

ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1014

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

TRINITY SERVICES GROUP, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

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

**CORRECTED BRIEF OF PETITIONER/CROSS-RESPONDENT
TRINITY SERVICES GROUP, INC.**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

The parties to the National Labor Relations Board (“NLRB” or “Board”) case below were: Trinity Services Group, Inc., as Respondent (“Trinity” or the “Company”); United Food and Commercial Workers Union, Local 99, as Charging Party (“Local 99” or the “Union”); and the General Counsel of the NLRB. The parties to this case are Petitioner/Cross-Respondent Trinity and Respondent/Cross-Petitioner NLRB.

B. Ruling Under Review

Trinity has petitioned the Court for review of the Board’s Decision in NLRB Case No. 28-CA-212163, which was entered on November 20, 2019, and is reported at 368 NLRB No. 115.

C. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Trinity discloses that it is a non-governmental entity and is not publicly traded. Trinity provides food services to publicly and privately operated detention facilities, including an Arizona Department of Corrections facility located in Douglas, Arizona.

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GLOSSARY OF ABBREVIATIONS

| Abbreviation | Definition |
|----------------------------------|--------------------------------------------------------------------------------|
| The Act or NLRA | National Labor Relations Act |
| The Board or NLRB | National Labor Relations Board |
| The ALJ | Administrative Law Judge John Giannopoulos |
| Trinity or the Company | Trinity Services Group, Inc. |
| The Douglas Facility | Arizona Department of Correction's detention facility in Douglas, Arizona |
| The Union | United Food and Commercial Workers Local 99 |
| The Board's Decision or Decision | The Decision and Order of the Board under review, reported at 368 NLRB No. 115 |
| The ALJ's Decision | The Recommended Decision of the ALJ |
| JA | Joint Appendix |
| RX | Respondent Exhibit |
| GCX | General Counsel Exhibit |
| Section 7 | 29 U.S.C. §157 |
| Section 8(a)(1) | 29 U.S.C. §158(a)(1) |
| Section 8(c) | 29 U.S.C. §158(c) |

I. JURISDICTIONAL STATEMENT

The NLRB had subject matter jurisdiction over the underlying matter, Case No. 28-CA-212163, under 29 U.S.C. § 160(a). The Board issued its final Decision and Order on November 20, 2019. The Board's Decision is reported as *Trinity Services Group, Inc.*, 368 NLRB No. 115 (2019). In accordance with Rule 15(a) of the Federal Rules of Appellate Procedure, Trinity petitioned this Court on January 23, 2020 for review of the Decision. The Board filed a cross-application for enforcement on February 26, 2020. This Court has jurisdiction over the Petition for Review under 29 U.S.C. § 160(f), and over the Board's Cross-Application for Enforcement under 29 U.S.C. § 160(e).

II. STATEMENT OF THE ISSUES PRESENTED

Did the NLRB err in finding a violation of Section 8(a)(1) of the Act by a Unit Manager's disputed statement to an employee allegedly blaming the Union for an accrual tracking error concerning her paid time off benefits?

III. STATUTES

A. Section 7 of the NLRA, 29 U.S.C. § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

B. Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

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

C. Section 8(c) of the NLRA, 29 U.S.C. § 158(c)

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

IV. STATEMENT OF THE CASE

A. Introduction and Background

At relevant times, there were 12 hourly Union represented employees working for Trinity at the Douglas Facility. JA33, 80, 121 at Art. 1. The Union was recognized as the representative of the unit employees for over 20 years. JA48. At the time of the disputed events at issue in this case, Trinity and the Union most recently were parties to a collective bargaining agreement (the “Agreement”) that was effective by its terms through June 30, 2017. JA118.

B. Procedural History

The Complaint (JA109) in pertinent part arose out of an alleged isolated discussion on December 15, 2017, between Unit Manager Sergio Rivera and employee Marisol Victoria. During the discussion, Mr. Rivera allegedly disparaged

the Union as the employees' representative. *See* JA111. Trinity timely answered, denying the allegation. JA115.

The Administrative Law Judge issued his Recommended Decision on November 7, 2018, JD(SF)-35-18. In pertinent part the ALJ found that Mr. Rivera violated Section 8(a)(1) of the Act when Ms. Victoria allegedly challenged a discrepancy in the paid time off ("PTO") accrual reflected in her pay statement, by telling her that the Union caused the problem and she should fix it with the Union. JA21. The ALJ reasoned that Mr. Rivera blamed the Union for adverse employment action against her. Trinity excepted to the ALJ's Decision, in view of the denials by Mr. Rivera and his colleague, also allegedly present at the time, about any discussion with Ms. Victoria regarding her PTO; despite Ms. Victoria's failure to identify the alleged problem in PTO accrual tracking and why it should not have been brought to the attention of the Union as she claimed Mr. Rivera suggested; and despite the lack of any alleged adverse action taken or threatened against Ms. Victoria.

A split panel of the NLRB issued its Decision on November 20, 2019, 368 NLRB No. 115 (2019). The Board majority concluded that Mr. Rivera's statement that the Union caused a problem with Ms. Victoria's PTO accrual was "coercively misleading" because the discrepancy she pointed out was not the Union's fault. Because the statement occurred in the context of negotiations for a successor to the Agreement and against the backdrop of grievance activity relating to administration

of PTO accruals, the statement would tend to discourage support for the Union. NLRB Chairman John Ring dissented, finding Mr. Rivera's comment was a lawful expression of his opinion about the complexity of a negotiated PTO system that was unique to the Douglas bargaining unit. The remark also was "of such obviously limited impact and significance" the Board should not have found a violation.

C. Statement of Facts

1. Mr. Rivera's Alleged Statement to Ms. Victoria

Ms. Victoria testified that she experienced a problem with her PTO that resulted in a discussion with Mr. Rivera on December 15, 2017.² She claimed she received a text message from Mr. Rivera saying that she should come to the office. JA72. When she arrived, Office Manager Frank Romero asked her to approve a change on her time card because the electronic recordkeeping system showed she had no available PTO to be used. JA73. Ms. Victoria claimed that when Mr. Rivera arrived, she told him she thought she had three days of PTO remaining to be used. JA74. Mr. Rivera allegedly said that this was a problem the Union caused, and she should contact the Union to fix it. *Id.* Ms. Victoria responded that she realized Mr. Rivera and Mr. Romero were not responsible for the accruals, and there was no problem. JA74-75.

² All subsequent dates refer to 2017, unless otherwise specifically noted.

Mr. Romero testified denying that he has ever spoken with Ms. Victoria about her PTO accruals. JA104. He did not speak with her on December 15. JA105. He works in an office that is separated from the area where Mr. Rivera and other supervisors sometimes do their work. JA106. He did not speak with Mr. Rivera and Ms. Victoria on December 15. *Id.*

Mr. Rivera also denied having a discussion with Ms. Victoria about her PTO on December 15. He testified that he is responsible for making sure employees receive the PTO they request. JA88. Employees submit PTO requests electronically. JA89. The requests are approved by management, and Mr. Rivera is notified. *Id.* Mr. Rivera does not deny requests for PTO. JA89, 93. He did not text Ms. Victoria to come to the office on December 15, and as a general matter, he does not send employees text messages. JA98. He did not discuss her accruals with her. PTO accruals are handled by a system known as Kronos, and are not the responsibility of any Trinity employee in Douglas. JA92. Mr. Rivera was not aware of any problems employees allegedly experienced regarding their accruals. JA94. He did not, and had no reason to disparage the Union with respect to any alleged PTO issues. *Id.*

2. Background Concerning Negotiations With the Union Over PTO Benefits

Negotiations between Trinity and the Union for a successor to the Agreement commenced on June 27. JA26. The negotiations continued during meetings held on August 9, October 19 and December 6. Ms. Victoria was an active member of the

Union who attended most of the bargaining meetings with Trinity, and therefore she was familiar with the status and contents of proposals. JA68-69. On December 6, the Union requested Trinity to present its Last, Best Offer, and Trinity did so. JA47. Trinity informed all employees about the contents of the Last, Best Offer in a written communication distributed on December 8. JA49, 82, 137. The accuracy of that communication is not disputed.

During the meeting on June 27, Trinity's representatives presented a comprehensive Initial Proposal for a Labor Agreement. JA128. The Initial Proposal included a number of improvements to be made to Article 17 of the Agreement, pertaining to PTO benefits. In particular, Trinity proposed to provide improved PTO benefits to new hires starting from their first day of employment; increased accruals of PTO for employees at all lengths of service; provided faster accruals of PTO each pay period rather than on a monthly basis; expanded utilization of PTO for purposes not previously covered; reduced the minimum increments of leave that may be used; increased accrual "caps" that may be banked by employees; and for the first time, allowed accrued, unused PTO to "roll over" from year to year. *Id.* These improvements reflected Trinity's effort to coordinate PTO benefits in Douglas with those already provided to other, non-unit employees of Trinity. JA148. No other group of Trinity employees was represented by a union.

During the meetings on August 9 and October 6, the bargaining committees discussed the benefits of Trinity's proposed PTO article among many other subjects. JA80. The Union did not present written proposals for an agreement. JA47-48. Later, the Union responded in writing to Trinity's proposals. JA138. On December 1, the Union accepted Trinity's proposal for a revised PTO Article. *Id.*

At the time of the parties' meeting on December 6, the subject of PTO benefits in a new contract was resolved. The open subjects identified in the Union's December 1 proposal primarily involved wage rates. At the Union's request, Trinity presented its Last, Best Offer for an Agreement on December 6. JA47. Trinity's Last, Best Offer was summarized in an employee bulletin that was distributed to employees on December 8. Employees later ratified the new agreement. JA150.

3. Background Concerning Grievance Activity Related to PTO Accruals

During the Agreement, and following its expiration, Douglas employees used their contractual PTO benefits for vacations, personal days and sick days. JA39. Employees gave notice of their use of PTO to their Unit Manager. In Ms. Victoria's case, the Unit Manager was Mr. Rivera. *Id.* Mr. Rivera was not responsible for tracking, recording or verifying the availability of accrued PTO for any employee who requested to use it. JA39-41. Accruals are tracked at a corporate rather than site facility level. JA65.

A dispute arose at the end of 2016 concerning allegedly incorrect PTO accrual amounts in Trinity's tracking system for the Douglas employees. JA43, 56. A grievance was submitted under the dispute resolution procedure in the Agreement. In February 2017, Trinity investigated the impact of the accrual "cap" on PTO balances contained in the Agreement, and in March corrective action was taken to adjust PTO balances. A Trinity representative met with employees to review their accruals, and the Union's representative was notified that adjustments were made. JA143. The grievance was appealed to arbitration in June 2017. JA136. No further action was taken regarding the grievance after that time. The Union's representative testified that the status of the grievance was unknown as of December 2017. JA56.

V. STANDING

As the party aggrieved by the Board's Decision, Trinity has standing under 29 U.S.C. § 160(f) to petition the Court to review and set aside the Decision. *See Retail Clerks Local 1059 v. NLRB*, 348 F.2d 369, 370 (D.C. Cir. 1965).

VI. ARGUMENT

A. Standard of Review

The D.C. Circuit does not "merely rubber-stamp NLRB decisions." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991). The Court denies enforcement and vacates Board orders when the Board's decision has "no reasonable basis in law or when the Board has failed to apply the proper legal standard." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445-46 (D.C. Cir. 2004). The Board's departure from

its own established precedent without a reasoned analysis renders its decision arbitrary and unenforceable. *See E.I. du Pont de Nemours & Co. v. NLRB*, 682 F.3d 65, 66-67 (D.C. Cir. 2012); *Mail Contractors of Am. v. NLRB*, 514 F.3d 27, 31 (D.C. Cir. 2008). Similarly, a Board decision is reversible when the Board's application of law to facts is arbitrary or otherwise erroneous. *Sutter E. Bay Hospitals v. NLRB*, 687 F.3d 424, 437 (D.C. Cir. 2012).

B. The Board's Finding of Unlawful Disparagement Has No Merit

The expression of Mr. Rivera's opinion that accrual discrepancies were the result of complexities caused by a PTO provision that was unique to the Douglas Facility was protected speech under section 8(c) of the NLRA. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 USC §158(c).

The Supreme Court expounded on the meaning of section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) as follows:

[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the board. Thus, [8(c)] merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinions' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1).

Id. at 617.

The protection of Section 8(c) is broadly defined to include “any” view, argument, or opinion. *See, e.g., Children’s Center for Behavioral Development*, 347 NLRB 35, 36 (2006). So long as an employer’s views, arguments, or opinions contain “no threat of reprisal or force or promise of benefit,” its communication is protected. As the Board majority here acknowledged, even highly offensive, denigrating statements are protected by Section 8(c). JA7 (“[W]ords of disparagement alone concerning a union . . . are insufficient for finding a violation of Section 8(a)(1)”). *See, e.g., Trailmobile Trailer LLC*, 343 NLRB No. 17 (2004) (Manager’s “degrading and demeaning statements” including that he “could teach monkeys to weld,” that he “could replace the[employees] within 10 minutes,” that “people in the [u]nion were stupid” and the union representative was “worthless and no good” did not violate the Act); *Poly-America, Inc.*, 328 NLRB 667, 669 (1999) (Employer did not violate the Act when it informed employees that the union was no good, had threatened to burn the plant facility, and would charge up to \$300 in weekly or monthly fees because such comments did not contain any threats of reprisal or promise of improper benefits).

The Board majority found that Mr. Rivera’s statement was coercive and therefore unlawful under *Novelis Corp.*, 364 NLRB No. 101 (2016). In that case, the employer and the employees’ union representative were bargaining terms for a new

collective bargaining agreement. The union informed the employer that employees rejected its proposals in an unsuccessful ratification vote, and authorized a strike. An employee testified without contradiction that his manager told him employees would lose their jobs if there were a strike. The Board found the threat of termination for engaging in a strike protected by Section 7 of the Act was unlawful in violation of Section 8(a)(1).

Novelis has no resemblance to the case here. No arguable threat of retaliation based on the exercise of protected, concerted activities was expressed or implied by Mr. Rivera's alleged statement to Ms. Victoria. Ms. Victoria did not claim she was subjected to, or threatened with any adverse employment action at all. The Board majority found coercion instead based on the purportedly misleading nature of Mr. Rivera's alleged statement. In particular, it cited this Court's decision in *NLRB v. Ingredion, Inc.*, 930 F.3d 509, 516 (D.C. Cir. 2019) distinguishing protected opinions from "coercive . . . overstatements."

"The Board has held that an employer violates Section 8(a)(1) by 'misrepresent[ing] the Union's bargaining positions' in a way that 'tends to undermine' employee support for the union." *Id.* In particular, the Board found one of Ingredion's managers told an employee not to apply for retirement because "there was a better contract coming" and he would "like the retirement that [Ingredion] was going to propose." Later the manager told another employee who was considering

retirement to speak with his union representatives and urge them to “start negotiating” with the employer. He told the employee the union “was not telling [them] everything” and the union “needed to get together and negotiate.” In fact, however, the employer and the union already started bargaining and negotiations were active and ongoing, with additional meetings scheduled later that month. The Court concluded that the record supported “the Board’s finding that Ingedion violated Section 8(a)(1) by misrepresenting the Union’s position in a way that tended to cause employees to lose faith in the Union.”

Ingedion does not support finding a violation here. Mr. Rivera’s statement to Ms. Victoria did not threaten her PTO benefits or attempt to influence her exercise of those benefits in any way. The discussion did not occur in the context of alleged unlawful direct dealing between a supervisor and a represented employee. Mr. Rivera and Ms. Victoria were not even discussing the subject of collective bargaining, the Union’s acceptance of Trinity’s PTO proposal, or the recently provided last, best offer. Mr. Rivera did not allegedly assert that any Union bargaining position was the cause of an accrual error. Unlike the manager in *Ingedion*, he did not mislead Ms. Victoria into believing the Union was responsible for preventing substantial, superior benefits from being provided to her because of its conduct at the bargaining table. Allegedly, he simply asserted that an accrual

tracking error must have occurred because of the complexity of tracking a PTO benefit that was unique to employees working under the Agreement.

Importantly, during their brief discussion Mr. Rivera did not allegedly misstate any of Trinity's or the Union's bargaining positions, intentionally or otherwise, and Ms. Victoria was not even arguably misled about the status or course of negotiations. Ms. Victoria participated in most of the bargaining meetings that were held, she was familiar with Trinity's proposal presented June 27, and she knew that the Union agreed to an improved new PTO benefits article as part of a new agreement. More generally, Ms. Victoria knew that the give and take of negotiations ended as a result of the presentation earlier in December of Trinity's last, best offer for a new contract, the elements of which were accurately described in a written communication to all employees. On December 15, Mr. Rivera did not allegedly suggest that the PTO benefits to which the Company and the Union agreed during negotiations had been modified in any way, or that the agreed upon PTO benefits were unfavorable to employees. He did not allegedly suggest that Ms. Victoria lost any benefits or experienced any adverse action whatsoever.

Despite the majority's finding in this case, the Board has not found an alleged statement concerning a party's position with respect to a grievance coercively misleading. Employees are participants in grievance procedures and not likely to be misled by common, adversarial statements concerning a contractual dispute. Ms.

Victoria arguably had an interest in the December 2016 grievance regarding PTO accruals, and she communicated with the Company's representatives, just as all other employees did, in March 2017 about efforts to correct errors. Even the Union's representative at the hearing did not know why the grievance was appealed to arbitration and she did not contend that there had been any activity concerning it in the six months prior to the alleged discussion on December 15. The Board majority's assertion that Mr. Rivera's statement faulting the Union for accrual calculation errors was misleading in the context of an apparently defunct grievance is simply false.

For Mr. Rivera allegedly to say that a problem he concededly was not responsible for, and did not have authority to address, was someone else's problem was not unlawful. The claim that he said accrual tracking is likely the result of a unique PTO benefit program in Douglas also was not unlawful. Saying that Ms. Victoria should address it with the Union was not disparaging, particularly if he believed the Union had the ability to rectify the matter as he allegedly suggested. Ms. Victoria was not misled and did not even claim there was any coercion involved in the statement. To the contrary, she testified she concluded the discussion by telling Mr. Rivera she did not think there was any problem to fix.

In *Children's Center for Behavioral Development*, 347 NLRB at 35, the Board reversed the administrative law judge's finding that the employer violated Section 8(a)(1) by issuing a memo to employees alleging that "for months now, the Union

has been doing everything in its power to harm Children’s Center” and asserting among other claims that the “Union has interfered with our relationship with the United Way, which affected our funding”; the Union was trying to “arbitrate grievances on behalf of Eileen Redeker, which has caused . . . costs and legal fees, which [we] cannot afford;” and the Union “is now claiming that it has a contract” with the Center, even though the Union rejected its last offer without returning to the bargaining table. The Board rejected the claim that the employer unlawfully accused the union of being responsible for legal and financial troubles that potentially jeopardized the employees’ jobs, finding the assertions “the expression of lawful opinion” and not tantamount to unlawful threats.

Expressions of opinion that are critical about a bargaining relationship are not unlawful. The circumstances surrounding the alleged discussion between Ms. Victoria, Mr. Rivera and Mr. Romero here pale by comparison to those in *Children’s Center for Behavioral Development*. Here, the discussion about an alleged PTO accrual discrepancy did not involve any claim of retaliation; Ms. Victoria did not assert that Mr. Rivera or the Company took away PTO she was entitled to receive; and Mr. Rivera did not claim the Union was responsible for any loss. Ms. Victoria claimed there was an accrual tracking error or discrepancy, stopping short of alleging any type of impropriety. Mr. Rivera for his part did not allegedly suggest or imply

the futility of Union advocacy, but to the contrary urged her to contact the Union presumably because the Union *could* fix the problem.

Trinity did not engage in retaliation against Ms. Victoria; Ms. Victoria did not even claim otherwise. The alleged discussion did not occur in the context of any hostility to employees' Union support. There is a total absence of any interference or coercion based on Ms. Victoria's, or any other employees, protected concerted activities. The allegation of disparagement has no merit. The Board's Decision should be reversed.

VII. CONCLUSION

For the foregoing reasons, the Court should grant the Company's Petition for Review and deny enforcement of the Board's Decision.

Dated: August 18, 2020

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(A) because this brief contains 3,863 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on this date, a true and correct copy of the foregoing Brief was filed electronically with the U.S. Court of Appeals for the D.C. Circuit, which will send a notice of the filing to all counsel of record.

Dated: August 18, 2020

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