

**Nos. 10-4334, 10-4465**

---

---

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**J.S. CARAMBOLA, LLP**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**ROBERT J. ENGLEHART**  
*Supervisor Attorney*

**DAVID SEID**  
*Attorney*  
**National Labor Relations Board**  
**1099 14th Street, N.W.**  
**Washington, D.C. 20570**  
**(202) 273-2978**  
**(202) 273-2941**

**LAFE E. SOLOMON**  
*Acting General Counsel*  
**CELESTE J. MATTINA**  
*Acting Deputy General Counsel*  
**JOHN H. FERGUSON**  
*Associate General Counsel*  
**LINDA DREEBEN**  
*Deputy Associate General Counsel*

**National Labor Relations Board**

---

**TABLE OF CONTENTS**

| <b>Headings</b>   | <b>Page(s)</b> |
|---|----------------|
| Statement of subject matter and appellate jurisdiction .....  | 1              |
| Statement of the issue presented .....  | 3              |
| Statement of the case.....  | 3              |
| I. The Board’s finding of fact .....  | 4              |
| A. The representation proceeding .....  | 4              |
| B. The initial unfair labor practice proceeding.....  | 6              |
| C. The prior appeal and this Court’s remand.....  | 7              |
| II. The Board’s conclusions and orders after this Court’s remand.....   | 8              |
| Statement of related cases .....  | 11             |
| Statement of the standard and scope of review.....  | 11             |
| Summary of argument.....  | 13             |
| Argument.....   | 14             |
| Substantial evidence supports the Board’s decision to overrule the Company’s objection to the representation election alleging improper prounion conduct by supervisors, and therefore the Board properly found that the company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union..... | 14             |
| A. Applicable principles .....  | 15             |
| B. Substantial evidence supports the Board’s decision not to set aside the results of the election.....   | 17             |

**TABLE OF CONTENTS**

| <b>Headings – Cont’d</b>  | <b>Page(s)</b> |
|---|----------------|
| C. The Company’s contentions that Thompson engaged in the objectionable conduct are without merit.....  | 21             |
| D. The Board did not abuse its discretion by partially revoking a company subpoena and by declining to enforce a subpoena that sought union phone records ..... | 23             |
| E. The Company’s remaining attack on the Board’s order is without merit .....   | 26             |
| Conclusion .....  | 28             |

## TABLE OF AUTHORITIES

| <b>Cases</b>   | <b>Page(s)</b>    |
|--|-------------------|
| <i>AOTOP, LLC. v. NLRB</i> ,<br>331 F.3d 100 (D.C. Cir. 2003) .....  | 18                |
| <i>Albertson's Inc. v. NLRB</i> ,<br>161 F.3d 1231 (10th Cir. 1998) .....  | 13                |
| <i>Amalgamated Clothing &amp; Textile Workers Union-AFL-CIO, CLC v. NLRB</i> ,<br>736 F.2d 1559 (D.C. Cir. 1984) ..... | 13                |
| <i>Boire v. Greyhound Corp.</i> ,<br>376 U.S. 473 (1964).....  | 2                 |
| <i>Burns Sec. Serv., Inc.</i> ,<br>278 NLRB 565 (1986) .....   | 24                |
| <i>Cavert Acquisition Co. v. NLRB</i> ,<br>83 F.3d 598 (3d Cir. 1996).....   | 14                |
| <i>Dayton Hudson Department Store Co. v. NLRB</i> ,<br>79 F.3d 546 (6th Cir. 1996) .....                               | 11,23             |
| <i>Deffenbaugh Industries, Inc. v. NLRB</i> ,<br>122 F.3d 582 (8th Cir. 1997) .....                                    | 11                |
| <i>Freund Baking Co.</i> ,<br>330 NLRB 17 (1999) .....   | 3                 |
| <i>Harborside Healthcare, Inc.</i> ,<br>343 NLRB 906 (2004) .....  | 15,16,17,18,20,21 |
| <i>Health Care &amp; Retirement Corp. of America v. NLRB</i> ,<br>255 F.3d 276 (6th Cir. 2000) .....                   | 13                |
| <i>Jamesway Corp. v. NLRB</i> ,<br>676 F.2d 63 (3d Cir. 1982).....   | 12                |

**TABLE OF AUTHORITIES**

| <b>Cases – Cont’d</b>   | <b>Page(s)</b> |
|---|----------------|
| <i>Joseph T. Ryerson &amp; Son, Inc. v. NLRB</i> ,<br>216 F.3d 1146 (D.C. Cir. 2000)..... | 23             |
| <i>Kux Manufacturing Co. v. NLRB</i> ,<br>890 F.2d 804 (6th Cir. 1989) .....              | 11,24          |
| <i>Madison Square Garden Ct.</i> ,<br>350 NLRB 117 (2007) .....                           | 20             |
| <i>Mid-Wilshire Healthcare Center</i> ,<br>349 NLRB 1372 (2007) .....                     | 19,21          |
| <i>NLRB v. A.J. Tower Co.</i> ,<br>329 U.S. 324 (1946).....                               | 11             |
| <i>NLRB v. Bancroft Manufacturing Co.</i> ,<br>516 F.2d 436 (5th Cir. 1975) .....         | 24             |
| <i>NLRB v. Basic Wire Products, Inc.</i> ,<br>516 F.2d 261 (6th Cir. 1975) .....          | 18             |
| <i>NLRB v. Blackstone Manufacturing Co.</i> ,<br>123 F.2d 633 (2d Cir. 1941).....         | 24             |
| <i>NLRB v. Cedar Tree Press, Inc.</i> ,<br>169 F.3d 794 (3d Cir. 1999).....               | 11             |
| <i>NLRB v. Dutch Boy, Inc.</i> ,<br>606 F.2d 929 (10th Cir. 1979) .....                   | 24             |
| <i>NLRB v. Family Fare, Inc.</i> ,<br>205 Fed Appx. 403 (6th Cir. 2006).....              | 19,21          |
| <i>NLRB v. FES, a Division of Thermo Power</i> ,<br>301 F.3d 83 (3d Cir. 2002).....       | 6              |

**TABLE OF AUTHORITIES**

| <b>Cases – Cont’d</b>  | <b>Page(s)</b> |
|--|----------------|
| <i>NLRB v. Garry Manufacturing Co.</i> ,<br>630 F.2d 934 (3d Cir. 1980).....                           | 16,17          |
| <i>NLRB v. Hood Furniture Manufacturing Co.</i> ,<br>941 F.2d 325 (5th Cir. 1991) .....                | 18             |
| <i>NLRB v. Kentucky Tennessee Clay Co.</i> ,<br>295 F.3d 436 (4th Cir. 2002) .....                     | 18             |
| <i>NLRB v. Mattison Machine Works</i> ,<br>365 U.S. 123 (1961).....                                    | 11             |
| <i>NLRB v. Mickey's Linen &amp; Towel Supply, Inc.</i> ,<br>460 F.3d 840 (7th Cir. 2006) .....         | 13             |
| <i>NLRB v. Newark Morning Ledger Co.</i> ,<br>120 F.2d 262 (3d Cir. 1941).....                         | 14             |
| <i>NLRB v. Seine &amp; Line Fishermen's Union of San Pedro</i> ,<br>374 F.2d 974 (9th Cir. 1967) ..... | 24             |
| <i>NLRB v. Urban Telegraph</i> ,<br>499 F.2d 239 (7th Cir. 1974) .....                                 | 18             |
| <i>New Process Steel, L.P. v. NLRB</i> ,<br>130 S. Ct. 2635 (2010).....                                | 7              |
| <i>Northeast Iowa Telegraph, Co.</i> ,<br>346 NLRB 465 (2006) .....                                    | 19,21          |
| <i>SNE Enterprises</i> ,<br>348 NLRB 1041 (2006) .....   | 20             |
| <i>Speedrack, Inc.</i> ,<br>293 NLRB 1054 (1989) .....   | 24             |

**TABLE OF AUTHORITIES**

| <b>Cases – Cont’d</b>  | <b>Page(s)</b> |
|--|----------------|
| <i>St. George Warehouse, Inc. v. NLRB</i> ,<br>420 F.3d 294 (3d Cir. 2008).....        | 13             |
| <i>Universal Camera Corp. v. NLRB</i> ,<br>340 U.S. 474 (1951).....                    | 12             |
| <i>Werthan Packaging, Inc.</i> ,<br>345 NLRB 343 (2005) .....                          | 18             |
| <i>Woelke &amp; Romero Framing v. NLRB</i> ,<br>456 U.S. 645 (1982).....               | 6              |
| <i>Zieglers Refuse Collectors, Inc. v. NLRB</i> ,<br>639 F.2d 1000 (3d Cir. 1981)..... | 11,12,18       |

**TABLE OF AUTHORITIES**

| <b>Statutes:</b>  | <b>Page(s)</b>  |
|---|-----------------|
| National Labor Relations Act, as amended<br>(29 U.S.C. § 151 et seq.) |                 |
| Section 7 (29 U.S.C. § 157) .....                                     | 10              |
| Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....                          | 1,3,6,7,9,14    |
| Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....                          | 1,3,6,7,9,14,27 |
| Section 8(c) (29 U.S.C. § 158(c)) .....                               | 15              |
| Section 9(d) (29 U.S.C. § 159(d)).....                                | 2               |
| Section 9(c) (29 U.S.C. § 159(c)) .....                               | 2               |
| Section 10(a) (29 U.S.C. § 160(a)) .....                              | 2               |
| Section 10(e) (29 U.S.C. § 160(e)) .....                              | 2,6             |
| Section 10(f) (29 U.S.C. § 160(f)) .....                              | 2               |

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

---

**Nos. 10-4334, 10-4465**

---

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**J.S. CARAMBOLA, LLP**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and on the cross-petition of J.S. Carambola, LLP (“the Company”) to review and set aside, a Board order finding that the Company violated Section 8(a)(5) and (1) of the National Labor Relations

Act (29 U.S.C. §§ 151, 158(a)(5) and (1)) (“the Act”) by failing to recognize and bargain with the Our Virgin Islands Labor Union (“the Union”). (A. 1-5.) The Board’s Decision and Order issued on November 10, 2010, and is reported at 356 NLRB No. 23 (2010.) (A. 6-8.)<sup>1</sup>

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Board’s Order is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over the case under Section 10(e) and (f) of the Act because the Company operates a facility in St. Croix, United States Virgin Islands (“VI”).

Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 24-RC-8577), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The Court has jurisdiction to review the Board’s actions in the representation case solely for the purpose of “enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board.” 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume

---

<sup>1</sup> “A.” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following a semicolon are to the supporting evidence.

processing the representation case in a manner consistent with the Court's rulings. *See Freund Baking Co.*, 330 NLRB 17 n.3 (1999) (citing cases).

The Board filed its application for enforcement on November 12, 2010. (A. 1-3.) The Company filed its cross-application for enforcement on November 24, 2010. (A. 4-5.) Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's decision to overrule the Company's election objection alleging improper prounion activity by supervisors, and therefore properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the Board-certified representative of a unit of its employees.

### **STATEMENT OF THE CASE**

The Board found (A. 6-8) that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of employees at its hotel and resort located in St. Croix, VI.<sup>2</sup> The Company does not dispute that it refused to bargain. It asserts that the Board erred by overruling, after a hearing, its election Objection

---

<sup>2</sup> The bargaining unit includes "[a]ll full time and regular part-time employees including cooks, bartenders, housekeeping and laundry workers, receptionists, waiters, waitresses, and maintenance workers . . . ." (A. 7.)

3. Relevant portions of the procedural history of the case before the Board are summarized below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Representation Proceeding**

The Company operates a hotel and resort in St. Croix, VI. (A. 30 par. 2(a), 38 par. 2(a)). On September 20, 2007, the Union filed a representation petition with the Board seeking to represent a unit of the Company's employees at its St. Croix facility. (A. 113.)

On October 25, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the designated employees. The tally of ballots showed that, of approximately 78 eligible employees, 36 cast ballots for the Union and 27 against it, with no challenged ballots. (A. 76; 113-18). The Company filed five timely objections to the election, but submitted evidence only on Objection 3, in which it claimed that the Union interfered with the election by having prounion supervisors "campaigning on behalf of the Union including soliciting the signing of authorization cards, instructing to attend union meetings and making other prounion statements that would tend to threaten or coerce employees." (A. 77; 119-23, 184-86, 260-63.)

After reviewing the Company's evidence in support of its objections to the election, the Board's Regional Director issued her Report on Objections in which

she directed that a hearing be held on Objection 3, and determined that the remaining objections be overruled. (A. 119-23.) On December 18, the Board's Regional Office conducted a hearing to receive evidence on Objection 3. (A. 77.)

Thereafter, the Board's hearing officer issued a Report and Recommendation on Objections in which she recommended overruling Objection 3 and certifying the Union. (A. 76-95.) The hearing officer found that kitchen employee Lauritz Thompson, the only person alleged to have engaged in improper prounion conduct by allegedly telling employees, "If you don't vote for the Union you are a stupid ass," was not a statutory supervisor, and that even if he was, he did not engage in any objectionable conduct that would warrant overturning the election. (A. 87-94.) The Company had terminated Thompson after he declined to write a statement admitting that he had engaged in union activity. (A. 86-87; 364-74, 490.)

The Company filed timely exceptions to the hearing officer's recommendation. Thereafter, on May 28, 2008, the two remaining Board members issued a Decision and Certification of Representative in which it adopted the hearing officer's recommendations and certified the Union. (A. 73-75.) The Board found it "unnecessary to pass on Thompson's supervisory status[. . . ]

agree[ing] with the hearing officer that, even assuming Thompson was a supervisor, his [alleged] statement was not objectionable.” (A. 74 n.3.)<sup>3</sup>

### **B. The Initial Unfair Labor Practice Proceeding**

After the Board’s certification issued, the Board’s General Counsel issued a complaint based upon the Union’s unfair labor practice charge that the Company had refused to bargain with the Union. Specifically, the complaint alleged that on June 16, 2008, the Union had requested bargaining, and that since June 25, 2008, the Company had denied the Union’s request, an action that violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A. 59, 169-75.) The Company admitted its refusal to bargain after receiving a request to bargain from the Union, but disputed the validity of the Union’s certification as the employees’ bargaining representative. (A. 173, 178-80.)

In light of the Company’s admission that it refused to bargain with the Union, the Board’s General Counsel filed a motion for summary judgment, and a notice to show cause why the General Counsel’s motion should not be granted. (A. 59; 105-11, 181-82.) The Company filed a response, arguing that the Board

---

<sup>3</sup> Since the Company did not file exceptions with the Board to the Regional Director’s overruling of Company Objections 1, 2, 4, and 5, it is barred from challenging those findings. 29 U.S.C. § 160(e). *See Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 666-67 (1982); *NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 89 (3d Cir. 2002).

should not grant summary judgment because the Board had improperly certified the Union as the exclusive bargaining representative in the underlying representation proceeding. (A. 59; 243-54.) On September 17, 2008, the only two sitting members of the Board issued a Decision and Order, granting the General Counsel's motion for summary judgment, and finding the Company's refusal to recognize and bargain with the Union violated Section 8(a)(5) and (1) of the Act. (A. 59-61.) The Company then filed a motion for reconsideration and memorandum in support. On November 7, the Board issued an order denying the Company's motion. (A. 62, 255-56.)

### **C. The Prior Appeal and this Court's Remand**

Following the Board's September 17, 2008 Decision and Order, the Company petitioned this Court for review of the Board's Order, and the Board cross-applied for enforcement. (Case Nos. 08-4729 and 09-1035). (A. 57, 64-68.) On June 17, 2010, after the case was briefed, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. The Board then requested that this Court remand the case for further proceedings consistent with the Supreme Court's decision (A. 47-53), which this Court granted on July 1, 2010 (A. 54-55).

## II. THE BOARD'S CONCLUSIONS AND ORDERS AFTER THIS COURT'S REMAND

On August 6, 2010, the Board issued a Decision, Certification of Representative, and Notice to Show Cause. (A. 9-10.) The Board explained that because its September 17, 2008 Decision and Order finding that the Company had unlawfully refused to recognize the Union was decided by a two-member Board, it would not give that decision “preclusive effect.” (A. 9.) The Board “also considered the postelection representation issues raised by the [Company]” and “reviewed the record in light of the exceptions and brief.” (A. 9.) On that basis, the Board certified the Union as the exclusive collective-bargaining representative of a unit of the Company’s employees, and adopted the Regional Director’s “findings and recommendations to the extent and for the reasons stated in [its] May 28, 2008 Decision and Certification of Representative,” which the Board “incorporated by reference.” (A. 9.)

The Board recognized that, “[a]lthough the [Company’s] legal position may remain unchanged, it is possible that the [Company] has or intends to commence bargaining,” and “possible that other events may have occurred during the pendency of [the] litigation that the parties may wish to bring to [the Board’s] attention.” (A. 9.) Accordingly, the Board gave the General Counsel leave to amend the complaint “to conform with the current state of the evidence,” and to the Company to file an answer to any amended complaint. (A. 9-10.) The Board also

gave the Company an opportunity to show why the Board should not grant the motion for summary judgment and to file a supporting brief or statement. (A. 10; 18.)

On September 3, 2010, the General Counsel issued an amended complaint alleging that the Company had refused to recognize and bargain with the Union “[s]ince about” June 25, 2008, and that its refusal violated Section 8(a)(5) and (1) of the Act. (29 U.S.C. §158(a)(5) and (1).) (A. 6; 30-34.) On September 7, 2010, the Union set a letter to the Company and its counsel that renewed the Union’s request for bargaining. (A. 42-46.) Thereafter, the Company filed an answer to the amended complaint in which it admitted its refusal to bargain after the Union’s June 2008 request, but disputed the validity of the Union’s certification as the employees’ bargaining representative. The Company also asserted that the General Counsel’s amended complaint was premature because as of September 3, 2010, the date of the amended complaint, it had not received a renewed demand for bargaining. (A. 6; 38-40.) Similarly, the Company filed an opposition to the Board’s motion for summary judgment, in which it asserted that the General Counsel’s amended complaint and motion for summary judgment were premature because the Union had not renewed its bargaining demand prior to those filings. (A. 27.)

On November 10, 2010, the Board (Chairman Liebman and Members Becker and Hayes) issued its Decision and Order, granting the General Counsel's motion for summary judgment. (A. 6-8.) The Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A. 6.) The Board also found that the Company did "not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings." (A. 6.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union. (A. 7.)

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A. 7.) Affirmatively, the Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post and electronically distribute an appropriate remedial notice to employees. (A. 7-8.)

## STATEMENT OF RELATED CASES

This case has not previously been before this Court and Board counsel is not aware of any related case pending before this or any other court.

## STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

Congress has entrusted to the Board the task of deciding representation questions under the Act and has given the Board a “wide degree of discretion” to establish the “safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 795 (3d Cir. 1999).

“There is a strong presumption that an election conducted by the [B]oard reflects the employees’ true desires regarding representation.” *Deffenbaugh Indus., Inc. v. NLRB*, 122 F.3d 582, 586 (8th Cir. 1997). *Accord Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). Thus, the party seeking to overturn a Board-conducted election has the burden to establish that the election was not fairly conducted. *See NLRB v. Mattison Mach. Works*, 365 U.S. 123, 124 (1961); *Dayton Hudson Dept. Store Co. v. NLRB*, 79 F.3d 546, 550 (6th Cir. 1996). That burden is a heavy one, requiring a showing that a “fair and free choice by the employees was impossible.” *Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1105 (3d Cir. 1981).

Parties objecting to the conduct of elections often argue, as here (Br. 32-33), that elections must occur under “laboratory conditions.” Yet, this Court recognizes that if an election was set aside whenever it failed to achieve “perfection,” “the employees’ choice of representative might never be accomplished, because a never-ending series of challenges to elections could be foreseen.” *Id.*

Accordingly, the Court will accept less-than-perfect conditions in the election process unless “coercive conduct has poisoned the fair and free choice” of employees and the conditions have “become so tainted that employees may have based their vote not upon conviction, but upon fear or upon other improperly induced consideration.” *Id.*

In determining whether a particular incident so disrupted an election as to warrant setting the election aside, a court must satisfy itself that the Board’s determination regarding the impact of the incident at issue is supported by substantial evidence on the record as a whole. *Jamesway Corp. v. NLRB*, 676 F.2d 63, 69 (3d Cir. 1982); *Zieglers Refuse Collectors*, 639 F.2d at 1105. Under that standard, the Board’s findings are conclusive if they represent a “choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In particular, “credibility determinations should not be reversed unless inherently incredible or patently unreasonable.” *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2008) (citation omitted).<sup>4</sup>

### SUMMARY OF ARGUMENT

The Board did not err by declining to overturn the election based on the evidence of a single pronoun statement by supervisor Lauritz Thompson to employees he did not supervise. For purposes of the decision, the Board assumed that, as alleged, Thompson stated: “If you don’t vote for the Union you are a stupid ass.” The Board reasonably found the statement was not coercive.

The Board also did not abuse its discretion by refusing to permit the Company to subpoena union phone records, including the private phone records of Union President Mario Ricky Brown. Such records would only show that a phone call was made between the Union and a purported supervisor, not that inappropriate conduct occurred. Moreover, the Company was not prejudiced by

---

<sup>4</sup> Although the above-referenced case--in which this Court has discussed in detail the standard used to review credibility determinations--refers to the findings of an administrative law judge in unfair labor practice cases, decisions make clear that courts accord the same sort of deference to the Board-approved findings of hearing officers in election-objection cases. *See NLRB v. Mickey’s Linen & Towel Supply, Inc.*, 460 F.3d 840, 842 (7th Cir. 2006); *Health Care & Ret. Corp. of Am. v. NLRB*, 255 F.3d 276, 282 (6th Cir. 2000); *Albertson’s Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998); *Amalgamated Clothing & Textile Workers Union-AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1563 (D.C. Cir. 1984).

the Board's decision because it was permitted to extensively question union witnesses about any contact with purported supervisors.

### **ARGUMENT**

#### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DECISION TO OVERRULE THE COMPANY'S OBJECTION TO THE REPRESENTATION ELECTION ALLEGING IMPROPER PROUNION CONDUCT BY SUPERVISORS, AND THEREFORE THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." The Company admitted in its answer to the complaint (A. 7; 39), and does not deny here, that it refused to bargain with the Union since June 2008 and after its certification. Accordingly, if the Board reasonably rejected the Company's objection regarding supervisory misconduct, then the Board's finding that that the Company violated Section 8(a)(5) and (1) of the Act is entitled to enforcement. *See Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 600-01, 610 (3d Cir. 1996).<sup>5</sup>

---

<sup>5</sup> Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7[.]" A violation of Section 8(a)(5) produces a "derivative" violation of Section 8(a)(1). *See NLRB v. Newark Morning Ledger Co.*, 120 F.2d 262, 265 & n.1, 267 (3d Cir. 1941).

We show below that the Board reasonably certified the Union because substantial evidence supports the Board's finding that Thompson's conduct did not warrant overturning the election.

### **A. Applicable Principles**

The Board in *Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004) ("*Harborside*"), declared that, "absent mitigating circumstances, supervisory solicitation of an authorization card has an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and therefore that "that conduct may be objectionable." *Id.* At the same time, the Board made plain that there is nothing the least bit objectionable about noncoercive prounion campaign speech by supervisors because "just as an employer, through its supervisors, can speak against representation . . . , a supervisor can also speak in favor of the union." *Id.*

Therefore, as long as no promise or threat is implicit in what prounion supervisors say in support of unionization, such comments simply add to the free flow of ideas that has long been recognized as the bedrock of an informed electorate. Indeed, it was precisely to insure that employees will have the opportunity to hear from management representatives about such issues that Congress enacted Section 8(c) of the Act (29 U.S.C. § 158(c)), which guarantees that employers can campaign freely without Board scrutiny as long as what they

say carries no implication of reward or punishment based upon how employees react to their views. *See generally, NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 937-38 (3d Cir. 1980).

In the end, the Board in *Harborside* enunciated a multifaceted test to determine whether prounion supervisory conduct upsets the requisite laboratory conditions for a fair election. First, the Board determines “[w]hether the supervisor’s prounion conduct reasonably tended to coerce or interfere with the exercise of employees’ free choice in the election.” *Id.* at 909. To answer that inquiry, the Board will “(a) consider[] the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) . . . the nature, extent, and context of the conduct in question.” *Id.*

If that inquiry concludes that prounion conduct reasonably tended to interfere with the employees’ exercise of free choice in the election, the Board turns to the second prong of the test to decide whether the misconduct affected the outcome of the election. In analyzing this, the Board considers “[w]hether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.” *Id.* That question, the Board explained, would be answered “based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the

conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.” *Id.*

**B. Substantial Evidence Supports the Board’s Decision Not To Set Aside the Results of the Election**

In its Objection 3, the Company claimed that the Union interfered with the election by having prounion supervisors “campaigning on behalf of the Union including soliciting the signing of authorization cards, instructing to attend union meetings and making other prounion statements that would tend to threaten or coerce employees.” (A. 77.) The only supporting evidence the Company provided was a claim that kitchen supervisor Lauritz Thompson told employees: “If you don’t vote for the Union you are a stupid ass.” (A. 92.) Evaluating that comment, the Board was fully warranted in finding (A. 9, 74 n.3), in agreement with the hearing officer, that “even assuming Thompson was a supervisor,” and even assuming he made the alleged statement, notwithstanding the credited evidence to the contrary, his statement “was not objectionable,” because it “could not reasonably have interfered with employee free choice in the election.”

Analyzing Thompson’s statement under *Harborside’s* first prong, which looks to whether coercive conduct occurred, the hearing officer reasonably concluded that, “although it may be offensive, [it] is not by itself of a coercive nature.” (A. 94) (footnote omitted.) A strong opinion for or against a union, even an offensive one, does not by itself constitute coercive conduct that warrants

overturning an election. *See Werthan Packaging, Inc.*, 345 NLRB 343, 343-44 (2005) (supervisor told union supporter that it was in her and “her family’s best interest to vote ‘no’”); *AOTOP, LLC. v. NLRB*, 331 F.3d 100, 104-05 (D.C. Cir. 2003) (union agent told employees that they “‘had to’ vote for the union”); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 329 (5th Cir. 1991) (statement to employee by another employee that “[y]ou know damn well the way you’re supposed to vote”); *NLRB v. Basic Wire Products, Inc.*, 516 F.2d 261, 265 (6th Cir. 1975) (statement by employee to another employee that “she was ‘gonna be sorry’ and would ‘regret it’ if she did not vote for the [u]nion.”) Indeed, the Board’s *Harborside* standard specifically recognizes that a supervisor has the right to express such opinions. 343 NLRB 906, 911.

Thompson’s statement stands in sharp contrast to the cases the Company relies on (Br. 36), where threatening statements of physical harm or job loss warranted overturning an election. *See NLRB v. Urban Tel.*, 499 F.2d 239, 241-44 (7th Cir. 1974) (employee’s statements attributable to union that employees would suffer “smashed faces” and that he would “kick ass” if the union did not win the election); *NLRB v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 439-40, 443, 445-46 (4th Cir. 2002) (union agent threatened employees with loss of job if they did not support the union); *Ziegler’s Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1003-04, 1010-11 (3d Cir. 1981) (a 6’7” ex-Marine threatened much smaller

employees that they should vote for the union if they knew what was good for them and that they would get their ass kicked if they did not).

In addition, as the Board emphasized (A. 9, 74 n.3), Thompson's statement, assuming it was made, was made to "some employees whom he did not supervise." Neither of the two people, whom the Company advances as having heard Thompson's statement, heard it directly from Thompson, and more importantly they were not subordinate to Thompson. (A. 80, 85, 92, 334-35, 337-42, 346-51.) The Board has consistently found that a supervisor's prounion conduct toward non-subordinate employees is less likely to be objectionable, even when it far more substantial than the alleged conduct here. For example, a supervisor's soliciting of non-subordinate employees to join the union has been found unobjectionable.<sup>6</sup> This case is, therefore, easily distinguishable from the case the Company relies on

---

<sup>6</sup> See *NLRB v. Family Fare, Inc.*, 205 Fed Appx. 403, 410-12 (6th Cir. 2006) (supervisors initiated union campaign, recruited others, and "spoke frequently about the union," but did not solicit any employees they supervised, or engage in "threatening, harassing, or intimidating behavior"); *Mid-Wilshire Healthcare Center*, 349 NLRB 1372, 1372-73 (2007) (supervisor spoke to an employee about the union, kept prounion paraphernalia in his office, and stood near the polling place); *Northeast Iowa Tel., Co.*, 346 NLRB 465, 467 (2006) (supervisors attended union meetings, signed authorization cards in front of other employees, and explained the benefits of unionization to employees, but no evidence that they solicited the employees they supervised).

(Br. 36), where supervisors engaged in objectionable conduct by directly soliciting employees whom they supervised.<sup>7</sup>

Finally, this case is very different factually from *Harborside*, see above pp. 15, where a supervisor was found to have engaged in objectionable conduct. There, the supervisor repeatedly threatened several employees with job loss if the union lost the election, and pressured employees to attend union meetings and sign union authorization cards. 343 NLRB 906, 909 (2004). Moreover, the supervisor in *Harborside* was a high level supervisor who had significant supervisory authority, including the authority to evaluate employees, directly suspend employees, and effectively recommend termination. *Id.* Here, although the Board assumed that Thompson was a supervisor and found it unnecessary to further examine the issue, there is no suggestion that he would have been a “high level supervisor.” Indeed, General Manager Jacques Baheux (A. 78; 395-96)—despite his testimony that Thompson recommended discipline—described Thompson’s role as a “mentor” or “coach” because his authority over the 3 to 5 employees he oversaw was more limited to ensuring that they properly prepared food and kept the kitchen clean. That testimony does not suggest that Thompson should be

---

<sup>7</sup> *Madison Square Garden Ct.*, 350 NLRB 117, 117-20 (2007) (supervisors led the union organizing effort and solicited employees whom they supervised). *See also SNE Enterprises*, 348 NLRB 1041, 1042-44 (2006) (supervisors did not engage in objectionable conduct by talking about the union, but did engage in objectionable conduct by soliciting employees whom they supervised).

deemed a “high-level” supervisor. *See NLRB v. Family Fare, Inc.*, 205 Fed Appx. 403, 410-11 (6th Cir. 2006) (court, applying *Harborside*, found that supervisors who had some role in discipline and wage increases were not high-level supervisors).<sup>8</sup>

**C. The Company’s Contentions that Thompson Engaged In Objectionable Conduct Are Without Merit**

The Company primarily argues that the hearing officer, as upheld by the Board, erred in crediting Thompson’s denial that he made the alleged statement (Br. 27-28), and that the hearing officer erred by finding that Thompson was not a supervisor (Br. 16-26). Those arguments, however, ignore the fact that the Board’s decision found that, even assuming Thompson was a supervisor and made the alleged statement, he simply did not engage in objectionable conduct. (A. 9, 74 n.3.)

---

<sup>8</sup> Even assuming Thompson’s alleged statement could have had a tendency to coerce employees, the Company, as the hearing officer noted (A. 94), has not shown any evidence that the statement would have met the second prong of *Harborside* by materially affecting the election outcome. Thus, given the margin of victory, the statement would have had to change five votes. Here, the Company has not shown that the statement affected any vote, let alone, five votes. Nor has the Company shown that Thompson’s conduct was widespread, widely disseminated, proximate to the election, or that employees would have thought that Thompson was speaking on behalf of the Company. By failing to meet those criteria, the Company has also failed to show how the statement would have had a lingering effect. *See Mid-Wilshire Healthcare Center*, 349 NLRB 1372, 1373 (2007); *Northeast Iowa Tel. Co.*, 346 NLRB 465, 467 (2006).

There is also no merit to the Company's attempt (Br. 34-35) to suggest that Thompson engaged in other prounion activity. In addition to Thompson's credited denial (A. 84-87, 93 and n.31; 373-74, 381, 415-16) that he had engaged in prounion activity, his testimony was corroborated by Union President Brown (A. 9, 74 n.2, 82 and n.12, 83, 92-93 and n.30; 282, 284, 294-95, 298-99, 451-52, 456-57), employee Sandra Byrd, who led the organizing effort (A. 9, 74, 83-84, 92-93 and n.30; 422-27, 429-30), and employee Charmaine Beverly Charles (A. 9, 74 n.2, 84, 92-93 and n.30; 436-40, 446-47), who testified that Thompson did not attend union meetings, solicit cards, or talk to employees about the Union.

The hearing officer (A. 127), as upheld by the Board (A. 9, 74 n.2), credited all of their testimony. As the hearing officer specifically found (A. 93), Thompson "testified in a candid and honest manner," and "consistently," "even though he was called to testify twice under subpoena by both parties." Likewise, the hearing officer found (A. 93 n.30) that Brown, Byrd, and Charles "testified consistently and without contradictions," and he noted that Byrd and Charles testified contrary to the Company's position despite being current employees. The Company has not

shown any extraordinary basis to reverse these demeanor-based credibility findings (A. 127).<sup>9</sup>

**D. The Board Did Not Abuse Its Discretion by Partially Revoking a Company Subpoena and by Declining To Enforce a Subpoena that Sought Union Phone Records**

Finally, the Company contends (Br. 26-32) that the hearing officer (A. 82 n.11; 274-80, 473, 483), as upheld by the Board (A. 9, 74 n.2), erred by partially revoking a subpoena and declining to enforce a second subpoena that sought union phone records and records from any other phone used by Union President Brown in the months leading up to the election. The Company was seeking evidence of union phone calls to 26 of the Company's purported supervisors and managers, including Thompson.

The Board's decision to revoke a subpoena is reviewed for abuse of discretion. *Joseph T. Ryerson & Son, Inc. v. NLRB*, 216 F.3d 1146, 1153-54 (D.C. Cir. 2000); *Dayton Hudson Dept. Store Co. v. NLRB*, 79 F.3d 546, 552 (6th Cir.

---

<sup>9</sup> The fact that Thompson did not provide the Company with a written statement denying the Company's allegations (Br. 34-35) does not constitute an extraordinary circumstance that undermines his credibility. Thompson's testimony (A. 86-87; 364-74) regarding the meeting with company officials, and the Company's own notes of that meeting (A. 440), show that the Company was holding a kangaroo court. General Manager Baheux repeatedly accused Thompson of having engaged in undisclosed prounion conduct, and Baheux directed him to write a statement admitting prounion conduct or else be terminated. When Thompson did not provide the Company with the statement it wanted, the Company terminated him.

1996); *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 446-47 (5th Cir. 1975).

Moreover, a private party who contends that a subpoena has been denied or revoked improperly must “demonstrate prejudicial error.” *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 933 (10th Cir. 1979). *Accord NLRB v. Seine & Line Fishermen’s Union of San Pedro*, 374 F.2d 974, 981-82 (9th Cir. 1967). *See also Kux Mfg Co.*, 890 F.2d at 811 (Board’s “disposition of a case will not be disturbed on the basis of alleged procedural irregularities unless the irregularities resulted in actual prejudice to the objecting parties’ interests”).

Here, the Company cannot establish that the Board abused its discretion in revoking the Company’s request for union phone records. Absent any supporting evidence of inappropriate pronoun conduct by supervisors, the Company’s request amounted to a mere fishing expedition for such evidence, something that the Board properly does not allow. *See Speedrack, Inc.*, 293 NLRB 1054, 1057 n.1 (1989); *Burns Sec. Serv., Inc.*, 278 NLRB 565, 566 (1986). *See also NLRB v. Blackstone Mfg. Co.*, 123 F.2d 633, 635 (2d Cir. 1941) (L. Hand, J.) (“While we should indeed be jealous of any denial of process to an employer, the Board is not powerless to prevent itself from being put upon by frivolous and dilatory demands”). As the hearing officer reasonably explained (A. 82; 302, 308), “at most the phone records would only establish that a phone call was made, but not the content of the conversation.”

Nonetheless, before partially revoking the Company's subpoena request, the hearing officer (A. 82 n.11; 289) did permit the Company to "question[] . . . the witnesses in connection with the phone records and phone calls made by the Union to the individuals listed in the [a]ttachment to the Subpoena and to examine and cross-examine Thompson . . . ." Through those questions the Company learned that Union President Brown had one main business phone, and several others primarily for personal use. (A. 310.) The Company also learned that, after Brown received the subpoena, he reviewed the Union's records. Brown's review established that the Company, which had the responsibility to prepare an *Excelsior* list of eligible voters, had listed Thompson as an eligible voter. Prior to receiving the subpoena with the attached names of purported supervisors, Brown did not know who Thompson was, and had never had any communication with him. (A. 81-82; 291-94, 311-12, 453-57, 493-94.) The Company also learned from Brown that his assistants, Ms. Garnett and Ms. Henry, had called employees on the *Excelsior* list and, unable to reach Thompson, left messages for him. (A. 292-94.) That testimony was corroborated by testimony from Henry. And notes taken by Garnett showed that Garnett had left three phone messages for Thompson to contact Henry, but that he did not contact her. (A. 326-29, 485-87.) Moreover, a comparison of the names on Garnett's notes with the *Excelsior* list of eligible voters and the Company's list of purported supervisors, confirms that she only

called employees on the *Excelsior* list, and that no other purported supervisors appear on the *Excelsior* list except for Thompson. (A. 484-87, 493-94.)

Finally, the Company was also able to question Brown regarding other information requested in the subpoenas. Through that questioning, the Company learned that none of the supervisors for whom the Company had sought information had signed an authorization card; that the Union had no written record of who had attended the three or four union meetings; and that Brown did not recall any of the supervisors or managers named by the Company as having attended a union meeting. (A. 82; 291, 294-95, 298-300, 447-48.)

In sum, the Company's mere speculation that union phone records would establish union phone calls to purported supervisors and managers falls far short of establishing that the Board abused its discretion by revoking the Company's subpoena for such records. That is particularly true here where the Company's extensive questioning of witnesses about those records and contemporaneous notes establish no phone contact other than messages left for Thompson.

**E. The Company's Remaining Attack on the Board's Order Is Without Merit**

The Company does not dispute that it has refused to recognize and bargain with the Union since the Union's June 2008 bargaining request. Nevertheless, the Company argues (Br. 13-16), even assuming the validity of the Board's August 6, 2010 certification, the Court must overturn the Board's subsequent November 10,

2010 unfair labor practice finding that the Company had refused to recognize and bargain with the Union because the Union never made a bargaining demand made after the Board's 2010 certification.

The Company, however, simply ignores the fact that the Union made a specific bargaining demand in September 7, 2010 letter, after the Board's August 2010 certification, and long before the Board's November 2010 unfair labor practice finding. In that letter, the Union's attorney "request[ed]" that the Company "begin discussion . . . to engage in collective bargaining negotiations."

(A. 46.) Though the Union's renewed bargaining demand came after the issuance of the amended complaint—but before the Board's Order—it is harmless error because the Company has never maintained that it began bargaining once it got the Union's September 7 bargaining request for bargaining.

Accordingly, as the Board found (A. 7), the Company's continuing refusal to bargain at the time the Board issued its November 10, 2010 unfair labor practice order was indisputably a violation of Section 8(a)(5) of the Act. And the fact that the Company's refusal may only have been a violation from September 7 on is of no moment because, as the Board explained (A. 7), "regardless of the exact date on which the [Company's] admitted refusal to bargain became unlawful, the remedy is the same."

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's Order in full.

/s/ Robert Englehart

**ROBERT ENGLEHART**

*Supervisory Attorney*

/s/ David Seid

**DAVID SEID**

*Attorney*

National Labor Relations Board  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2978  
(202) 273-2941

**LAFE E. SOLOMON**

*Acting General Counsel*

**CELRESTE J. MATTINA**

*Acting Deputy General Counsel*

**JOHN H. FERGUSON**

*Associate General Counsel*

**LINDA DREEBEN**

*Deputy Associate General Counsel*

**NATIONAL LABOR RELATIONS BOARD**

May 2011

H:Carambola(2011)-finalbrief-reds

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

|                                |                  |
|--------------------------------|------------------|
| NATIONAL LABOR RELATIONS BOARD | *                |
|                                | *                |
| Petitioner/Cross-Respondent    | * No. 10-2549    |
|                                | * 10-4465        |
| v.                             | *                |
|                                | * Board Case No. |
| J.S. CARAMBOLA, LLP            | * 24-CA-10951    |
|                                | *                |
| Respondent/Cross-Petitioner    | *                |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,305 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 27th day of May, 2011

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

|                                |                  |
|--------------------------------|------------------|
| NATIONAL LABOR RELATIONS BOARD | *                |
|                                | *                |
| Petitioner/Cross-Respondent    | * Nos. 10-4334   |
|                                | * 10-4465        |
| v.                             | *                |
|                                | * Board Case No. |
| J.S. CARAMBOLA, LLP            | * 24-CA-10951    |
|                                | *                |
| Respondent/Cross-Petitioner    | *                |

**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Charles E. Engeman, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart  
1336 Beltjen Road  
Suite 201  
St. Thomas, VI 00802

Christopher J. Moran, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart  
1600 Market Street  
Suite 2020  
Philadelphia, PA 19103-000

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 27th day of May, 2011