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

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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
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
JA	Joint Appendix
Section 8(a)(1)	29 U.S.C. §158(a)(1)
Section 8(c)	29 U.S.C. §158(c)

I. SUMMARY OF THE ARGUMENT

An employer violates Section 8(a)(1) of the National Labor Relations Act ("Act") when it "interferes with, restrains, or coerces employees" in their decision to support a union. 29 U.S.C. §158(a)(1). Under Section 8(c) of the Act, the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). Reading together Sections 8(a)(1) and 8(c), plainly interference with protected rights under the Act must be established with evidence demonstrating a threat of reprisal or force, or a promise of a benefit. Absent that, "an 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." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

In this case, Trinity's supervisor Sergio Rivera allegedly told an employee, Marisol Victoria, that a paid time off ("PTO") accrual problem was one her Union caused, and she should contact the Union to fix it. JA74. Ms. Victoria responded that she realized Mr. Rivera was not responsible for the accruals, and there was no problem. JA74-75. Absent any element of coercion, Mr. Rivera's alleged statement was protected by Section 8(c) and did not violate Section 8(a)(1) of the Act. The National Labor Relations Board's ("Board") contrary Decision should be vacated.

The General Counsel's Brief ("Brief") in support of the Board's Decision contends that neither the existence of threats nor promises of benefits is necessary to find a violation of the Act. Brief 8. Rather, the Board contends that "misleading" statements by definition are unlawful even when, as in this case, the "subjective intent" of the speaker and the "subjective understanding" of the purported target betray no element of deception. *Id.* The Board confuses the misstatement that it attributed to Mr. Rivera with one that is coercively misleading and in doing so disregarded Section 8(c) and its own precedents. Under the circumstances, Mr. Rivera's statement to Ms. Victoria contained no explicit nor implicit threat, and did not violate Section 8(a)(1) of the Act.

II. ARGUMENT

A. The Board's Finding of Interference Based on an Alleged Nonthreatening Statement by a Supervisor Conflicts with the National Labor Relations Act and the Board's Own Precedents

A finding that nonthreatening speech violates the Act contradicts Section 8(c), which encompasses even allegedly false statements that are unaccompanied by threats. *See, e.g.*, *Poly-America, Inc.*, 328 NLRB 667, 669 (1999) (Supervisor's statements that the union was no good, had threatened to burn the plant facility, and would charge up to $300 in weekly or monthly fees were lawful because he was merely "sharing . . . his own negative views about the union."). Section 8(c) privileges "expressions of opinions which, however false or unsubstantiated, d[o]

not rise to the level of interference, restraint, or coercion prohibited by Section 8(a)(1) of the Act." *Camvac Int'l*, 288 NLRB 816, 820 (1988). "Section 8(c) does not require fairness or accuracy." *North Star Steel Co.*, 347 NLRB 1364, 1367 n.13 (2006); *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 708 (1992), *enforced*, 991 F.2d 786 (1st Cir. 1993).

The Board's ruling in this case purports to be based on *NLRB v. Ingredion, Inc.*, 930 F.3d 509 (D.C. Cir. 2019), where this Court enforced a decision finding that misstatements about an ongoing bargaining process can establish coercion and violate Section 8(a)(1). There, a manager lied to an employee about his union's refusal to bargain, told the employee the union was keeping secrets from him and his coworkers, and told the employee to wait to apply for retirement because there was "a better contract coming" that the employer planned to propose in the future. These statements were misleading because they were asserted as facts, were objectively false, and directly challenged the union's ability to act as employees' representative in current, active collective bargaining negotiations. In addition to threatening the futility of bargaining, in violation of the Act, the manager in essence blamed the union for the necessity of his own unlawful direct dealing.

By contrast here the Board did not find any explicit or implicit threat in any aspect of Mr. Rivera's statement to Ms. Victoria, and as a result it is in no way comparable to *Ingredion*. The Board asserts that Mr. Rivera's statement was

tantamount to claiming that the Union was responsible for the bookkeeping associated with employee PTO accruals, but that claim overreaches. Mr. Rivera asserted his opinion that the Union was the source of accrual "problems," he did not claim the Union maintained inaccurate records. Both Mr. Rivera and Ms. Victoria knew the Union did not maintain accruals for Trinity employees; Ms. Victoria acknowledged she knew that even Mr. Rivera was not responsible for the accruals.

Unlike the case in *Ingredion*, Mr. Rivera did not threaten Ms. Victoria with the futility of bargaining, or promise her that Trinity would provide superior benefits absent representation during bargaining over those benefits. In *Ingredion* the manager's false statements involved retirement benefits that contemporaneously were being addressed at the bargaining table. While the Board contends that PTO in this case was a "major topic of negotiations," Brief 8, at the time of the discussion between Mr. Rivera and Ms. Victoria undisputedly it was a *concluded* topic. Bargaining over the subject of PTO benefits was completed when the Union informed Trinity that it accepted a proposed new PTO article to be included in a new collective bargaining agreement. JA138. Mr. Rivera did not state or imply that absent Union representation Ms. Victoria would receive superior PTO benefits or that the Union was an incapable bargaining representative. Ms. Victoria was a regular observer of the negotiations and knew that both Trinity and the Union had

satisfied their statutory obligation to bargain in good faith and achieved an agreeable solution concerning PTO benefits.

Despite the reference to accrual "problems", it has not been alleged that retaliation occurred or that employees in fact failed to receive all of the PTO benefits they were due. Unlike *Ingredion* no such unlawful conduct is alleged; to the contrary, the Board contends that the issue of accruals was simply disputed. Mr. Rivera's alleged claim that the Union was responsible for causing a problem concerning accruals was not determined to be false. Nor did Mr. Rivera suggest that representation by the Union was futile or even inadequate; after all, he urged Ms. Victoria to take her problem to the Union to get it solved.

The other cases cited by the Board in its Brief do not support its effort to avoid application of Section 8(c) in the context of alleged misstatements. Whereas *Ingredion* involved the inescapable threat of futility of bargaining, the other cases cited involved employers who explicitly blamed employees' union representatives for their own patently unlawful conduct. These include:

- *Novelis Corp.*, 364 NLRB No. 101 (2016), *enforced in relevant part*, 885 F.3d 100 (2d Cir. 2019), where a manager threatened employees that they would lose their jobs if a strike occurred.
- *Faro Screen Process, Inc.*, 362 NLRB 718 (2015), where the employer mischaracterized its unlawful unilateral wage increase as an "early" pay increase and then blamed the union when it unlawfully unilaterally retracted the increase following the union's objection.

- *Miller Waste*, 334 NLRB 466, 467-68 (2001), *enforced* 315 F.3d 951 (8th Cir. 2003), where the employer threatened employees they would not receive a pay increase because the union prevented it.

- *Westminster Cmty. Hosp.*, 221 NLRB 185, 193 (1975), *enfd. mem.* 556 F.2d 1186 (9th Cir. 1977), where a manager claimed that the union prevented the employer from increasing benefits, stated the employer would have granted increased benefits but for the union, and promised the benefits would be increased in the future if employees voted against the union.

- *Peyton Lincoln-Mercury*, 208 NLRB 596 (1974), where a supervisor told employees they would earn more and receive more time off if they were not represented by a union, at a time when the parties' collective bargaining agreement was nearing expiration and therefore threatening refusal to bargain in good faith.[2]

All of these cases involved unlawful employer conduct combined with the employer's false effort to blame the union for that conduct. By contrast here Trinity did not allegedly engage in unlawful conduct in connection with disputes over PTO accruals, no other unlawful conduct was alleged in connection with the bargaining process, and Mr. Rivera did not allegedly blame the Union for any unlawful conduct. To the contrary here the Board did not find, and there was no claim in the administrative Complaint that Trinity's bargaining conduct was not in good faith and complete compliance with the Act. No threat concerning the futility of bargaining

[2] The Board argues that its decision in *Regency at the Rodeway Inn*, 255 NLRB 961 (1981) has some relevancy to this case. That case, however, involved alleged coercive interrogation of an employee, not disparagement of her union representative. Neither that case, nor any other decision relied upon by the Board, suggests that an alleged nonthreatening misstatement violates the Act.

can be inferred from the discussion, which was not accompanied by direct dealing or other unlawful elements.

The existence of grievances challenging various employees' PTO accruals also does not warrant presuming coercion. A single grievance that covered all of the Douglas employees' PTO accruals was submitted by the Union in December 2016, a year before the discussion with Mr. Rivera that is at issue here. JA43, 52, 56. The grievance eventually was appealed to arbitration in June 2018, JA136, but the status of the grievance was unknown even to the Union's representative at the time of the incidents in this case and it was apparently defunct. JA56. While the grievance stimulated give and take between Trinity and the Union it was not taken to arbitration as the Board incorrectly contends. Brief 12. The Board's Brief also attempts to create a false conflict over the existence of other grievances but it is undisputed that at the time of the disputed discussion in this case Ms. Victoria had no grievance pending. The Union's representative claimed that she submitted one other grievance in December 2017, but it involved another employee, Delia Fontes. JA57.

As noted above, blaming a union for failing to achieve superior benefits at the bargaining table can, in some cases, constitute a threatened refusal to bargain in violation of the Act. That is not the case in the context of grievance procedures. The Board fails to cite any prior decision involving allegedly misleading statements about outstanding grievances that has resulted in a violation of Section 8(a)(1).

Grievances by definition involve disputes, and are regularly marked by parties blaming one another for taking allegedly unreasonable positions. The Board's current claim that a violation of the Act occurs whenever an employer blames the Union for "employees' difficulty in receiving an important benefit," Brief 14, would constitute a radical departure from the Board's precedents.[3] Finding a statement that blames a union for the existence of contractual disputes would result in unfair labor practices being found in virtually every grievance process.

In any event, the history concerning grievance disputes over PTO accruals asserted by the Board in its Decision, and in its Brief, would explain and not contradict Mr. Rivera's statement to Ms. Victoria that she should address her claim regarding PTO accruals with the Union. It would have been fair and not misleading for Mr. Rivera to assert that confusion over leave benefits had been caused by the existence of a separate and unique accrual method provided by the expired collective bargaining agreement, and that disputes should and could be resolved by contacting her Union representative. The history, in short, demonstrates there was nothing misleading or improper about Mr. Rivera's statement at all.

[3] As noted in Trinity's opening brief, that position contradicts the Board's decisions such as in *Children's Center for Behavioral Development*, 347 NLRB 35 (2006) (Finding lawful statements to employees blaming the union for undermining the employer's funding source, causing unreasonable costs related to arbitration of grievances, and falsely claiming that an agreement existed between the parties).

In *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972 (D.C. Cir.), *cert. denied*, 525 U.S. 1067 (1998), this Court refused enforcement of a Board order finding an employer's speech to employees instigating decertification of their union representative violated Section 8(a)(1). The Court noted the absence of unlawful threats accompanying the employer's statements, and therefore found them protected by Section 8(c). The Board's precedents also consistently find lawful employer statements that are unaccompanied by threats, even when they are clearly designed to undermine union support. *See, e.g. Curwood, Inc.*, 339 NLRB 1137 (2003) (Employer lawfully told employees that customers would view union representation negatively); *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408 (1992) (Employer lawfully pointed out disadvantages of the union proposed pension plan and provided information to employees about decertifying the union because they were not accompanied by threats or promises of benefits). "Otherwise lawful statements do not become unlawful . . . [under § 8(a)(1)] merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union." *Id.* at 409-10. The same applies here.

III. CONCLUSION

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

Dated: October 14, 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 2,312 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.

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