

Nos. 20-1014, 20-1055

**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 AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TRINITY SERVICES GROUP, INC.)	
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Petitioner/Cross-Respondent)	
)	Nos. 20-1014, 20-1055
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	28-CA-212163
)	
Respondent/Cross-Petitioner)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1), counsel for the National Labor

Relations Board certify the following:

A. Parties and Amici

1. Trinity Services Group, Inc. was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court.
2. The National Labor Relations Board is the respondent and cross-petitioner before the Court; the Board's General Counsel was a party before the Board.
3. The labor union United Food and Commercial Workers Union, Local 99 was the charging party before the Board.

B. Rulings Under Review

This case is before the Court on Trinity's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on November 20, 2019, and reported at 368 NLRB No. 115.

C. Related Cases

This case has not previously been before the Court.

/s/ David Habenstreit

David Habenstreit

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1015 Half Street, SE

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Dated at Washington, D.C.
this 1st day of September 2020

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This unfair-labor-practice case is before the Court on the petition of Trinity Services Group, Inc. to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued on November 20, 2019, and

reported at 368 NLRB No. 115. (JA 5-23.)¹

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, which authorizes the Board to prevent unfair labor practices affecting commerce. 29 U.S.C. §§ 151, 160(a). The Board's Order is final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Trinity's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUE

Does substantial evidence on the record as a whole support the Board's finding that Trinity violated Section 8(a)(1) of the Act by unlawfully blaming the Union representing its employees for creating problems with the computation of time off credit?

RELEVANT STATUTORY ADDENDUM

The addendum attached to this brief contains all applicable statutory provisions.

¹ "JA" refers to the joint appendix, and "Br." refers to Trinity's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

A. Trinity's Operations

Trinity, a food service contractor, is contracted by the state of Arizona to provide meals to inmates at a state prison in Douglas, Arizona. (JA 14; JA 31-32.)

Sergio Rivera is the unit manager, and Frank Romero is the office manager. (JA 15; JA 27, 31, 37-38, 104.) Trinity's offices are located in a trailer on prison grounds. (JA 16; JA 71, 105-06.)

The United Food and Commercial Workers Union, Local 99, has represented Trinity's food supervisors, warehouse aides, and drivers since 1995. (JA 5, 15; JA 48, 121.) The food supervisors oversee the inmates who actually cook and serve the food.² (JA 15; JA 101.) Of the 18 Trinity employees at Douglas, 12 are unit employees. (JA 15; JA 31-32, 80.) Rivera supervises the unit employees' daily work, makes their schedules, and schedules their leave. (JA 15; JA 37-38.)

² Despite the job title, food supervisors are hourly employees. No party alleged them to be supervisors as that term is used in Section 2(11) of the Act, 29 U.S.C. §152(11). (JA 27-29, 102.)

B. Trinity's Dual Leave Programs and Its Problems Calculating Employee Leave

Before the parties' most recent collective-bargaining agreement expired in July 2017, they began bargaining for a successor agreement. (JA 15; JA 33-34.) One of the major topics of discussion was Trinity's paid time off plan. (JA 16; JA 34, 42, 137, 148-49.) After each bargaining session, a Trinity manager distributed a newsletter called "Negotiation News" to employees, which detailed that session's negotiations. (JA 15; JA 81-82, 85-87, 137, 148-49.)

Trinity's employees used paid time off for both vacation and sick leave. (JA 15; JA 79.) Under the 2013 contract, Trinity employees received a fixed number of days at the beginning of the year, depending on longevity, and accrued additional time each month. (JA 15-16; JA 125.) An employee with two years of service, for example, would accrue five days on January 1 and then earn up to an additional 11 days, for a total of 16 days of paid time off. (JA 16; JA 125.) Employees with three or more years of service accrued 10 days of leave on January 1 and then earned from 11 to 21 additional days. Time off could not be rolled over to the next year. (JA 16; JA 125.)

Douglas is Trinity's only unionized facility, and the paid time off plan for those unionized employees was different than the plan used at non-unionized facilities. (JA 15; JA 148-49.) After implementing a new software system for keeping track of leave balances, Trinity experienced difficulty administering the

two different time-off systems. (JA 16; JA 38, 43, 53, 60-65, 74, 140-44, 149.) As a result, employees experienced problems getting approval for their leave. (JA 7, 16; JA 53.) Even though employees' pay stubs indicated they had leave available, when they tried to take it, Trinity managers would tell them, "they don't have the time to take because they never accrued" the leave. (JA 53, 69-70.) The Union filed grievances over this issue as early as December 2016 and continued throughout 2017 to ensure that employees were able to use the leave they had accrued. (JA 17; JA 35-36, 43, 53, 135-36.)

During negotiations for the successor contract, Trinity proposed instituting the time-off plan it used in non-unionized facilities. (JA 16; JA 133-34.) Under Trinity's proposal, employees would not accrue days at the beginning of the year but would instead accrue hours per pay period and ultimately receive fewer days of leave per year. (JA 16; JA 133-34.) For example, an employee with two years' experience would accrue a maximum of 13 days' leave (instead of 16 under the prior contract). (JA 16; JA 133-34.) In its December 1 wage proposal, the Union tentatively agreed to accept Trinity's time-off proposal with some changes, including allowing employees to roll over unused leave. (JA 7, 15; JA 51-52, 58-59, 137-39.) The parties ratified an agreement in April 2018. (JA 15; JA 107-08, 150.)

C. Rivera Blames the Union for Trinity's Paid Time Off Problems

When food supervisor Marisol Victoria requested three days off in December, her time card showed she had enough days accrued. (JA 7; JA 67, 78-79.) On December 15, unit manager Rivera instructed her to report to the office. (JA 18; JA 72.) There, Romero told her she needed “to sign for a change that was made on [her] time card because . . . [she] no longer had any [paid time off].” (JA 7; JA 73.) Victoria disagreed, telling Romero and Rivera that she believed she still had three days of leave. (JA 7; JA 73-74.) Romero explained that the “system” showed she had no leave remaining, even though her time card showed three days of leave available. (JA 7; JA 74.) Rivera then told Victoria, “that is a problem that the Union created regarding PTO [paid time off]. You need to fix that with the Union.” (JA 18; JA 74.) Victoria told Rivera and Romero that they “should be taking care of giving us the correct [paid time off].” (JA 18; JA 74.) Rivera replied, “yes, I know, but that’s the problem with the Union.” (JA 18; JA 74.) Victoria signed her revised time card and returned to work. (JA 74-75.) Although she had requested three days of leave to cover time off because of illness, she was ultimately granted only one day of leave. (JA 18; JA 78-79.)

II. The Board's Conclusions and Order

On the foregoing facts, a Board majority (Members McFerran and Kaplan; Chairman Ring, dissenting) found that Trinity violated Section 8(a)(1) of the Act by informing employees who were denied personal time off that the Union was responsible for creating problems regarding time off and they needed to fix that with the Union. (JA 7-8.)³

The Board's Order requires Trinity 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 Section 7 of the Act. (JA 7, 22.) Affirmatively, the Order directs Trinity to post the Board's remedial notice. (JA 8, 22.)

SUMMARY OF THE ARGUMENT

The Board—with court approval—has long held that an employer violates the Act when it misrepresents a union's position or falsely blames a union for reductions or restrictions in employee benefits. That is exactly what Trinity unit manager Sergio Rivera did here. For at least a year, Trinity had trouble properly accounting for employees' leave balances, and the Union filed multiple grievances

³ A Board majority (Chairman Ring and Member Kaplan; Member McFerran, dissenting) dismissed an allegation that Trinity coercively interrogated an employee. (JA 5.) That allegation is not before the Court.

to ensure that employees received their accrued leave. When employee Marisol Victoria tried to use the three days of leave shown on her time card, Rivera not only told her she had a zero leave balance, but that this was a problem “created” by the Union. He placed responsibility for the problem on the Union and told Victoria she “need[ed] to fix that with the Union.”

But the Union had no ability to “fix” Victoria’s time card and grant her leave. In addition, Rivera made these statements in the middle of ongoing grievance proceedings and negotiations for a new collective-bargaining agreement, with leave a major topic of negotiation. The Board found that Rivera’s statements unlawfully misrepresented the Union’s bargaining position in a way that tended to undermine employee support for the Union.

Trinity’s arguments to the contrary are unavailing. Section 8(c) of the Act provides no safe harbor for Rivera’s misrepresentations simply because he did not directly threaten Victoria or engage in direct dealing. Rather, non-threatening overstatements that an employer has reason to believe will mislead his employees are unlawful, whether or not accompanied by overt threats. In addition, the Board’s analysis in Section 8(a)(1) cases is an objective one, rendering Trinity’s focus on Rivera’s subjective intent and Victoria’s subjective understanding irrelevant.

ARGUMENT

Trinity Violated Section 8(a)(1) of the Act by Blaming the Union for Trinity's Own Repeated Failures To Calculate Employees' Paid Time Off Correctly

A. Principles and Standard of Review

Section 7 of the Act guarantees employees the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining.” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of Section 7 rights. 29 U.S.C. § 158(a)(1). An employer’s conduct violates Section 8(a)(1) of the Act if it has a reasonable tendency to coerce employees in the exercise of their right to engage in Section 7 activity. The Board’s inquiry is objective and “turns on how a reasonable employee would have understood the action.” *Advanced Life Sys. Inc. v. NLRB*, 898 F.3d 38, 44-45 (D.C. Cir. 2018).

In analyzing the Board’s findings, the Court “‘recognize[s] the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.’” *Id.* at 45 (quoting *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006)). In addition, “[n]either the employer’s intent to interfere nor actual coercion of the employee needs to be proven.” *Id.* at 44.

The Board's findings are conclusive if supported by substantial evidence on the record as a whole, even if the Court might justifiably have reached a different conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks and citation omitted). The Court recognizes that "matters involving the interpretation of incidents between management and labor will often turn on the Board's assessment of events in light of its expertise in the area of labor relations." *NLRB v. Ingredion, Inc.*, 930 F.3d 509, 514 (D.C. Cir. 2019). The Court therefore affirms the Board's findings unless "no reasonable factfinder" could find as the Board did. *Id.* (quoting *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 165 (D.C. Cir. 2016)).

B. Substantial Evidence Supports the Board's Findings that Trinity Unlawfully Blamed the Union for Creating Problems with the Computation of Time Off Credit

The Board found that Trinity violated the Act when its unit manager, Rivera, told employee Victoria that the reason she did not have three days of leave despite contrary indications on her time card was "a problem that the Union created," a problem she "need[ed] to fix . . . with the Union." (JA 18; JA 74.) When Victoria remonstrated that Trinity's managers "should be taking care of giving us the

correct [paid time off],” Rivera repeated “that’s the problem with the Union.” (JA 18; JA 74.) As we now show, the Board’s finding that Rivera’s statements violated the Act is consistent with long-standing court and Board precedent and supported by substantial evidence.

Statements such as Rivera’s violate Section 8(a)(1) by “‘misrepresenting the union’s bargaining positions’ in a way that ‘tends to undermine’ employee support for the union.” *Ingredion*, 930 F.3d at 516 (quoting *Miller Waste Mills, Inc.*, 334 NLRB 466, 467-68 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003)). The Board has found that employers’ misrepresentations regarding unions violate the Act in situations where, for example, the employer:

- falsely stated that while it was willing to offer a more generous contract, the union would not negotiate (*Ingredion*, 930 F.3d at 516);
- falsely represented to employees that the union sought the retroactive rescission of a wage increase (*Novelis Corp.*, 364 NLRB No. 101, slip op. at 2 n.9 (2016), *enforced in relevant part*, 885 F.3d 100 (2d Cir. 2018));
- misrepresented the union’s position about a wage increase and blamed the union for its rescission (*Faro Screen Process, Inc.*, 362 NLRB 718, 718 (2015));
- blamed the union for preventing a wage increase (*Miller Waste*, 315 F.3d at 955); and
- blamed the union for preventing it from granting better benefits (*Westminster Cmty. Hosp., Inc.*, 221 NLRB 185, 193 (1975), *enforced mem.*, 566 F.2d 1186 (9th Cir. 1977)).

Thus, the Board has long held that blaming a union for the employer's own actions or misrepresenting the union's positions constitutes an unlawful attempt "to disparage the Union 'in the eyes of the employees so as to discourage membership in the Union.'" *Westminster*, 221 NLRB at 193 (quoting *General Dynamics Corp.*, 186 NLRB 978, 979 (1970)).

Similarly here, the record evidence fully supports the Board's finding that Trinity violated Section 8(a)(1) of the Act by falsely blaming the Union for its own bookkeeping problems. (JA 7-8.) As an initial matter, the Board found that "Rivera's statements were patently false as to administration of the extant contract," a finding Trinity does not challenge. (JA 8.) Nor could it, given the evidence. After Trinity implemented a new software program, administering time off for the Douglas employees became more difficult. (JA 16; JA 38, 43, 53, 60-65, 74, 140-44, 149.) In 2017, Trinity's human resources staff engaged in a prolonged debate about how to credit leave to the Douglas employees even though the contractual paid time off plan had been in place since at least 2013. (JA 15; JA 118, 140-44.) The Union meanwhile had filed several grievances and taken one grievance to arbitration because Trinity "all of a sudden stopped paying" for time off and started "saying that the workers didn't have" time off to take. (JA 7; JA 35-36, 43, 53, 55-61, 135-36.) In an "ongoing . . . back and forth," Trinity would tell employees they did not have leave accrued, the Union would file a grievance,

and then Trinity would tell the employees “they can take time off.” (JA 53.)

Some of those grievances remained “outstanding” at the time of Rivera’s statements to Victoria. (JA 7 n.10, 22; JA 55.)⁴

In other words, none of the problems experienced by the employees with Trinity’s failure to properly calculate their leave was attributable to the Union or its failure to bring these problems to Trinity’s attention. Indeed, as the Board found, there “was no objective basis for blaming the [U]nion, rather than [Trinity], for the claimed discrepancy” in Victoria’s leave (JA 8), and the record is “undisputed that the Union had no responsibility for [Trinity’s paid time off] bookkeeping” (JA 7; JA 62-65, 140-44). Moreover, the discrepancy between the three days of leave shown on Victoria’s time card and the zero days shown in Trinity’s bookkeeping system was “likely attributable to the failure of [Trinity’s] current software program,” not the different paid time off plans applicable to unionized and non-unionized employees, a finding Trinity does not dispute. (JA 7.)

⁴ Trinity’s claim that Rivera’s misleading statements occurred in the context of an “apparently defunct grievance” (Br. 15) is therefore contrary to the established facts. In any event, Trinity failed to except to the judge’s finding that some grievances remained pending, and Section 10(e) of the Act therefore prevents the Court from considering it now. (JA 7 n.10.) 29 U.S.C. §160(e); *New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 733 (D.C. Cir. 2011) (court lacks jurisdiction to consider arguments not raised to the Board in the first instance).

Given employees' repeated problems ascertaining their correct leave balances, as well as the multiple grievances filed by the Union to ensure employees received their accrued paid time off, leave issues were of "vital importance" to employees, and Rivera's misrepresentations could only be interpreted as placing blame on the Union for Victoria's current predicament. *Peyton Lincoln-Mercury*, 208 NLRB 596, 597 (1974). That Trinity "may not have engaged in other unlawful acts, or that the statutory rights of only a single employee are violated, or that the employee whose rights have been violated has not communicated that fact to others" is irrelevant to the Board's analysis. *Regency at the Rodeway Inn*, 255 NLRB 961, 961-62 (1981).

Rivera's "patently false" misrepresentations that blamed the Union for employees' difficulty in receiving an important benefit were made without any objective basis during ongoing contract negotiations and grievance proceedings. (JA 8.) Accordingly, the Board's determination that those statements "would undermine the Union's status as bargaining representative and reasonably tend to cause an employee to lose faith in the Union's representation on the [leave] issue," (JA 8) is fully supported by the record evidence and comports with established Board and court law.

C. Rivera's Misleading Statements Were Not Protected by Section 8(c) of the Act

Although the Board found Rivera's statements to be patently false because "the Union had no responsibility" for Trinity's failure to properly account for employee leave (JA 7-8), Trinity nonetheless argues (Br. 10-12, 16) that those untruths were merely Rivera's "opinion" and therefore protected by Section 8(c) of the Act. 29 U.S.C. §158(c). Trinity further argues that Rivera's statements are protected because he did not directly threaten Victoria with discharge or retaliation. (Br. 10-12, 16.) As we now show, these arguments fail.

Section 8(c) of the Act provides that an employer may state "any views, argument, or opinion," but only if those statements do not threaten or coerce employees in violation of Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *Ingredion*, 903 F.3d at 515-16. That provision provides no safe harbor for Rivera's "conscious overstatements he has reason to believe will mislead his employees." *Gissel*, 395 U.S. at 620. *Accord Ingredion*, 930 F.3d at 515-16. By making materially false statements about the Union's responsibility for Trinity's failure to properly calculate employees' leave balances, Rivera was not merely expressing a negative "opinion" (Br. 10). Rather, his statements misrepresented the Union's position while the parties were bargaining about paid time off; they suggested to employees that the Union was not working on their behalf and wrongly blamed the Union for the current problems. (JA 7.)

Placing blame on the Union for Trinity's leave problems has "the obvious effect of coercing employees to refrain from supporting the Union as this places their [wages and benefits] in jeopardy. Such a statement interferes with their Section 7 rights to support a union uninhibited from interference." *Wellstream Corp.*, 313 NLRB 698, 707 (1994). That interference occurred despite Trinity's claim that Rivera did nothing unlawful because he "was not responsible for, and did not have authority to address" the problems with leave accrual. (Br. 15.) Rivera's status as a lower-level supervisor "does not make [Trinity's] conduct insignificant." *Tower Auto., Inc.*, 326 NLRB 1358, 1358 (1998). The Board, therefore, properly determined that Rivera's statements were coercive misrepresentations unprotected by Section 8(c). (JA 8.)

Trinity faults the Board for finding a violation in the absence of direct threats or retaliation against Victoria. (Br. 11-12, 16-17.) But it is well-settled that an employer's misrepresentations about a union's position can violate the Act even if the employer makes no direct threats. *Ingredion*, 930 F.3d at 516; *Faro*, 362 NLRB at 718 n.5. As the Court has explained, an employer that focuses on whether the misstatements were non-threatening "misunderstands the nature of its violation [because t]he Board did not find that the statements were threatening, but rather that they were misleading." *Ingredion*, 930 F.3d at 516. Rivera's "misrepresenting the Union's position in a way that tended to cause employees to

lose faith in the Union” had the tendency to coerce employees, and the Board’s finding is fully supported. *Ingredion*, 930 F.3d at 516.

Nor is Rivera’s intent relevant here, as Trinity claims, when it suggests that Rivera merely “urged [Victoria] to contact the Union presumably because the Union *could* fix the problem.” (Br. 17, emphasis in original.) Similarly, Trinity focuses on Victoria’s subjective reaction to Rivera’s misstatements, claiming that she “was not even arguably misled” because she attended bargaining sessions and would have known both the Union’s bargaining position and that “the give and take of negotiations [had] ended.” (Br. 14.) But Rivera’s subjective intent and Victoria’s subjective understanding are not part of the Board’s analysis. (JA 8 n.14, 16 n.11.) Rather, the test for a Section 8(a)(1) violation is an objective one in which the Board analyzes whether, “considering the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with those rights.” *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001).

Trinity’s violation, therefore, does not depend on whether the dispute between the parties over leave accrual “may have ended” by the time of Rivera’s misstatements. *Regency at the Rodeway Inn*, 255 NLRB 961, 961-62 (1981). Nor, despite Trinity’s suggestion that Rivera might actually believe the Union had the power to help Victoria and therefore somehow bolstered union support (Br. 15), does the violation depend on “motive, courtesy, or gentleness, or on whether the

coercion succeeded or failed.”⁵ *Hanes Hosiery, Inc.*, 219 NLRB 338, 338 (1975.)

Rather, in cases like this one, neither the “intent to interfere nor actual coercion of the employee needs to be proven.” *Advanced Life*, 898 F.3d at 44.

To the extent that Trinity’s repeated use of the word “allegedly” (Br. 2, 3, 4, 5, 13, 14, 15) suggests it is challenging the Board’s finding that Rivera actually made the misleading statements to Victoria, it failed to make that argument explicit, as it is required to do. *See Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019) (finding argument forfeited where petitioner’s opening brief was “obscure on the issue”) (internal quotation marks and citation omitted); *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (contentions merely mentioned in a party’s opening brief are deemed waived). In any event, the judge credited Victoria because of her “forthright” demeanor and because, as a current employee, she testified against her own pecuniary interests.⁶ (DO 14.) Rivera, on the other hand, he found to be “not credible,” not only because of his demeanor, but also because he “kept changing [his testimony]

⁵ Of course, by asserting that the Union had the power to fix Victoria’s leave problem, Rivera still wrongly conveyed that the Union had some role in leave administration even where it is undisputed that Trinity was solely responsible.

⁶ A current employee’s testimony is “particularly reliable” and a relevant factor to be considered in assessing credibility. *Mek Arden, LLC*, 365 NLRB No. 109, slip op. at 6 (2017), *enforced*, 755 F. App’x 12 (D.C. Cir. 2018).

regarding the issue” of paid-time off. (JA 21.) While Trinity asserts Rivera “was not aware of any problems employees allegedly experienced regarding their accruals” (Br. 6), that was merely one of three positions Rivera took during the hearing, cycling from he had “heard of” the issue, to “not sure,” to finally land on unawareness. (JA 21; JA 38, 40, 94, 100-01.)⁷ Because Trinity failed to argue that the judge’s detailed credibility determinations are “hopelessly incredible, self-contradictory, or patently insupportable,” those rulings should not be disturbed. *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted).

Finally, Trinity’s citations to cases such as *Children’s Center for Behavioral Development* (Br. 11, 15, 16), *Trailmobile Trailer* (Br. 11), and *Poly-America* (Br. 11) do not help its cause. None of those cases involved an employer misrepresenting the union’s positions or blaming it for employees’ problems receiving contractual benefits, as Trinity did here. Rather, in *Children’s Center for Behavioral Development*, 347 NLRB 35, 35-36 (2006), the Board found the employer did not violate the Act because its statements that the union was harming it and costing it money were not materially false and did not accuse the union of

⁷ Meanwhile, one of Trinity’s “Negotiation News” publications, distributed to employees in October, acknowledged that administering the contractual paid time off plan had been “very challenging.” (JA 81-82, 85-87, 149.)

harming employees directly. In *Trailmobile Trailer, LLC*, managers made “flip and intemperate” remarks about employees and the union, including that “people in the Union were stupid,” and a union representative was “worthless and no good.” 343 NLRB 95, 95 (2004). Because the managers’ comments did not suggest that the employees’ union activity was futile, convey threats, or constitute harassment that tended to interfere with employees’ Section 7 rights, the Board found those comments to be mere personal opinions, protected by Section 8(c) of the Act. *Id.* And in *Poly-America, Inc.*, the Board found a foreman did not unlawfully disparage the union by sharing his own negative views of the union with employees, but he did violate the Act by telling employees the union would “cause the [employer] to lower wages, hours, and overtime and that job security would suffer.” 328 NLRB 667, 669 (1999), *enforced in relevant part*, 260 F.3d 465 (5th Cir. 2001).

In sum, Trinity makes a lot of claims about what Rivera’s statements were not, while ignoring what they were—misrepresentations falsely blaming the Union for creating the problems employees repeatedly experienced with proper leave accounting. Placing blame on the Union for Trinity’s own failures in administering employee benefits violates Section 8(a)(1) of the Act because it “misrepresent[s] the Union’s position in a way that tended to cause employees to lose faith in the Union.” *Ingredion*, 930 F.3d at 516.

CONCLUSION

The Board respectfully requests that the Court deny Trinity's petition for review and enforce the Board's Order in full.

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National Labor Relations Board
September 2020

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

TRINITY SERVICES GROUP, INC.)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 20-1014, 20-1055
v.)	
)	Board Case No.
NATIONAL LABOR RELATIONS BOARD)	28-CA-212163
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 4,579 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of FRAP 32(a)(5)(A) and the type-style requirements of FRAP 32(a)(6).

Dated at Washington, DC
this 1st day of September 2020

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit 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.

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Dated at Washington, DC
this 1st day of September 2020

STATUTORY ADDENDUM

**STATUTORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 1 of the Act (29 U.S.C. § 151):

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2 of the Act (29 U.S.C. §152) provides in relevant part:

When used in this Act [subchapter]--

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7 of the Act (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 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 in relevant part:

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 7.

Section 8(c) of the Act (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.

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

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.