced "to chisel that which must be precise from what the agency has left vague and indecisive," the Board's decision should be vacated and remanded for clarification. *Chenery*, 332 U.S. at 196–97.

What standard should apply to third-party financial inducements is an important question of labor law, which should be answered by the Board in the first instance. *Id.* at 200. Panel rehearing should be granted.

Dated: March 30, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, I electronically filed this Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ William R. Peterson
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 40(b) because this petition contains 3,260 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(f).

2. This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

/s/ William R. Peterson
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