

CASE BEING CONSIDERED FOR TREATMENT
PURSUANT TO RULE 34(j) OF THE COURT'S RULES

Case No. 20-1067

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

RAED MCCRACKEN JARRAR
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review from the NLRB

PETITIONER'S FINAL REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
ALJ	Administrative Law Judge
ALJD	Administrative Law Judge's Decision
Board	National Labor Relations Board
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NLRB Order	NLRB Decision and Order, 368 NLRB No. 112. (Nov 12, 2019)
JA	Joint Appendix

STATUTES AND REGULATIONS

All applicable statutes are contained in the Brief of Petitioner Raed McCracken Jarrar (“Petitioner Jarrar”) and the Brief of Respondent National Labor Relations Board (“NLRB” or the “Board”).

SUMMARY OF ARGUMENT

In opposition to Petitioner Jarrar’s Petition for Review, the Board attempts to evade accountability by shielding itself from the Court’s jurisdiction, fails to reconcile contrary law and evidence, and fails to address, let alone impugn, many of the arguments presented in Petitioner Jarrar’s Opening Brief. Upon examination, the Court should reject the Board’s arguments and grant the Petition for Review.

ARGUMENT

I. The Board’s Attempts to Shield Itself from the Court’s Jurisdiction are Meritless

The Board attempts to shield itself from the Court’s jurisdiction, stopping just short of asking the court to rubber-stamp its order. On the one hand, the Board argues that Petitioner Jarrar did not preserve his arguments. On the other hand, the Board claims that the Court can’t expand the record. Both arguments are meritless for the reasons described below.

**A- The Board’s Claim that Petitioner Jarrar Did Not Preserve
His Arguments is Meritless**

The Board states on page 1 of its brief that its “Decision and Order, reported at 368 NLRB No. 112 (Nov. 12, 2019), *is final*” (emphasis added). But the Board tries to shield itself by suggesting that a Section 10(e) jurisdictional bar precludes this court from considering all but one of the arguments raised by Petitioner Jarrar because they “were not raised before the Board at the right time under its rules.”

The Board’s Section 10(e) argument is unavailing. “[S]ection 10(e) serves two purposes . . . it has a notice function that ensures that the Board has the opportunity to resolve all issues properly within its jurisdiction . . . [and] it requir[es] that all contestable issues be raised first before the Board or not at all.” *Local 900, Int’l Union of Elec., Radio, & Mach. Workers v. NLRB*, 727 F.2d 1184, 1191 (D.C. Cir. 1984). This Court has found that “[i]n assessing a claim of forfeiture under § 10(e), ‘the critical question is whether the Board received adequate notice of the basis for the objection.’” *Pa. State Corr. Officers Ass’n v. NLRB*, 894 F.3d 370, 376 (D.C. Cir. 2018) (quoting *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1090 (D.C. Cir. 2016)).

Accordingly, this Court has found the Board to be sufficiently “on notice” of certain issues even where the specific objection is made “for the first time

before” the Court. *See BPH & Co. v. NLRB*, 333 F.3d 213, 219 (D.C. Cir. 2003) (finding that, although the petitioner’s “attack on the Board’s new application [was] made for the first time before [the Court],” the petitioner satisfied Section 10(e) by asserting the argument in its brief to the Board); *see also Camelot Terrace*, 824 F.3d at 1090 (petitioners’ exceptions and supporting brief, although “no paragon of precision or detail . . . included several statements adequate to apprise the Board that the [petitioners] intended to press the question now presented” (internal quotation marks omitted)).

In this case, the Board received adequate notice of and had sufficient opportunity to respond to all four of Petitioner Jarrar’s issues under the governing Section 10(e) standard.

In fact, the Board concedes in its brief that one of the arguments raised in Petitioner’s Opening Brief was indeed preserved because it was raised by the General Counsel. The Board states on page 34 of its brief that the argument that “the interns were analogous to job applicants because they were petitioning for compensation” is preserved because it was raised by the General. It is unclear why the Board only recognized this one argument and overlooked all the other issues and arguments raised by the General Counsel as explained below.

The Petition for Review raises four main issues and is based on four main arguments. The four issues, in short, are:

1. If AIUSA statements violated Section 8(a)(1) of the Act.
2. If AIUSA interns were statutory employees under Section 2(3) of the Act.
3. If the activities in question were protected by under Section 7 of the Act.
4. If AIUSA employees acted to protect their own conditions of employment.

In addition, the four arguments that the issues are based on in short are:

1. The Board went against its own internal procedure and precedent pertaining to settlements;
2. The Board went against substantial evidence on the record;
3. The Board overstepped its authority by making a determination on the interns' "common law" employment status; and
4. The Board departed without explanation from binding precedent, including on protections under Section 7 of the NLRA and on employees joining the petition to protect their own conditions of employment.

On March 6, 2019, after the ALJ hearing, the NLRB General Counsel filed the "Brief of Counsel for The General Counsel to Administrative Law Judge Michael A. Rosas" (JA 129-176) discussing, at length, issue #1 above.

The brief discusses Section 8(a)(1) violations 25 times.

The brief raises issue #2 more than 12 times, including in Section V of the briefing (pages 32-38) (JA 165-172) that is dedicated to the intern's employment status.

The brief raises issue #3 more than 10 times, including on Pages 19, 25, and 29. (JA 152, 158, and 162).

Finally, the brief raises issue #4 in depth, including raising the employees' terms and conditions 15 times and the issue of increased workload 12 times, including on pages 1, 16-18. (JA 134, 149-151).

The brief relies on the same arguments as well, raising argument #2 while discussing the evidence on the record dozens of times, including on pages 9-15 and 20-23 (JA 142-148, 153-156). The brief alludes to argument #3, including on page 32 and 33 (JA 165-166). The brief relies on argument #4 in most of its sections, and discusses binding precedent on pages 19, 25, 29, 33, and 36 (JA 152, 158, 162, 166, and 169).

On May 6, 2019, Counsel for The General Counsel filed their Cross-Exception, where issues #1, #3, and #4 were raised again, including on pages 3 and 4 (JA 232-233). The Cross-Exception relies on arguments #2 and #4, including on pages 3 and 4 (JA 232-233).

Counsel for the General Counsel filed their Answering Brief to

Respondent's Exception on May 6, 2019, where they raised all four issues again. The answering brief also relies on arguments #2 and #4 in most of its section, and raises argument #3 including in an entire section on page 23 (JA 224) entitled "The Board need not decide whether the interns were employees under the Act."

Even for the one argument that the Board recognizes was preserved because it was raised by the General Counsel, the Board claims it was waived because "merely alluding to an issue in an opening brief, without supporting argument, is tantamount to waiver." Petitioner Jarrar relied on the argument in the Opening Brief, not only alluded to it, asserting:

The NLRB Board should have either not made a determination on the interns' employment status or just accepted the General Counsel's sound determination that the interns' petition for compensation made the interns analogous to applicants for employment (JA 171), who are employees under NLRB precedent.

Even if Petitioner Jarrar's argument was not of precision or detail, it still satisfied Section 10(e). In *NLRB v. Blake Const. Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981), where the objections were "no paragon of precision or detail," they were found to be considerably more focused and quite different from the "general pro forma objections found to be impermissibly vague in other cases relied on by the Board." See, *Marshall Field Company v. NLRB*, 318 U.S. 253 (1943), (only objection was examiner erred "in making each and every

recommendation"); *NLRB v. Seven-Up Bottling Company*, 344 U.S. 344, 350, (1953) (only objection was the remedy was "contrary to, and unsupported by, the evidence and contrary to law"). *see also Camelot Terrace*, at 1090 (petitioners' exceptions and supporting brief, although "no paragon of precision or detail . . . included several statements adequate to apprise the Board that the [petitioners] intended to press the question now presented."

In addition, *City of Waukesha v. E.P.A.*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) does not apply here. The Board omits the emphasized part of the quote: "Because this argument was raised in the opening brief only summarily, without explanation or reasoning, *and first raised comprehensibly only in the reply brief, it is waived.*" *See Steel Joist Inst. v. OSHA*, 287 F.3d 1165, 1166 (D.C.Cir.2002) (argument presented for first time in reply brief held waived) (citing *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 607 n. 10 (D.C.Cir.2000)). Here, Petitioner Jarrar neither raised the argument in the first time in this reply brief, nor just alluded to it in his opening brief.

Even if the Court were to find that the Board did not have adequate notice of the issues and arguments, including argument #1, prior to issuing its decision, "extraordinary circumstances" nevertheless warrant this Court considering Petitioner Jarrar's arguments. *See* 29 U.S.C. § 160(e). Petitioner Jarrar is handling this matter Pro Se with no access to counsel during a global

pandemic, and the issue at hand is so extraordinary and sever that, as Petitioner Jarrar's opening brief states, it deals with a "hyper-partisan NLRB Board that, according to the NLRB Board's own dissenting member, has been tearing down NLRA protections 'at every opportunity, real or invented.'" (JA 7)

B- The Board's claim that this Court has no jurisdiction to review extra-record evidence is meritless.

In its brief, the Board objects almost ten times to using extra-record evidence and it claims that "the Court lacks jurisdiction to consider such extra-record material [...]." Contrary to the Board's claim, and as Petitioner Jarrar points out in his Opening Brief, "this Court may expand the record under Federal Rule of Appellate Procedure 10(e)." The Opening Brief also requested that the Court reviews "Board's interpretation of the common law de novo."

II. The Board Fails to Reconcile Longstanding Precedent

The Board barely attempts to reconcile its longstanding procedure and precedent. As Petitioner Jarrar's Opening Brief points out, the Board departed without explanation from binding precedent, including on protections under Section 7 of the NLRA and on the issue of the employees joining the petition to protect their own conditions of employment. In its brief, the Board has failed to present the reasoned explanation that this Court requires when an agency departs from or distinguishes precedent.

**A- The Board Failed to reconcile longstanding precedent
pertaining to employees joining the petition to protect their
own conditions of employment**

As the Board's dissenting member stated in the NLRB Decision and Order (JA 6):

The majority dismisses any suggestion that supporting the interns' petition might have positively affected the employees' terms and conditions as speculative, asserting that "there is no evidence suggesting that the employees joined the petition in order to change or protect their own conditions of employment." But no such evidence is necessary because the test of whether an activity is for "mutual aid or protection" is an objective one. [Fresh & Easy, supra, 361 NLRB at 153]

Petitioner Jarrar echoes the same sentiment in his Opening Brief:

no such evidence is necessary because the test of whether an activity is for "mutual aid or protection" is an objective one, according to Fresh & Easy, supra, 361 NLRB at 153. By basing their determination on the lack of presented evidence, the NLRB Board departed from its precedent set in Fresh with no explanation.

The Board does not even attempt to reconcile or distinguish Fresh. The Board does not address the point that no evidence is needed in the first place and that the test is objective. Rather, the Board ironically digs deeper in the evidence zone and criticizes the extra-record evidence provided in Petitioner Jarrar's Opening Brief.

Based on all the information presented in Petitioner Jarrar's Opening Brief, an objective test would certainly lead to the conclusion that the interns

issue *affected* the employees' own terms and conditions of employment and that employees *joined* the petition in order to change or protect their own terms and conditions of employment, as Petitioner Jarrar argued in his Opening Brief.

The Board has failed to present the reasoned explanation that this Court requires when an agency departs from or distinguishes precedent.

B - The Board Failed to Reconcile Longstanding Section 7 Precedent

As Petitioner Jarrar argued in his Opening Brief, the NLRB's primary rationale that "[a]ctivity advocating only for nonemployees is not for 'other mutual aid or protection' within the meaning of Section 7 and accordingly does not qualify for the Act's protection" is contrary to law and precedents. This unprecedented ruling triggered this declaration by the NLRB Board's dissenting member: "Until today, it was clear that the National Labor Relations Act protected covered employees who joined together to help their coworkers, even if those workers were not covered themselves. Because the Board should uphold the protections of the Act, not tear them down at every opportunity, real or invented, I dissent." (JA 7)

In his Opening Brief, Petitioner Jarrar points out that Section 7 of the Act provides in relevant part: "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. . . .” 29 U.S.C. §157.

More importantly, Petitioner Jarrar explains in his Opening Brief that according to the Supreme Court, employee conduct is protected under Section 7 of the Act when it is concerted and engaged in for mutual aid and protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Petitions that relate to terms and conditions of employment—such as a petition for better wages—are a form of protected concerted activity for ‘mutual aid or protection’. E.g., *Sam’s Club*, 322 NLRB 8, 14 (1996) (holding that circulating a petition protesting labor conditions and soliciting signatures to the petition is concerted activity). Concerted activity undertaken solely for the benefit of or in solidarity with other employees is also protected. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155 (2014) (“Congress created a framework for employees to band together in solidarity to address their terms and conditions of employment”)

Eastex held that employees’ distribution of a newsletter opposing right-to-work legislation and supporting voter registration to elect candidates favoring minimum-wage increase was for “mutual aid or protection,” which is a much lower standard than the facts at hand in this case involving employees, including interns, of the same organization.

The Board barely attempts to reconcile or distinguish Eastex. The best the Board could come up with is citing¹ *Five Star Transp., Inc.*, 349 NLRB 42 (2007) again, which is literally the one and only case relied upon in the Board's Decision and Order. Five Stars is easily distinguishable. As the Board's dissenting member pointed out (JA 6):

The only Board decision relied upon by the majority, meanwhile, is easily distinguishable. Five Star involved the efforts of school bus drivers to prevent a school district from awarding the driving contract to another company. Certain drivers wrote letters to the school district that "focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others."

In that context, a divided Board panel concluded that the letter-writers had not engaged in Section 7 activity. The Five Star drivers, unlike the employees here, were not supporting co-workers on whom they relied—the Board majority found they were expressing general concern about public safety. Whatever might be said about the situation in Five Star, the facts in this case clearly do not support a finding that (in the words of the Eastex Court) the relationship between employees' concerted activity and their interests as employees is "so attenuated that [the] activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."

[...]

¹ The Board's citation of Five Stars does not mention that the actual quote is from *Waters of Orchard Park*, 341 N.L.R.B. 642, not Five Stars. As the Board's dissenting member points out: "The Five Star Board cited *Waters of Orchard Park*, 341 NLRB 642 (2004), as support. That case, too, is easily distinguishable. There, the Board held that nurses who called a state agency to complain about excessive heat in a nursing home did not engage in Sec. 7 activity because they had disclaimed any interest in their own working conditions and instead insisted that they were calling only to protect patients."

Also, in Five Stars, the Board did caution that a written communication must be considered "in its entirety and in context" when determining whether there is a "nexus to terms and conditions of employment," which is precisely what the Board has failed to do here.

The mere fact that the Board could not come up with a single authority other than Five Stars to justify its departure from the record, even after the Board's Dissenting Member distinguished it in the Board's Decision and Order, should be enough for the Court to grant the Petition for Review.

It's worth noting that the Board's dissenting member stated (JA 4):

The majority's holding that the employees did not engage in protected concerted activity presents a separate basis on which the employees may seek judicial review of the Board's order as "person[s] aggrieved." See Act, Sec. 10(f), 29 U.S.C. §160(f). Entirely apart from the dismissal of the 8(a)(1) allegation here, the holding has the independent effect of permitting Amnesty to discipline or discharge employees for any past or future concerted activity on behalf of the interns

The NLRB Board Majority would agree that without the controversial ruling on Section 7, their entire case would not survive (JA 3):

Our concurring colleague faults us for reaching the question whether the employees engaged in activity protected by Sec. 7 here because, in her view, the case could be decided solely on the basis that the Respondent had not threatened employees with reprisal for future protected activity. We disagree. The judge found the employees had engaged in protected activity and included, among the violations he found, that "[t]he Respondent violated Sec[.] 8(a)(1) . . . by: . . . (b) threatening employees with unspecified reprisal because they engaged in protected concerted activity."

Petitioner Jarrar agrees with the Board's statement inasmuch as if this Court overturns the Section 7 ruling alone, the Court will effectively overturn the NLRB Decision and Order in its entirety.

C- The Board's Brief Fails to Address or Respond to Key Arguments in Petitioner Jarrar's Opening Brief

Finally, the Board's brief fails to address or impugn other key arguments raised in Petitioner Jarrar's Opening Brief.

For example, the Board does not contest the authenticity of the emails sent to Petitioner Jarrar by the NLRB's Counsel for the General Counsel, where they confirmed that Amnesty International USA was "*willing to enter into formal settlement stipulation under which they would be agreeing to entry of a Board order covering all of the violations found by Judge Rosas, which would include a cease-and-desist remedy as well as posting a notice for employees. It's basically a consent decree,*" and later confirmed that the "*Region was under the impression from discussions with the Board's Executive Secretary's office that a decision would not be issuing pending these talks. It was very much a surprise that it came out.*" The Board's only attempt to address this is by claiming that settlement talks do not "preclude" the Board from issuing an order, but it does not explain the Board's departure from its precedent and procedure.

Another example is the Board's failure to address the lack of authority to determine common law issues such as employment status. The Board concedes in a footnote on page 31 that "Section 2(3) of the NLRA provides that "[t]he term 'employee' shall include any employee" aside from specific, enumerated exceptions. 29 U.S.C. § 152(3)." The Board relies on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) to claim the ultimate authority of defining who is an employee. But *Sure-Tan* proves the exact opposite – it revolves around the Board's decision to extend the Act's protections to "undocumented aliens," and the Court side with the Board "[s]ince undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee,'" which is exactly the argument raised by Petitioner Jarrar in the Opening Brief.

Another example is that the Board's response pertaining to Amnesty International USA's statements that violated the Act. The Board merely repeats the same arguments and conclusions in its Decision and Order without even attempting to address the fact that its findings are not supported by substantial evidence, including an audio recording that was relied upon by the Administrative Law Judge.

CONCLUSION

For the foregoing reasons and for those set forth in his Opening Brief, Petitioner Jarrar respectfully requests that the Court grants this Petition for Review and vacates Order No. 05-CA-221952 reported at 368 NLRB No. 112.

Date: November 30, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(a) that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,439 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Microsoft Word in a proportional 14-point typeface in Times New Roman font.

CERTIFICATE OF SERVICE

I certify that I electronically filed this PETITIONER'S FINAL
REPLY BRIEF with the United States Court of Appeals for the District of
Columbia Circuit via the Court's CM/ECF system on November 30, 2020,
and that service will be made on counsel of record for all parties to this case
through the Court's CM/ECF system.