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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

3484, INC.; 3486, INC.,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Amicus Curiae.

Nos. 24-9511 & 24-9525

Petition for Review from an Order of the National Labor Relations Board
(NLRB Nos. 27-CA-278463, 27-CA-278592 & 27-CA-279117)

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Eric Weitz (Kira Dellinger Vol, Jennifer A. Abruzzo, Peter Sung Ohr, Ruth E. Burdick, and David Habenstreit with him on the brief) of the National Labor Relations Board, Washington, D.C., for Respondent/Cross-Petitioner.

Matthew Ginsburg and Maneesh Sharma, filed an Amicus Curiae brief in support of National Labor Relations Board.

Before **HARTZ**, **EID**, and **FEDERICO**, Circuit Judges.

HARTZ, Circuit Judge.

3484, Inc. and 3486, Inc. (the Employers) seek review of a decision and order of the National Labor Relations Board (NLRB or Board). The Board found that the Employers committed unfair labor practices in violation of the National Labor Relations Act (NLRA or the Act) § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3), and ordered relief. *See 3484, Inc.*, 373 N.L.R.B. No. 28, 2024 WL 1012781 (Mar. 7, 2024). The Employers argue that the Board's findings were not supported by substantial evidence and that the Board's procedures and remedies were not authorized by the Act or violated their constitutional rights.

Exercising jurisdiction under 29 U.S.C. § 160(e) and (f), we hold that substantial evidence supported all the Board's findings, except for its finding that 3484 unlawfully interrogated an employee about union activity. And we hold that we lack jurisdiction to consider the Employers' constitutional challenges and 3486's challenge to the Board's statutory authority because these arguments were not preserved for appellate review. *See* 29 U.S.C. § 160(e).

I. BACKGROUND

A. Factual Background

Unless otherwise indicated, the following facts are not disputed on appeal. Film producer David Wulf created two Utah corporations, 3484 and 3486, to produce two Hallmark movies. The articles of incorporation for 3484 were filed in January

2021 to produce *Christmas at the Madison*, and the articles of incorporation for 3486 were filed in April 2021 to produce *Love at the Pecan Farm*. Wulf was the sole owner and officer of both corporations.

The productions shared personnel. Jennifer Ricci served as the line producer for 3484 and the unit production manager for 3486. In both roles Ricci was responsible for overseeing the day-to-day operations of the production, which included hiring crew members, managing the budget, and keeping things on track. Brett Miller was the transportation coordinator for both productions. He was responsible for transporting vehicles, trailers, and equipment required for the movies, along with hiring and managing a crew of drivers. 3484 employed 13 drivers; nine of those drivers plus a new hire also worked on the later 3486 production. Most of the drivers were members of the International Brotherhood of Teamsters Local 222 based in Salt Lake City, Utah.

In April 2021, before production on the 3484 movie was set to begin, drivers employed by 3484 contacted Joshua Staheli, a business agent for Teamsters Local 399 based in Los Angeles, California. Local 399 is a craft union chartered specifically to represent workers in the film industry. The 3484 drivers wanted to discuss the prospect of negotiating a union contract.

Ricci heard that the 3484 drivers were considering organizing. She called April Hanson, a driver on the 3484 production whom she had known for ten years and asked her if she had heard anything about drivers organizing. Hanson responded

that she was not aware of any organizing efforts. The conversation lasted a minute. After the call Ricci texted Hanson, asking her to keep their conversation confidential.

Staheli ultimately decided not to organize the 3484 drivers because he felt that they had minimal bargaining power. But the same drivers reached out to Staheli again two months later, in early June 2021. This time they wanted to discuss organizing the drivers on the 3486 production. Staheli asked Local 399 representative Lindsay Dougherty to contact Wulf about bargaining with the union. On June 10 and 11, Daugherty emailed Wulf, asking to discuss a union contract for the 3486 drivers. Also, Staheli tried to contact Ricci on June 11.

Wulf informed transportation coordinator Miller that Daugherty had contacted him. He directed Miller to speak with the union, "figure something out," and "take care of it." Pet'rs App., Vol. I at 48–49. Time was of the essence, as filming on the 3486 movie was scheduled to begin on Sunday, June 13.

Still on June 11, Miller called driver Roy Brewer, who was the captain of the 3486 drivers. He asked Brewer if he knew who had called Local 399. Miller then warned Brewer that production on the 3486 movie and future Hallmark productions would move to Canada if the drivers organized.

After the call Brewer reported the exchange to Staheli. Staheli texted Miller and asked him to confirm the threat to relocate production, which Miller did without hesitation. That evening, on the basis of the exchange between Miller and Brewer, Staheli filed an unfair-labor-practice charge with the Board's Denver Regional Office. The charge alleged that 3486 violated § 8(a)(1) of the NLRA by "threatening

to retaliate against employees if they joined or supported a union" and "interrogating employees about their union activities." *Id.*, Vol. II at 583. The charge also alleged that 3486 violated § 8(a)(5) of the Act by "refus[ing] to recognize the union as the collective bargaining representative of its employees" and "refus[ing] to bargain in good faith with the union as the collective bargaining representative of its employees." *Id.* Staheli forwarded Wulf an email from the Board confirming its receipt of the charge.

The following day, June 12, the drivers transported the trucks, trailers, vans, and equipment to St. George, Utah, where filming was set to begin the next morning. Staheli drove to St. George to continue his efforts to obtain a union contract for the drivers. That day, he emailed Brewer a standard list of unfair labor practices for him to share with the other drivers so that they could look for additional violations.

The morning of June 13 Staheli sent Wulf a proposed collective bargaining agreement that would allow the drivers to obtain health insurance and retirement benefits. Staheli and two Local 222 business agents were at the first filming location—the Leeds Market in Leeds, Utah. While filming was underway, Staheli talked with many of the drivers.

Ricci, as unit production manager for 3486, was also by the drivers in the parking lot. Staheli spoke with her about the possibility of obtaining a union contract for the drivers. Ricci briefly stepped away and called Wulf. After speaking with Wulf, she reported to Staheli that she would have to get back to him about the

organizing efforts. Ricci also repeated what Miller had said to Brewer, telling Staheli that production would move to Canada if the drivers organized.

Shooting at the Leeds Market finished around noon. As the production crew was getting ready to move the trucks, trailers, equipment, vans, and crew to the next filming location (a pecan farm), Staheli asked Brewer to call the drivers together to vote on a strike. Staheli told the drivers that 3486 had committed unfair labor practices, that he anticipated that 3486 would continue to commit unfair labor practices, and that he and Local 399 were going to help the drivers strike in response. Staheli also told them that he wanted them to vote on whether to strike.

Following Staheli's direction, the drivers voted. Each wrote either "yes" or "no" on a piece of paper and dropped it into a baseball cap. All nine drivers voted to strike. Staheli walked over to Ricci to inform her that the drivers had voted to strike, and he texted Miller the same news.

The trucks, trailers, vans, and other equipment were leased to 3486 by a variety of different entities, including a company owned by Wulf. After the strike commenced, Staheli and Brewer had conversations with vendors to see what they wanted the drivers to do with their equipment, since the drivers would not be moving the equipment to the next filming location while on strike. Each contacted vendor asked for its equipment to be returned rather than abandoned at its present location. Staheli directed the drivers to move the equipment to the parking lot of the Best Western hotel where the drivers were staying. The drivers did not move various vehicles and equipment that they recognized they did not have permission to take.

Later that afternoon, Wulf emailed Staheli, claiming that the drivers had stolen 3486 property by moving it to the hotel. Wulf called the police to report the alleged theft. After the vehicles had been moved to the hotel, Staheli discovered that one of the vehicles contained 3486 property. That evening, Staheli, Wulf, and local police met in the hotel parking lot and Wulf himself retrieved the equipment from the vehicle. The police did not interfere, saying the dispute was a civil matter.

On June 14 the drivers picketed by the set at the pecan farm while filming on the 3486 movie continued. They chanted demands for employee benefits and held signs reading, "Stop the War on Workers" and "Honk." *Id.* at 671. The drivers picketed on and off until the last day of filming. 3486 hired two replacement drivers and hired additional drivers as needed.

On June 17 (day five of the strike), Spencer Hogue, the principal officer of Local 222, emailed Wulf on behalf of the striking drivers. The email notified Wulf that the drivers were ending the strike and made "an unconditional offer for all striking employees to return back to work." *Id.* at 610.

3486 did not reinstate any of the striking drivers. In a letter addressed to Staheli and Hogue, legal counsel for 3486 alleged that the drivers vandalized company equipment and property during the strike and asserted that this "serious misconduct . . . negates any right to reinstatement." *Id.* at 676. Shortly thereafter, Staheli filed another unfair-labor-practice charge with the Board, alleging that 3486 violated § 8(a)(3) of the NLRA by "refus[ing] to recall [employees] from layoff because the [employees] joined or supported a labor organization and in order to

discourage union activities or membership." *Id.* at 575. 3486 finished filming on July 2, 2021.

B. Procedural Background

In February 2022 the Board's General Counsel filed a consolidated complaint against 3484 and 3486. The complaint alleged that 3484 violated § 8(a)(1) of the Act when Ricci questioned Hanson about union activity and asked her to keep their conversation confidential. As for 3486, the complaint alleged violations of § 8(a)(1) when Miller questioned Brewer about union activity and threatened that film production would shut down if employees unionized, and it alleged a violation of § 8(a)(3) when 3486 refused to reinstate the drivers conducting an unfair-labor-practice strike despite their unconditional offer to return to work. The charges were consolidated for a hearing before an administrative law judge (ALJ). At the time of the hearing, 3484 and 3486 were no longer ongoing businesses as production on each movie had ended.

On February 27, 2023, the ALJ issued his recommended decision and order, finding for the Board on all charges. As remedies, he recommended (1) ordering the Employers to cease and desist from committing unfair labor practices and (2) ordering 3486 to rescind the terminations of the striking drivers, award them backpay, and make them whole "for any other direct or foreseeable pecuniary harms" suffered as a result of their unlawful discharges. *Id.*, Vol. III at 773.

The Employers filed exceptions to the ALJ's decision. But a three-member panel of the Board affirmed the ALJ's rulings, findings, conclusions, and remedies, with

several minor modifications. The Employers filed in this court a timely petition for review of the Board's order. In response, the Board filed a cross-application for enforcement of its order.

II. DISCUSSION

A. Standard of Review

In determining whether to grant enforcement of a Board order or uphold a final order of the Board, we "uphold the NLRB's factual findings if they are supported by substantial evidence in the record as a whole." *NLRB v. F&A Food Sales, Inc.*, 202 F.3d 1258, 1260 (10th Cir. 2000) (internal quotation marks omitted); *see* 29 U.S.C. § 160(e) ("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."); *id.* § 160(f) (same). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Coreslab Structures (TULSA), Inc. v. NLRB*, 100 F.4th 1123, 1135 (10th Cir. 2024) (internal quotation marks omitted). "Although substantial-evidence review is quite narrow, . . . [the] substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1028 (10th Cir. 2003) (internal quotation marks omitted). "That said, we may not overturn a Board decision just because we might have decided the matter differently; rather, our function is to ascertain that the Board acts within reasonable bounds and that the supporting evidence is truly substantial." *Id.* (brackets and internal quotation marks omitted).

As for our review of the Board's interpretation of the NLRA, in the past we have shown "considerable deference" to the Board. *Coreslab*, 100 F.4th at 1135 (internal quotation marks omitted). But recently *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 411–13 (2024), *reversing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), invoked the Administration Procedure Act (APA), 5 U.S.C. § 706, to hold that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." Hence, deference is no longer owed. *See Rieth-Riley Constr. Co., Inc. v. NLRB*, 114 F.4th 519, 528–29 (6th Cir. 2024) ("We do not defer to the NLRB's interpretation of the NLRA, but exercise independent judgment in deciding whether an agency acted within its statutory authority. We pay careful attention to the judgment of the agency to inform that inquiry, and we also review de novo the NLRB's interpretation of non-NLRA legal conclusions." (citations and internal quotation marks omitted)); *cf. Sunnyside Coal Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 112 F.4th 902, 910 (10th Cir. 2024) (recognizing that we give no deference to agency interpretation of statutes in light of *Loper Bright*). *Loper Bright* does not, however, "call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology." 603 U.S. at 412.

B. 3484's Violations of § 8(a)(1)

1. Unlawful Interrogation of Hanson

3484 first argues that substantial evidence does not support the Board's finding that line producer Ricci unlawfully interrogated driver Hanson. We agree.

The NLRA "prohibits employers and unions from engaging in certain unfair labor practices." *Starbucks Corp. v. McKinney*, 602 U.S. 339, 342 (2024) (brackets and internal quotation marks omitted). Section 8(a)(1), 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their rights to organize, "bargain collectively," and "engage in other concerted activities" under § 7, 29 U.S.C. § 157. We have held that "interrogating employees about their, or their co-workers', union sympathies . . . may violate § 8(a)(1)." *McLane/Western, Inc. v. NLRB*, 723 F.2d 1454, 1456 (10th Cir. 1983). "A violation is established if the questions asked, when viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to union activities." *Presbyterian/St. Luke's Med. Ctr. v. NLRB*, 723 F.2d 1468, 1475 (10th Cir. 1983) (internal quotation marks omitted). "The test is not whether employees were actually coerced, but whether the questioning tended to be coercive." *Id.*

The Board affirmed the ALJ's finding that "under all of the circumstances," Ricci's questioning of Hanson "would reasonably tend to coerce Hanson so that she would feel reasonably obligated to disclose any knowledge she had of union activity

to Supervisor Ricci and that Hanson would also reasonably feel restrained from exercising rights protected by Section 7." Pet'rs App., Vol. III at 762; *see 3484, Inc.*, 2024 WL 1012781, at *1.[1] And on appeal the Board maintains that "[t]he facts surrounding Ricci's questioning of Hanson are undisputed and fully support the Board's finding of a violation." Resp't Br. at 12.

But we fail to discern any meaningful distinction between this case and *Cannady v. NLRB*, 466 F.2d 583, 585–87 (10th Cir. 1972). In that case, the owner of a clay-target manufacturing plant spoke with a part-time employee on the telephone. *See id.* at 585–86. The plant owner, who "had heard about some [union authorization] cards floating around," asked the employee "if there had been any union activity at the plant." *Id.* at 586. The employee "responded that she was unaware of a union although she had signed an authorization card." *Id.* The plant owner then offered the employee a full-time job at the plant and the employee accepted. *See id.* At the conclusion of the exchange, the plant owner also asked the employee to obtain a sample union authorization card. *See id.* The employee testified that she said she could not comply with the request. *See id.* at 585. The Board found that the questioning constituted an unlawful interrogation in violation of § 8(a)(1). *See id.* at 586–87. But we refused to enforce the Board's finding because we disagreed that the exchange was "coercive in nature." *Id.* at 586. Instead, we said that "[n]ot all interrogations are illegal" and concluded that "[t]he Board has failed to meet its

[1] 3484 does not contest the Board's finding that Ricci was a supervisor under the NLRA.

burden of proof in its contention that the interrogation by [the plant owner] interfered with the free exercise of [the employee's] rights." *Id.* at 587.

The Board attempts to brush *Cannady* aside as a "fact-specific denial of enforcement" that "does not require a different result." Resp't Br. at 14. We are not convinced. The context here is quite similar to that in *Cannady*. In a telephone conversation with driver Hanson, Ricci said that she had heard that the drivers on the 3484 production were considering organizing and asked Hanson if she knew anything about the 3484 transportation department trying to obtain a union contract: "are you hearing of . . . transpo[rtation] flipping the show?"[2] Pet'rs App., Vol. I at 89. Hanson responded that she was not aware of any organizing efforts. The conversation lasted a minute.

As in *Cannady*, Ricci's question was a broad inquiry about union activity. She did not ask Hanson about specific individuals or about Hanson's involvement in organizing efforts. And the conversation was far from prolonged. Given our precedent, we cannot say that there is substantial evidence that Ricci's question about union activity could have reasonably coerced Hanson with respect to the exercise of her § 7 rights. We therefore set aside the Board's finding.

[2] During her testimony Ricci explained that in the film industry "flipping the show" means trying "to get a union contract or turn the show into a union project." Pet'rs App., Vol. I at 90.

2. Confidentiality Request

We do think, however, that there is substantial evidence to support the Board's finding that Ricci's follow-up request to keep the conversation confidential violated § 8(a)(1) by infringing on Hanson's § 7 rights.

Although "businesses have a substantial and legitimate interest in maintaining the confidentiality of private information," this interest is "outweighed" by the § 7 rights of employees to discuss "their terms of employment" and "working conditions." *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1259–60 (10th Cir. 2005) (internal quotation marks omitted) (hotel's confidential-information policy violated § 8(a)(1) to the extent that it "define[d] confidential information" to prevent employees from discussing "wages, hours, and other terms and conditions of employment"). These rights include the right of employees to talk among themselves about conversations they have had with supervisors about union activity. *See First Am. Enters.*, 369 N.L.R.B. No. 54, 2020 WL 1911428, at *3–4 (Apr. 9, 2020) (although supervisor's questioning of union steward about her solicitation of fellow employee was not sufficiently coercive to rise to level of unlawful interrogation, supervisor's subsequent "instruction to [steward] to keep their conversation confidential was unlawful" because steward "had the right to discuss the interaction with other employees").

Immediately after Ricci ended her call with Hanson, she texted Hanson, "Please don't say anything I just said . . . Thanks!" Pet'rs App., Vol. II at 594. The Board found that this instruction "infringed on Hanson's Section 7 right to discuss

the union-related conversation with other employees" and "also interfered with Hanson's Section 7 right of access to the Board by infringing on her right to discuss the incident with a Board agent and to file an unfair labor practice charge." *3484, Inc.*, 2024 WL 1012781, at *1.

3484 does not dispute that Ricci gave this instruction to Hanson, nor does it offer any "business justification" for it. *See First Am. Enters.*, 2020 WL 1911428, at *3–4. Its sole argument is that the Board affirmed the ALJ's finding despite its being "based on an error." Pet'rs Br. at 23 (internal quotation marks omitted). 3484 is correct that the ALJ made a factual error, but the Board did not rely on it. The ALJ found that Ricci's confidentiality instruction "creat[ed] an impression among [3484] employees that their union activities were under surveillance" and concluded that the instruction constituted "another unlawful interrogation." Pet'rs App., Vol. III at 763, 772. The Board, however, amended the ALJ's finding to "delete [this] inadvertent reference to impression of surveillance," determining that "there is no allegation or finding that [3484] created an impression of surveillance." *3484, Inc.*, 2024 WL 1012781, at *1 n.2. The Board further said that the ALJ "incorrectly applied an interrogation analysis" and that it opted to "rely on a different rationale," concluding that the request was an unfair labor practice because it "constituted an unlawful confidentiality instruction." *Id.* at *1. Thus, the Board expressly recognized the factual error by the ALJ and offered its own reasoning to support its ruling that Ricci's confidentiality instruction was an unfair labor practice. 3484 does not, and could not, complain of this procedure of the Board. Under 29 C.F.R. § 101.12(a) the

Board "may adopt, modify, or reject the findings and recommendations of the [ALJ]"; *see Norris, a Dover Res. Co. v. NLRB*, 417 F.3d 1161, 1167 (10th Cir. 2005) (stating that the same standard of judicial review applies "regardless [of] whether the NLRB affirms the ALJ's decision and order in its entirety, modifies it, or reaches contrary findings"). We conclude that substantial evidence supports the Board's ruling.

3484's reliance on *Lafayette Park Hotel*, 326 N.L.R.B. 824, 826 (1998), is misplaced. 3484 correctly quotes that opinion for the proposition that a confidentiality instruction with "no more than a speculative effect on employees' Section 7 rights" cannot "warrant a finding of an 8(a)(1) violation." *Id.* But at issue in that case was an employee-handbook rule prohibiting hotel employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." *Id.* The Board concluded that employees would not "reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union"; instead, employees would reasonably understand that the rule was designed to protect the hotel's interest in maintaining the confidentiality of "guest information, trade secrets, contracts with suppliers, and a range of other proprietary information." *Id.* In contrast, there is no ambiguity about what Ricci wanted to keep secret.

C. 3486's Violations of § 8(a)(1)

3486 argues there is not substantial evidence to support the Board's findings that transportation coordinator Miller unlawfully interrogated and threatened driver Brewer in violation of § 8(a)(1). We disagree.

We have already noted that an employer commits an unlawful interrogation when the questioning "could reasonably coerce or intimidate the employee with regard to union activities." *Presbyterian/St. Luke's Med. Ctr.*, 723 F.2d at 1475 (internal quotation marks omitted). Although § 8(c) allows employers to communicate their views about unionization or unions to their employees, this freedom is limited. *See* 29 U.S.C. § 158(c). Such communications may not contain a "threat of reprisal or force or promise of benefit." *Id.* "It is well settled that an employer violates § 8(a)(1) by threatening employees with reprisal for engaging in union activity." *NLRB v. Okla. Fixture Co.*, 79 F.3d 1030, 1034 (10th Cir. 1996).

After Wulf directed Miller to "take care of" the union matters, Miller called Brewer. Pet'rs App., Vol. I at 49. The ALJ found that Miller "had a high-level of authority over the drivers" and was the "highest-ranking driver official." *Id.*, Vol. III at 765. Miller testified that he asked Brewer, "[D]o you know who called the union[?]" *Id.*, Vol. I at 46. During his testimony Miller acknowledged that his concern was finding out which driver had called Local 399.

Miller testified that he told Brewer something to the effect of: "if the union comes in to organize these drivers, the production is going to go to Canada." *Id.* at 47. Miller also warned Brewer that future production work for the drivers would be

impacted, explaining that "Hallmark will take their shows somewhere else." *Id.* And Miller later repeated these statements in a text-message conversation with Staheli: "[Wulf is] [s]aying that Hallmark will pack up and go to Canada [if the drivers organize]." *Id.*, Vol. II at 604.

On this evidence the Board could properly find that Miller's statements constituted threats of current and future job loss if the drivers organized and would have "reasonably tend[ed] to interfere with, restrain or coerce" Brewer in the exercise of his § 7 rights. *Okla. Fixture Co.*, 79 F.3d at 1034; *see NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 702 (10th Cir. 1969) ("It is a basic violation of § 8(a)(1) for an employer to interfere with employee organizational activity by a coercive threat to close his plant."); *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 561–62 (5th Cir. 2003) ("Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to threaten job loss or the closure of a work site in the event of unionization."); *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 230 (6th Cir. 2000) ("An employer's threat to close down if the company unionizes is a hallmark violation of the NLRA." (internal quotation marks omitted)); *NLRB v. La. Mfg. Co.*, 374 F.2d 696, 702 (8th Cir. 1967) ("Of course, it is an unfair labor practice for an employer to threaten employees with moving the plant and the loss of jobs as a result of their acceptance of a union."). If, as in *NLRB v. Automotive Controls Corp.*, 406 F.2d 221, 223–24 (10th Cir. 1969), the record showed that Miller had provided some explanation for moving the production other than animus against the union, this

would be a different case. But absent such an explanation, we cannot say that the finding by the Board was unsupported in the circumstances.

3484 does not dispute that Miller made these comments to Brewer. But it insists that "the Board again found an unlawful interrogation based on a lone, innocuous question." Pet'rs Br. at 24. Miller's question, however, was more pointed than Ricci's broad question about organizing activity. The inquiry could reasonably appear to be aimed at identifying the ringleader of the drivers' organizing campaign for the purpose of discouraging that person from continuing his efforts or, worse, retaliating against that person. In any event, the questioning was potentially more coercive since it was accompanied by Miller's warning of job loss. *See, e.g.*, *McLane/Western, Inc.*, 723 F.2d at 1457 (upholding the Board's unlawful-interrogation finding where the supervisor asked "which employees supported the union" and threatened that the company "would close their doors and move the company away rather than deal with the union" (internal quotation marks omitted)); *Presbyterian/St. Luke's Med. Ctr.*, 723 F.2d at 1475 (upholding unlawful-interrogation finding where supervisor asked employee whether she had solicited other employees regarding union matters and warned her that "she might be putting her job in jeopardy"); *NLRB v. Okla-Inn*, 488 F.2d 498, 501 (10th Cir. 1973) (questioning was coercive where supervisor asked employee "whether she had decided which way she would vote [in the unionization election]" and threatened that if she voted for the union she "would lose her job").

3486's remaining defense to these violations is that Miller's comments were not attributable to the company because he was not a "supervisor" or "agent" of 3486 under the NLRA.[3] Pet'rs Br. at 26 (internal quotation marks omitted). "Ordinarily, a finding of supervisory status is sufficient to charge the employer with responsibility" for that individual's conduct. *Furr's, Inc. v. NLRB*, 381 F.2d 562, 566 (10th Cir. 1967). Section 2(11) of the Act defines *supervisor* as:

> [A]ny 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.

29 U.S.C. § 152(11) (emphasis added). "[T]he existence of any one of the listed powers, as long as it involves the use of independent judgment, is sufficient to support a determination of supervisory status." *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1076 (10th Cir. 2005) (internal quotation marks omitted).

[3] The Board argues that we lack jurisdiction to review this argument because 3486 failed to raise it before the Board. *See* 29 U.S.C. § 160(e). We disagree. The Board concluded in its decision that although 3486 filed an exception to the ALJ's finding that Miller was a supervisor, it "failed to argue that the [ALJ] erred in finding that Miller possessed the statutory indicia of authority to suspend, promote, and demote." *3484, Inc.*, 2024 WL 1012781, at *1. The Board then "affirm[ed] the [ALJ's] finding that Miller was a [§] 2(11) supervisor solely based on the absence of exceptions to the findings that he possesses those statutory indicia." *Id.* at *1; *see* 29 U.S.C. § 152(11). As we understand the Board's statement in its decision, however, it was simply stating that the ALJ's finding that Miller was a supervisor was supported by indicia that were not factually challenged by the company—not that the company failed to argue that Miller was not a supervisor. The argument made by 3486 in this court is not materially different from its argument to the Board.

There is substantial evidence that Miller was a supervisor. 3486 contends that Miller could "at most" arrange the schedules of the drivers and designate a driver as captain. Pet'rs Br. at 27. But the record includes a number of other indicia. Although Miller did not have the authority to fire drivers, he testified that he could recommend that a driver be fired and that he used his independent judgment to "hire" drivers, "direct" the manner in which they worked, grant a driver's request to miss work, and "discipline" drivers by issuing warnings and suspending them. 29 U.S.C. § 152(11). Miller's comments were therefore attributable to 3486.

D. 3486's Violation of § 8(a)(3)

3486 argues that there is not substantial evidence to support the Board's finding that the company violated § 8(a)(3) by refusing to reinstate the striking drivers after receiving their unconditional offer to return to work. We cannot agree.

Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate against employees for engaging in protected union activity, such as a strike. *See* 29 U.S.C. § 158(a)(3) ("It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) ("Under § 8(a)(3), it is unlawful for an employer by discrimination in terms of employment to discourage membership in any labor organization, which includes discouraging participation in concerted activities, such as a legitimate strike." (citation and internal quotation marks omitted)). Ordinarily, however, an employer may permanently

replace striking workers to enable it to continue operations, so strikers' future employment is limited to filling vacancies. *See Harberson v. NLRB*, 810 F.2d 977, 980 (10th Cir. 1987). But not always. The motive for the strike and the behavior of the strikers make a difference.

1. Unfair-Labor-Practice Strike

Whether striking employees are entitled to immediate reinstatement depends on the cause of the strike. *See Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 976 (10th Cir. 1990). An "economic" strike occurs when "employees strike in support of bargaining demands concerning wages, hours and working conditions," while an "unfair labor practice" strike occurs when "employees strike in protest of employer conduct found subsequently to be an unfair labor practice." *Id.* at 976 (internal quotation marks omitted). "If an employer hires permanent replacements during an economic strike, striking workers are entitled only to preferential reinstatement as positions become available." *Harberson*, 810 F.2d at 980. But "[e]mployees who engage in an unfair labor practice strike[] are guaranteed a more favorable remedy": "upon an unconditional offer to return to work[,] unfair labor practice strikers are entitled to reinstatement with back pay, even if the employer has hired replacements in the interim." *Facet Enters., Inc.*, 907 F.2d at 976.

3486 contends that the strike was an economic strike, not an unfair-labor-practice strike, and therefore the striking drivers were not entitled to reinstatement because 3486 hired replacement drivers. It asserts that "the union representatives planned to use the work stoppage . . . for leverage . . . to exact economic

concessions," and that the June 11 unfair-labor-practice charge filed by Staheli was mere "pretext" for securing a union contract for the drivers. Pet'rs Br. at 31 (internal quotation marks omitted). It directs us to testimony and exhibits that, it claims, "show[] the union's goal was always economic." Pet'rs Reply Br. at 2.

This is not a frivolous argument. On the evidence in this record, a reasonable person could have found that the drivers would not have gone on strike simply to protest the conversations that constituted unfair labor practices. But the only issue before us is whether there was substantial evidence to support the Board's ruling. And it is "settled that a strike is an unfair labor practices strike even though there may have been causes for it in addition to the employer's unfair labor practices." *Head Div., AMF, Inc. v. NLRB*, 593 F.2d 972, 979 (10th Cir. 1979). Indeed, "[a] strike which is motivated, even in part, by an employer's unfair labor practices is an unfair labor practice strike." *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996); *see, e.g.*, *Head Div., AMF, Inc.*, 593 F.2d at 980–81 (upholding the Board's finding that a strike was an unfair-labor-practice strike even though the Board acknowledged that "a major cause of the strike was displeasure with the course of contract negotiations" because there was still substantial evidence that employee concern over unfair labor practices was "an operative cause of the strike").

We must affirm the Board's decision because there is substantial evidence that the striking drivers were motivated, at least in part, by 3486's commission of unfair labor practices. Staheli filed the unfair-labor-practice charge against 3486 two days before the drivers voted to strike. He testified that the day before the strike he called

legal counsel for Local 399 to discuss "the specifics of calling a ULP [unfair-labor-practice] strike" and how to explain the purpose of the strike to the drivers. Pet'rs App., Vol. I at 111. That same day, he emailed Brewer a list of common unfair labor practices so that he and the other drivers could keep an eye out for future violations. In addition, Brewer testified that before the vote to strike, Staheli informed the drivers that 3486 had committed unfair labor practices and that Local 399 was going to help the drivers organize and correct those practices. Staheli also testified that he told the drivers that "the company had committed multiple ULPs" and that "based on the ULPs, [he] wanted to vote them for a strike." *Id.* at 117, 119. And the union and the drivers repeatedly identified the strike as an unfair-labor-practice strike.

Although 3486 insists that the testimony of Staheli and Brewer was "entirely self-serving" and cannot support the Board's finding, Pet'rs Br. at 30, the ALJ found their testimony to be credible, and the Board found "no basis for reversing [those] findings." *3484, Inc.*, 2024 WL 1012781, at *1 n.1. "[W]e will not disturb the NLRB's determinations of witness credibility or lack thereof except in rare circumstances." *Albertson's, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998). Self-serving testimony is commonplace, not rare. In the absence of more, much more, we cannot set aside the credibility determinations.

3486 also argues that the Board simply adopted the ALJ's finding that the strike was an unfair-labor-practice strike without "provid[ing] any reasoning of its own." Pet'rs Br. at 30. But we have long recognized that "the Board is not required to restate everything [in its decision and order] if it finds that the [ALJ's] conclusions

are fair and supported by the evidence." *Artra Grp., Inc. v. NLRB*, 730 F.2d 586, 590 (10th Cir. 1984). The ALJ's unfair-labor-practice-strike findings, several paragraphs in all, were sufficient to "inform the parties of the disposition of the arguments made." *YMCA of Pikes Peak Region, Inc. v. NLRB*, 914 F.2d 1442, 1449 n.4 (10th Cir. 1990).

2. Strike Misconduct

Turning from the debate over how to classify the strike, 3486 makes one final objection. It argues that its refusal to reinstate the striking drivers did not violate § 8(a)(3) because each of the nine striking drivers engaged in misconduct by moving 3486 equipment after striking. 3486 asserts that the striking drivers "never received approval from Wulf or anyone else associated with the 3486 Production to move the equipment." Pet'rs Br. at 36.[4] We are not persuaded.

Although an employer is ordinarily required to reinstate unfair-labor-practice strikers immediately upon receiving their unconditional offer to return to work, that is not the case with respect to striking employees "who engage in serious misconduct while on strike." *Medite of N.M., Inc. v. NLRB*, 72 F.3d 780, 790 (10th Cir. 1995). Employees who have "personally engaged" in *serious* misconduct "lose the

[4] 3486 also argued below that the striking drivers "vandalized" company property. Employers' Br. in Support of Exceptions to ALJ's Decision, Docket Nos. 43 (24-9511), 39 (24-9525) at 15 (Exceptions Br.). But it has abandoned this argument on appeal. The company's passing references to equipment damage are "inadequately briefed" and therefore "waived" because it has failed to explain how any alleged damage could constitute serious misconduct or could be attributed to particular strikers. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

protections of the Act and are not entitled to reinstatement after the strike ends." *Id.* (internal quotation marks omitted). For strike misconduct to be "serious," it "must have had a tendency to coerce other employees in the exercise of their protected rights," including the right to refrain from engaging in concerted activities. *Id.* (internal quotation marks omitted); *see* 29 U.S.C. § 157 (employees have right to join and to refrain from joining concerted activities); *Highway Truck Drivers & Helpers Loc. 107, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 273 F.2d 815, 818 (D.C. Cir. 1959) (union violated § 7 when its threats coerced drivers not to continue to operate trucks during a strike). To benefit from this defense to denial of reinstatement, the employer must show that "it had an honest belief that the strikers had engaged in misconduct." *Medite of N.M., Inc.*, 72 F.3d at 790 (internal quotation marks omitted). The Board's General Counsel then bears the burden of proving that no serious strike misconduct occurred. *See id.*

The ALJ rejected 3486's misconduct argument as "vague, uncertain, and failing to contain adequate specific evidence" of individual drivers committing misconduct, and found that the drivers' "conduct both picketing on June 14 at the Pecan Farm and gathering and moving vehicles and equipment did not fall outside of protection under the Act." Pet'rs App., Vol. III at 770. The Board affirmed the ALJ's finding that "the record does not reflect the predicate misconduct by specific strikers"

and denied the defense. *3484, Inc.*, 2024 WL 1012781, at *2. The Board's finding was supported by substantial evidence.[5]

3486's misconduct argument fails for several reasons. First, the company makes no argument that the strikers' moving of the vehicles and equipment was "serious" misconduct. As previously noted, under the definition of *serious* adopted by this court, the misconduct must have "a tendency to coerce [nonstriking] employees in the exercise of their protected rights." *Medite of N.M., Inc.*, 72 F.3d at 790 (internal quotation marks omitted). Yet 3486 merely asserts that the Board has recognized that strikers have been deemed to forfeit their right to reinstatement when "'they seized the employer's property.'" Pet'rs Reply Br. at 8 (quoting *Gen. Tel. Co. of Mich.*, 251 N.L.R.B. 737, 739 (1980)).

But even if such conduct could constitute serious misconduct regardless of whether it tended to coerce or intimidate nonstriking employees into relinquishing

[5] The Board suggests that we lack jurisdiction to review the particular misconduct argument that 3486 makes on appeal because it was not raised before the Board. *See* 29 U.S.C. § 160(e). But we think that 3486 adequately preserved the argument that all the strikers engaged in misconduct harming nonstrikers by "removing" equipment, generators, and trailers "vital to staying cool in temperatures nearing 110 degrees." Exceptions Br. at 15; *see* 29 C.F.R. § 101.11(b) (after the ALJ files its recommended order, the parties may either (1) accept and comply with the order, "which, in the absence of exceptions, shall become the order of the Board," or (2) "file exceptions to the [ALJ's] decision with the Board"); 29 C.F.R. § 101.12(a) (if any party files exceptions to the ALJ's decision, the Board "reviews the entire record" and "issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the [ALJ]").

their right not to strike (which we need not decide),[6] there is no evidence in the record that any of the striking drivers knowingly moved vehicles and equipment without authorization. 3486 does not dispute that the equipment vendors that Staheli and Brewer spoke with requested that the drivers return their equipment to Salt Lake City rather than abandoning it on set. And although Wulf testified that one of the equipment vendors said that she authorized the return of the equipment only after "the Teamsters" threatened her, there is no evidence that any of the drivers themselves knew of any impropriety. Pet'rs App., Vol. I at 391.

3486 also argues that the equipment vendors had no right to request the premature return of their equipment because the production company still had the right to possess the equipment under the lease agreements it had signed. But even if the owners lacked authority (no lease agreement was ever produced), 3486 representatives on site did not oppose moving the vehicles and equipment, so the drivers had no way of knowing that they were moving anything without authorization.[7] It is not enough that removal of the vehicles and equipment may have been highly improper. So long as an individual driver had no knowledge of the

[6] *Cf. NLRB v. Moore-Lowry Flour Mills Co.*, 122 F.2d 419, 426 (10th Cir. 1941) ("Striking employees who commit unwarranted acts of trespass or violence against the property of the employer are not entitled to reinstatement, with or without backpay.").

[7] Staheli testified that when he asked Ricci what she wanted the drivers to do with cases containing 3486 production equipment on a camera truck that was about to be moved to the hotel, she responded, "do what you have to do and we'll do what we have to do." Pet'rs App., Vol. I at 126–27.

impropriety, the driver has not intentionally or deliberately engaged in wrongdoing and cannot be deprived of the right to reinstatement. *See Webster's Third New International Dictionary* at 1443 (2002) (defining *misconduct* as "*intentional* wrongdoing" and "*deliberate* violation of a rule of law or standard of behavior" (emphasis added)).

In sum, substantial evidence supports the Board's finding.

E. Challenges to Board's Procedures

In addition to challenging the Board's findings, the Employers take issue with the process by which the Board made those findings. They argue that the Board's "in-house" adjudication violated their constitutional rights to a jury trial "before an independent, life-tenured judge" under Article III and the Seventh Amendment. Pet'rs Br. at 52. But we lack jurisdiction to consider these constitutional challenges because they were not raised before the Board.

Section 10(e) of the NLRA states that "[n]o 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." 29 U.S.C. § 160(e).

The Employers do not dispute that they failed to raise these constitutional challenges before the Board. But they assert that there is a "futility exception" to § 10(e). Pet'rs Br. at 63 (internal quotation marks omitted). They contend that it would have been pointless to raise these challenges below because neither the ALJ

nor the Board has special expertise in deciding constitutional matters, and neither can provide any relief to remedy the alleged constitutional defects.

For support, the Employers rely on the Supreme Court's opinion in *Carr v. Saul*, 593 U.S. 83 (2021). At issue in that case was "whether petitioners forfeited their" challenges that "ALJs [of the Social Security Administration (SSA)] who originally heard their cases were not properly appointed under the Appointments Clause of the U.S. Constitution" because they failed to make these arguments "first to their respective ALJs." *Carr*, 593 U.S. at 85. The Court declined to impose an exhaustion requirement because raising these claims before the administrative agency would have been futile, reasoning that "Petitioners assert purely constitutional claims about which SSA ALJs have no special expertise and for which they can provide no relief." *Id.* at 93.

But there was no statute or regulation in *Carr* that required the petitioners to first raise their challenges during administrative proceedings; instead, the exhaustion requirement that the Court considered would have been "judicially created." *Id.* at 88; *see NLRB v. Starbucks Corp.*, 125 F.4th 78, 87–88 (3d Cir. 2024) (distinguishing *Carr* on this ground). Section 10(e), however, is quite different. It operates as a "non-waivable jurisdictional bar to consideration of objections not presented to the Board," *Pub. Serv. Co. of N.M. v. NLRB*, 692 F.3d 1068, 1076 (10th Cir. 2012) (Gorsuch, J.), "depriv[ing] appellate courts of jurisdiction to consider issues not raised during the proceedings before the Board." *NLRB v. Cmty. Health Servs.*, 812 F.3d 768, 775 n.4 (10th Cir. 2016) (internal quotation marks omitted). Because § 10(e) expressly

requires petitioners to first raise their arguments before the Board for us to exercise jurisdiction, we are not at liberty to read a futility exception into the statute. *See Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (stressing that the Court "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise"); *see generally Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) ("Courts have no authority to create equitable exceptions to jurisdictional requirements." (internal quotation marks omitted)).

That said, we recognize that we may excuse the failure to urge an objection before the Board in "extraordinary circumstances." 29 U.S.C. § 160(e). But the Employers did not make an extraordinary-circumstances argument in their opening brief. Although they did argue in their reply brief that "questions implicating fundamental separation-of-powers concerns easily qualify as extraordinary circumstances," Pet'rs Reply Br. at 19, the "general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." *In re: Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d 1094, 1110 n.4 (10th Cir. 2017) (internal quotation marks omitted). And we will not sua sponte consider whether extraordinary circumstances are present when such an argument has not been properly presented to us. *See, e.g.*, *Int'l Ladies' Garment Workers' Union, Upper S. Dep't, Six AFL-CIO v. Qualify Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (respondent's procedural-due-process challenge "may not be considered" because it did not object before the Board and "did not suggest any extraordinary circumstances in either the Court of Appeals or in this Court" (internal quotation marks omitted)); *1621 Route 22*

W. Operating Co., LLC v. NLRB, 825 F.3d 128, 142–43 (3d Cir. 2016) (refusing to consider sua sponte whether extraordinary circumstances were present); *NLRB v. Apico Inns of Cal., Inc.*, 512 F.2d 1171, 1174 (9th Cir. 1975) ("No extraordinary circumstances having been alleged, this court cannot consider respondent's assertion that there was not substantial evidence in support of the Board's finding of a retaliatory firing.").[8]

[8] We note that we have considerable doubt that the extraordinary-circumstances exception would have been satisfied. We know of no case in which this court has applied this exception, and elsewhere it has been applied rarely. One court applied the exception when previously controlling judicial precedent was overruled after the Board issued its opinion. *See NLRB v. Robin Am. Corp.*, 667 F.2d 1170, 1171 (5th Cir. Unit B 1982). Another court indicated that it would apply when the reason the petitioner had not filed a timely objection to a Board decision was because the Board's office closed early on the day the exception was due. *See NLRB v. Int'l Woodworkers of Am., AFL-CIO, Loc. Union No 13-433*, 238 F.2d 378, 379 (9th Cir. 1956).

In circumstances more analogous to those present here, several courts have applied the exception to hear challenges to the Board when the Board has "travel[led] outside the orbit of its authority." *Noel Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013), *aff'd on other grounds*, 573 U.S. 513 (2014) (internal quotation marks omitted). In those cases the courts held that the Board had no authority to issue an order because three of its five members had been appointed in violation of the Constitution's Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, so the Board had no quorum. *See id.* (circumstances were extraordinary because the issue went "to the very power of the Board to act and implicate[d] fundamental separation of powers concerns"); *UC Health v. NLRB*, 803 F.3d 669, 672–73 (D.C. Cir. 2015) (same); *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 308 (D.C. Cir. 2015) (same); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 597–601 (3d. Cir. 2016) (same). Other circuits, however, have declined to apply the extraordinary-circumstances exception to the identical claim. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 351 (5th Cir. 2013); *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 796–98 (8th Cir. 2013).

And one of the courts that had applied the exception declined to apply it when the issue related to whether Board ALJs were unconstitutionally protected from removal by the President. *See Starbucks Corp.*, 125 F.4th at 87. The court distinguished the issue on the ground that, under recent Supreme Court authority,

F. Challenges to Board's Remedy

We also lack jurisdiction to consider 3486's argument that the Board did not have the authority under the NLRA to award the drivers compensation for "'any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the[ir] unlawful discharges.'" Pet'rs Br. at 38 (quoting *3484, Inc.*, 2024 WL 1012781, at *4). 3486 failed below to adequately raise the objection to the Board's grant of that remedy.

The Employers filed 17 exceptions to the ALJ's order. In Exception 14, 3486 objected:

> To the ALJ's remedy that In accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), Respondent 3486, Inc. shall compensate each of the nine drivers for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of their employment, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*,

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such challenges to removal protections "do[] not call into question the ALJ's or the Board's core authority to act." *Id.* This distinction seems consistent with the authority establishing the "outside the orbit" exception. The Supreme Court in *NLRB v. Cheney California Lumber Co.*, 327 U.S. 385, 388 (1946), without referencing the extraordinary-circumstances exception, declared that a court may decline to enforce a Board order "if the Board has patently traveled outside the orbit of its authority so that there is legally speaking no order to enforce." We think it questionable that the Board's allegedly improper use of in-house ALJs rises to that level. *Cf. Smith v. Bd. of Governors of Fed. Reserve Sys.*, 73 F.4th 815, 823 (10th. Cir. 2023) (declining to consider former bank employees' unpreserved Appointments Clause challenge to the authority of the Office of Financial Institution Adjudication ALJ who adjudicated their case and observing generally that "structural challenges have no special entitlement to review on appeal from the agency" (internal quotation marks omitted)).

> supra. (ALJD, p.48, lines 22-29). In support thereof, Respondent relies on the record and accompanying Brief in Support of Exceptions.

Pet'rs App., Vol. III at 783.

On occasion we have held that even a "terse" exception may suffice to preserve an issue in certain circumstances. *Coreslab*, 100 F.4th at 1143; *see Pub. Serv. Co. of N.M.*, 692 F.3d at 1073–74. But there are limits. 3486 did not state, or even hint, that one of the grounds for its objection was the absence of statutory authority for the remedy. The company's blanket objection "[t]o the ALJ's remedy" merely copied and pasted the disputed portion of the ALJ's order without offering an explanation why the ALJ's suggested remedy was improper. This was not enough. Pet'rs App., Vol. III at 783; *see Wyman Gordon Pa., LLC v. NLRB*, 836 F. App'x 1, 5 (D.C. Cir. 2020) ("Simply saying 'I object,' without explaining why, is not sufficient to fairly present and preserve an issue before the Board."). And we note that the Board did not address the issue now being raised by 3486, clearly signaling that it did not perceive any such challenge by the company. *See Pub. Serv. Co. of N.M.*, 692 F.3d at 1074 (that the Board "chose to address the two objections it felt it could discern lurking" suggested the exceptions were sufficiently raised before the Board); *Coreslab*, 100 F.4th at 1144 (same).

To be sure, 3486's brief in support of the exceptions did list Exception 14 in two of the headings. But the discussions under those headings addressed only

whether the company had committed unfair labor practices. Not a word was said about the propriety of particular remedies.[9]

And for the same reasons discussed in the previous section, we reject 3486's extraordinary-circumstances argument, which was not raised until its reply brief and is therefore waived. *See In re: Motor Fuel Temperature Sales Pracs. Litig.*, 872 F.3d at 1110 n.4.

The dissent contends that we nevertheless have jurisdiction to consider this issue, invoking our statement in *Coreslab*, 100 F.4th at 1144, that "we may exercise our jurisdiction over a challenge despite a party's failure to object before the agency . . . where the decision at issue clearly demonstrates the Board exceeded its statutory authority." But we cannot say at this point in the proceedings that there has been such excess. In *Coreslab* the Board's order imposed a specific remedy, whose legitimacy we could examine. Here, in contrast, the Board has merely stated a general proposition, and even expressed some doubt whether there would be a factual basis for any unusual remedy. In this circumstance we cannot say that the remedy to be imposed by the Board will "clearly" be in excess of its authority. If the Employers later wish to challenge any remedy ultimately imposed as beyond Board authority, they can pursue relief at that time. *See Home Beneficial Life Ins. Co. v. NLRB*, 172 F.2d 62, 63 (4th Cir. 1949).

[9] 3486 also argues that the Board's make-whole remedies "violate[d] the major questions doctrine," "violate[d] 3486's due process rights," and "violate[d] the non-delegation doctrine." Pet'rs Br. at 44, 17. Exception 14 did not suffice to preserve those arguments either.

III. CONCLUSION

We **GRANT** 3484's petition for review challenging the Board's finding that it violated § 8(a)(1) of the NLRA by unlawfully interrogating Hanson, but we **DENY** the remainder of the Employers' petition. Accordingly, we **GRANT** the Board's cross-application for enforcement except insofar as it is predicated on its finding that Hanson was unlawfully interrogated. We **GRANT** the Board's unopposed motions to lodge nonrecord materials. We **REMAND** to the Board for further proceedings consistent with this opinion.

Like the majority, I would leave many of the Board's findings undisturbed.[1] But I disagree with the majority about whether substantial evidence supports the Board's finding that Brett Miller, a supervisor acting on behalf of 3486, unlawfully threatened an employee by stating that future productions would move to Canada if drivers unionized. In my view, Miller's statement did not threaten retaliatory action by Wulf or 3486, but rather described decisions about future productions that would be made by Hallmark, the third-party company that commissioned Wulf's productions. Accordingly, I would deny enforcement of the finding that Miller's statements constituted unlawful threats.

I also disagree with the majority's conclusion that we lack jurisdiction to consider 3486's challenge to the Board's remedy—an argument that 3486 admittedly did not raise below. Section 10(e) of the NLRA generally bars our jurisdiction to consider an issue that a party failed to first raise before the Board. But even in such a circumstance, we may still exercise jurisdiction where the Board acts outside the scope of its authority.

Here, the Board's order requiring 3486 to compensate the striking drivers for *any* "direct or foreseeable pecuniary harms" is patently beyond its statutory authority under the NLRA. That monetary relief is the prototypical form of tort-like legal damages. But

[1] In particular, I agree that substantial evidence supports the Board's findings that (1) 3484 committed an unfair labor practice when Ricci asked Hanson to keep their conversation confidential; (2) 3486 committed an unfair labor practice when Miller, acting as a supervisor or agent of 3486, asked Brewer about union activity; and (3) 3486 committed an unfair labor practice when Wulf refused to reinstate the striking drivers. I also agree that substantial evidence does *not* support the Board's finding that 3484 unlawfully interrogated an employee when Ricci asked Hanson about union activity.

the NLRA only authorizes the Board to order equitable (or equitable-adjacent) relief, such as orders requiring employers to "cease and desist" from unfair labor practices or to take certain types of "affirmative action," including "reinstatement" of terminated employees "with or without back pay." 29 U.S.C. § 160(c). Nowhere in that limited statutory grant is there the power to award a full array of compensatory and consequential damages—a remedy ordinarily available only in a suit at common law, not in an in-house proceeding before an administrative agency. Because the Board exceeded its authority, we may properly exercise jurisdiction to consider 3486's challenge to the Board's remedy. And because the Board was without authority to award that remedy, I would vacate that portion of the Board's order and remand for further proceedings.

For these reasons, I respectfully concur in part and dissent in part.

I.

I begin by addressing the Board's finding that Miller, acting as a supervisor of 3486, unlawfully threatened Roy Brewer, a 3486 driver and transportation captain, when Miller stated that future productions would move to Canada if drivers unionized. In my view, that finding is unsupported by substantial evidence.

Section 8(a)(1) of the NLRA makes it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [in Section 7 of the NLRA]," including the rights to self-organization, collective bargaining, and other union-related activities. 29 U.S.C. § 158(a)(1); *see Presbyterian/St. Luke's Med. Ctr. v. NLRB*, 723 F.2d 1468, 1472 (10th Cir. 1983) (holding that an employer violates Section 8(a)(1) if the employer's

conduct "*reasonably tends* to interfere with, restrain, or coerce employees" in the exercise of their statutory rights (emphasis added) (quotation omitted)). In light of that prohibition, an employer may violate the NLRA by threatening adverse consequences as a result of unionization. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–20 (1969); *Dentech Corp.*, 294 NLRB 924, 928 (1989); *see also Lear Siegler Inc. v. NLRB*, 890 F.2d 1573, 1580 (10th Cir. 1989) (holding that an employer violated Section 8(a)(1) by telling employees that they would be permanently replaced if they participated in a strike).

At the same time, an employer is free to express "any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Gissel*, 395 U.S. at 618. Indeed, an employer "may even make a prediction as to the precise effects he believes unionization will have on his company," so long as the prediction is "carefully phrased on the basis of objective fact" regarding the "probable consequences [of unionization] beyond his control or to convey a management decision already arrived at." *Id.*

In *NLRB v. Automotive Controls Corp.*, for instance, this Court held that an employer's statement that it would move locations if employees unionized—but "[n]ot as long as [the business] continue[d] to operate on a profit margin"—was not an unlawful threat. 406 F.2d 221, 224 (10th Cir. 1969). Because the employer's statement did not suggest that "adverse consequences [would] be deliberately inflicted" as retaliation for unionization, we concluded that the statement was instead

a "mere[] prediction[] of dire economic consequences well within the protection of [the NLRA]." *Id.* By contrast, if an employer suggests that he will take action "on his own initiative" in response to unionization, then "the statement is no longer a reasonable prediction based on available facts[,] but a threat of retaliation." *Gissel*, 395 U.S. at 618.

Applying those principles here, Miller's statement to Brewer was not a threat, but rather a mere "prediction as to the precise effects" that Miller and Wulf "believe[d] unionization [would] have" on future productions. *Id.* As the record demonstrates, Miller's statement expressed only that *Hallmark*—the client that commissioned the 3486 production—would "pack up and go to Canada" if drivers unionized. A.R. Vol. I at 47; A.R. Vol. II at 604. Miller did *not* state that Wulf himself, as 3486's owner and director, would decide to move to Canada. Thus, Miller's statement did not suggest that Wulf would take action "on his own initiative" in retaliation for the drivers' unionization. *Gissel*, 395 U.S. at 618. Rather, Miller's statement did nothing more than describe the "probable consequences [of unionization] beyond his [or Wulf's] control." *Id.*

To be sure, in one factually similar context, the Board held that an employer unlawfully threatened employees by stating that it would move its operations to Canada if the employees unionized or went on strike. *Dentech Corp.*, 294 NLRB at 928. But the statements at issue in *Dentech* were markedly different from those here. In *Dentech*, both the company's president and a company supervisor repeatedly told employees that the president *himself* would "move the company back to Canada" if

workers unionized—even stating at one point that "there were people in Canada that would be happy" to take those workers' positions. *Id.* at 925, 935–36. Miller's statements here did not cross that line: his statements only communicated the actions that Hallmark, as a third party, would take in response to unionization.

The majority brushes aside this distinction, concluding instead that Miller's statements constituted retaliatory threats. Maj. Op. at 17–19. The majority's reasoning, however, conflates the question of whether Miller *threatened* Brewer with the question of whether Miller *interrogated* him. *Id.* at 18–19. Specifically, the majority suggests that both Miller's *statement* to Brewer and Miller's *question* to Brewer—asking Brewer if he knew who had called the union—reinforced the coerciveness of each other, thereby making each independently unlawful. *Id.*

To be clear, I agree with the majority that Miller's question, by itself, constituted an unlawful interrogation. And I do not doubt that the analysis of Miller's questioning shares some overlap with the analysis of his statement, particularly when considering the coerciveness of each in the entire context of Miller and Brewer's interactions. But the majority does not cite any authority for the proposition that unlawfully coercive questioning necessarily transforms an employer's separate statements into unlawfully coercive threats. In fact, our cases suggest to the contrary: for instance, in *Automative Controls Corp.*, we concluded that an employer did not threaten employees merely by stating that the business would move locations if employees unionized, notwithstanding a separate, unchallenged finding that the employer unlawfully interrogated employees. 406 F.2d

at 222–24. And there we emphasized that, although coerciveness is determined "in light of the totality of employer communications," courts also must proceed from "the premise that employers' statements that are not coercive" on their own "are protected by [Section] 8(c) and cannot be the basis for finding a violation of [Section] 8(a)(1)." *Id.* at 223.

Thus, the fact that Miller unlawfully interrogated Brewer does not necessarily mean that Miller's separate statement constituted an unlawful threat. Even considering the statement in context, the record demonstrates that Miller was only communicating the "probable consequences [of the drivers' unionization] beyond his [or Wulf's] control." *Gissel*, 395 U.S. at 618. Accordingly, I would hold that substantial evidence does not support the Board's findings that Miller unlawfully threatened Brewer, and I would therefore deny enforcement of that finding.

II.

I next address our jurisdiction to consider 3486's argument that the Board exceeded its statutory authority by ordering it to compensate the striking drivers for "'any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the[ir] unlawful discharges.'" Aplt. Br. at 38 (quoting *3484, Inc.*, 373 N.L.R.B. No. 28, 2024 WL 1012781, at *4).

The majority concludes that we lack jurisdiction to consider this argument because 3486 failed to adequately raise it before the Board. Maj. Op. at 33–35 & nn.8–9. I disagree. To explain why, I begin by describing the legal framework for preservation and jurisdiction in an appeal from a Board decision.

"In every case and at each stage of the proceeding, we must satisfy ourselves that our jurisdiction is proper." *Cotton Petroleum Corp. v. U.S. Dep't of Interior*, 870 F.2d 1515, 1521 (10th Cir. 1989). At the same time, we also have a "virtually unflagging obligation . . . to exercise the jurisdiction given" to us. *Co. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Under the NLRA, the failure to preserve an objection before the Board constitutes a jurisdictional bar on appeal. *See Coreslab Structures (TULSA), Inc. v. NLRB*, 100 F.4th 1123, 1142–43 (10th Cir. 2024). In that way, preservation in the NLRA context is unique. Ordinarily, preservation "bear[s] on whether it is appropriate for a party to raise an argument on appeal, not on whether we have the power to consider it." *Id.* at 1142. The NLRA, however, "transform[s] preservation issues into jurisdictional questions." *Id.* Specifically, Section 10(e) of the NLRA—which, along with Section 10(f), supplies the basis for our appellate jurisdiction in this case—provides that "[n]o 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." 29 U.S.C. § 160(e).

That statutory language, we have explained, "deprives appellate courts of jurisdiction to consider issues 'not raised during the proceedings before the Board.'" *NLRB v. Cmty. Health Servs.*, 812 F.3d 768, 775 n.4 (10th Cir. 2016) (quoting *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982)); *see Pub. Serv. Co. of N.M.*, 692 F.3d at 1073 (Gorsuch, J.) ("[E]ven mustering the appropriate

skepticism and eyeing § 160(e) narrowly, it still appears to us a true jurisdictional limit."). And to adequately raise an objection under Section 10(e) so as to preserve it for appellate review, a party must "raise it in a manner sufficient to place the Board on notice it should be addressed and may become an issue in this [C]ourt." *Coreslab*, 100 F.4th at 1143.

But even where a party fails to adequately raise and preserve an objection, we may still exercise jurisdiction to consider the argument if an exception to Section 10(e) applies. *Id.* Section 10(e) bears two such exceptions. First, the statute's text expressly provides that "[w]e may exercise our jurisdiction over a challenge despite a party's failure to object before the agency in the case of 'extraordinary circumstances.'" *Id.* at 1144 n.8 (quoting 29 U.S.C. § 160(e)). Second, and relatedly, we may exercise jurisdiction to hear an argument despite a party's failure to preserve it "where the decision at issue clearly demonstrates the Board exceeded its statutory authority." *Id.* (citing *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946) ("[I]f the Board has patently traveled outside the orbit of its authority," then "there is legally speaking no order to enforce.")).[2]

[2] Some courts have treated this principle as a form of extraordinary circumstances, rather than as a separate exception. *See, e.g.*, *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 600 (3d Cir. 2016) (holding that "a challenge which . . . implicates [the Board's] authority to act[] constitutes an 'extraordinary circumstance' under § 160(e)"); *Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013), (holding that "questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns" are "governed by the 'extraordinary circumstances' exception"), *aff'd on other grounds*, 573 U.S. 513 (2014). Our cases, on the other hand, seem to treat it as a distinct exception

The reason for this second exception is that "Congress has imposed on [us] responsibility for assuring that the Board keeps within reasonable grounds." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). And "[t]o police those bounds of agency action, federal courts must retain the ability to consider '[c]ertain jurisdictional challenges' which 'need not be raised before the Board to be considered on review.'" *Coreslab*, 100 F.4th at 1144 n.8 (quoting *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 574 (D.C. Cir. 2009)). "At bottom, '[a] court can always invalidate Board action' when that action 'is patently beyond the Board's jurisdiction, even if the jurisdictional challenge was never presented to the Board.'" *Id.* (quoting *Loc. 900, Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB*, 727 F.2d 1184, 1191 n.5 (D.C. Cir. 1984)); *see Noel Canning v. NLRB*, 705 F.3d 490, 497 (D.C. Cir. 2013) (observing that courts may "consider[] objections to the authority of the decisionmaker whose decision is under review even when those objections were not raised below"), *aff'd on other grounds*, 573 U.S. 513 (2014); *Mich. Cmty. Servs., Inc. v. NLRB*, 309 F.3d 348, 360–61 (6th Cir. 2002) (noting that a party may object to a Board order as beyond the scope of its statutory authority at any time, despite failing to raise the issue before the Board).

Indeed, the Supreme Court has even recognized a similar exception to the NLRA's related jurisdictional requirement that a party exhaust their administrative remedies. *See Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958). Specifically, the Court

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independent of extraordinary circumstances. *See Coreslab*, 100 F.4th at 1144 n.8. Regardless of how it is understood, the exception applies in this case.

has explained that when a party challenges agency action as outside the scope of the agency's authority, the suit "is not one to 'review,' in the sense of that term as used in the [NLRA], a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188. Thus, federal courts have "jurisdiction [equivalent] of an original suit" over such challenges, such that a party need not first exhaust their administrative remedies. *Id.* at 189.

That reasoning extends perforce to the jurisdictional requirement of preservation. When the Board acts "in excess of its delegated powers," *id.* at 188, its action is ultra vires and therefore void. And "it would be passing strange for an ultra vires agency action to be better insulated from judicial review than one issued under lawful authority." *Teamsters Loc. Union No. 455 v. NLRB*, 765 F.3d 1198, 1201 (10th Cir. 2014) (Gorsuch, J.). Consistent with that principle, the Supreme Court has explained that when an appellate court reviews any Board action under Sections 10(e) and 10(f), "all questions of the jurisdiction of the Board and the regularity of its proceedings," and "all questions of constitutional right or statutory authority[,] are open to examination by the court." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938).

Thus, even assuming that 3486 failed to adequately raise its objection to the Board's remedy, we may still exercise jurisdiction to review that argument if the remedy exceeded the Board's statutory authority. As I explain below, that is the case

here. I would therefore hold that we have jurisdiction to review 3486's challenge to the Board's remedy.

III.

The Board is a limited-authority agency that may only act to the extent Congress authorizes. But Congress has never authorized the Board to award the remedy it ordered here—namely, tort-like legal damages. Indeed, in enacting the NLRA, "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Int'l Union, United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO) v. Russell*, 356 U.S. 634, 643 (1958).

The remedy the Board awarded in this case clearly exceeds that statutory boundary. The Board ordered 3486 to "compensate each of the nine [striking] drivers for any . . . direct or foreseeable pecuniary harms incurred as a result of the unlawful termination of their employment, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings." A.R. Vol. III at 833. That remedy—no matter how the Board labels it—constitutes an award of compensatory and consequential damages. The Board has no power to award such relief.[3]

[3] The majority suggests that there is no way to determine whether the Board's remedy exceeded its statutory authority "at this point in the proceedings" because the Board has "merely stated a general proposition" as to the remedy and has not yet determined the precise amount of damages it will ultimately award. Maj. Op. at 35. But the problem with the Board's remedy is not its *amount*, but rather its *form*. As I explain below, the Board is substantively limited in the types of remedies it may

A.

Generally, the Board's power to craft and impose remedies for violations of the NLRA is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *see Angle v. NLRB*, 683 F.2d 1296, 1301 (10th Cir. 1982) (stating that the power to impose remedies for violations of the NLRA is a "power for the [Board], not this [C]ourt, to wield" (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953))). We therefore ordinarily review a Board-ordered remedy with deference, giving "special respect" to the Board's choice. *Monfort v. NLRB*, 965 F.2d 1538, 1546 (10th Cir. 1992) (citing *Gissel*, 395 U.S. at 612 n.32).

Our deference ends, however, when the Board's choice of remedy "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA]," *id.* at 1546 (quoting *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)), or when the remedy exceeds a "'rational and consistent' interpretation of the Board's statutory authority," *Coreslab*, 100 F.4th at 1142–43 (quoting *NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 123 (1987)).

To determine whether the Board's remedy exceeds its authority, the place to start is the NLRA itself. Section 10(c) of the NLRA authorizes the Board to order employers to "cease and desist from" unfair labor practices and to "take such

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impose. The Board's remedy in this case clearly transcends that limitation because it constitutes a form of legal damages—no matter the ultimate amount.

affirmative action[,] including reinstatement of employees with or without back pay, as will effectuate the policies of [the NLRA]." 29 U.S.C. § 160(c). As just explained, this statutory provision gives the Board "broad discretion to craft remedies appropriate for violations" of the NLRA. *Coreslab*, 100 F.4th at 1146 (citing *Fibreboard*, 379 U.S. at 216).

But the Board's remedial discretion is not unlimited. First, "the Board's authority to remedy unfair labor practices is expressly limited by the requirement that its orders 'effectuate the policies of the [NLRA].'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (quoting 29 U.S.C. § 160(c)). Relatedly, "the Board's otherwise broad discretion . . . stops when [the remedy it imposes] veers from remedial to punitive." *Id.*; *see Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). That is so because "the policies of the [NLRA]" to which Section 10(c) refers serve a decidedly remedial purpose—one that aims to restore an injured employee to their rightful position, rather than to punish the employer for their wrongful conduct. *See Sure-Tan*, 467 U.S. at 900; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 195 (1941) (stating that the NLRA's purpose is to "restor[e] the situation, as nearly as possible, to that which would have obtained but for" the violation). To that end, the Board must also ensure that its remedies are "sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practice." *Sure-Tan*, 467 U.S. at 900. In other words, although the Board's remedies should be designed to make an injured employee whole, the remedies may only redress "actual losses." *Phelps Dodge*, 313 U.S. at 198.

Beyond those substantive limitations, the Board is also limited in the *types* of remedies it may award. Although the Board has broad discretion in crafting remedies, courts have generally understood the Board's remedial power to be equitable, rather than legal, in nature.

Again, the text of the NLRA sheds some light on this. Section 10(c) authorizes the Board to issue only two types of orders: it may order employers (1) to "cease and desist" from any unfair labor practices and (2) to take certain forms of "affirmative action," "including reinstatement of employees with or without back pay." 29 U.S.C. § 160(c). The NLRA thus empowers the Board to order employers to either *refrain* from certain actions or to *engage* in certain actions. In that way, the Board's remedial power resembles that of historical courts of equity, which traditionally "could 'restrain[] . . . a contemplated or threatened action' and 'require affirmative action.'" *NLRB v. Starbucks Corp.*, 125 F.4th 78, 95 (3d Cir. 2024) (quoting *Ex parte Lennon*, 166 U.S. 548, 556 (1897)). And the fact that the NLRA "empower[s] the Board to order entities 'to cease and desist' and to take 'affirmative action[]'"—without authorizing any other type of remedy—indicates that the statute *only* grants the Board "the authority to order equitable remedies." *Id.* (citing Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. Rev. 530, 553 (2016)).

That understanding makes even more sense when considering the two types of "affirmative action" that the statute expressly authorizes, both of which are equitable in nature. Section 10(c) specifies that the "affirmative action" the Board may order an employer to take "includ[es] reinstatement of employees with or without back

pay." 29 U.S.C. § 160(c). The former of these, reinstatement of employees, has long been viewed as an equitable remedy, akin to an injunction. *See, e.g.*, *Phelps Dodge*, 313 U.S. at 188 & n.6 (suggesting that "the right to restore to a man employment which was wrongfully denied [to] him" is a form of "equitable relief"); *Agwilines, Inc. v. NLRB*, 87 F.2d 146, 151 (5th Cir. 1936) (observing that the Board's remedial power is a "power to restore status disturbed in violation of statutory injunction similar to that exerted by a chancellor in issuing mandatory orders to restore status").

The same is true of the latter remedy—awards of back pay. Although back pay awards "somewhat resemble" money damages that "compensat[e] for private injury," the remedy is still equitable in nature. *Va. Elec. & Power Co.*, 319 U.S. at 543. Indeed, the Supreme Court has consistently characterized an award of back pay as "an equitable remedy, a form of *restitution*." *Curtis v. Loether*, 415 U.S. 189, 196 (1974) (emphasis added) (discussing back pay awards in the similar context of Title VII). That is because an award of back pay is based only on the amount of money that was *unlawfully withheld* from the employee as a result of the employer's unfair labor practice. *Id.*; *see Va. Elec. & Power Co.*, 319 U.S. at 543 (noting that a back pay award "restore[s] to the employees in some measure what was taken from them because of the [employer's] unfair labor practices"). Thus, although an award of back pay consists of monetary relief that compensates an injured employee, the remedy is merely "an incident to equitable relief"—it supplements the reinstatement order, allowing the injured employee to both return to work and receive the pay that they would have received but for the employer's unfair labor practice. *NLRB v.*

Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); *see Russell*, 356 U.S. at 645 (noting that back pay awards "may incidentally provide some compensatory relief to victims of unfair labor practices," but they do not "constitute an exclusive pattern of money damages for private injuries").[4]

To sum up, the only two types of "affirmative action" that the NLRA expressly authorizes the Board to order are both equitable (or equitable-adjacent, at least) in nature. Of course, the NLRA does not limit the Board's remedial power to those two remedies; to the contrary, the statute states in non-exhaustive terms that the Board's power to order "affirmative action" *includes* those two remedies. 29 U.S.C. § 160(c). But the fact that the NLRA only expressly grants the Board authority to award those two equitable remedies sheds light on what other types of relief the Board may award. *See Phelps Dodge*, 313 U.S. at 187–88 ("The powers of the Board as well as the restrictions upon it must be drawn from [Section] 10(c)."). Because the statute's express grant of authority is limited to equitable remedies, there is no textual hook for traditional legal remedies.

Another clue as to the scope of the Board's remedial power comes from Section 10(c)'s requirement that any Board remedy must "effectuate the policies" of the NLRA. 29 U.S.C. § 160(c). In turn, the NLRA expressly states that its policies include, as relevant here, "encouraging the practice and procedure of collective

[4] Moreover, because an award of back pay is only incidental to equitable relief, it may properly be awarded in a Board proceeding without running afoul of the Seventh Amendment. *Jones & Laughlin*, 301 U.S. at 48.

bargaining and [ ] 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." *Id.* § 151. Importantly, the requirement that any Board remedy "effectuate the policies" of the NLRA is not an independent source of power, nor does it otherwise expand the scope of the Board's remedial authority. Instead, it operates as a *limitation* on the Board's power, making clear that any Board remedy must "vindicate public, not private rights" and must therefore be remedial, not punitive. *Va. Elec. & Power Co.*, 319 U.S. at 543.

Consistent with that understanding—and looking to the equitable remedies that the NLRA expressly authorizes—the Supreme Court has explained that the NLRA "did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *Russell*, 356 U.S. at 642–43; *see Loc. 60, United Brotherhood of Carpenters & Joiners of Am. (AFL-CIO) v. NLRB*, 365 U.S. 651, 655 (1961); *accord Gurley v. Hunt*, 287 F.3d 728, 731 (8th Cir. 2002) ("Courts have emphasized that the NLRB is not authorized to award full compensatory or punitive damages to individuals affected by the unfair labor practice.").

The Board itself has recognized this limitation. Past Board decisions have acknowledged that the Board "is not empowered to remedy tortious acts" and that it "does not award tort remedies," but rather awards only those remedies that are necessary to "vindicate the purposes of the [NLRA]." *Freeman Decorating Co.*, 288

NLRB 1235, 1235 n.2 (1988); *see Teamsters, Loc. 85 (Viking Delivery Serv., Inc.)*, 186 NLRB 462, 474 (1970); *cf. Mass. Comm'n Against Comm'n v. Loc. Union No. 12004*, 2004 WL 1852966, at *31 (NLRB July 28, 2004) (noting a "general impression that the NLRA's protections end where tortious acts begin"). Even the Board, then, has long viewed its remedial power as an equitable one.

To be sure, the Board has occasionally ordered monetary awards designed to compensate for losses that an employee suffers as a result of unfair labor practices, even beyond back pay. *See Thryv, Inc. & Int'l Brotherhood of Elec. Workers, Loc. 1269*, 372 NLRB No. 22, 2022 WL 17974951, at *10–13 (Dec. 13, 2022), *order vacated in part on other grounds*, 102 F.4th 727 (5th Cir. 2024) (collecting examples). And those monetary awards have encompassed "pecuniary harms that were either a direct, or an indirect but foreseeable, consequence of [an employer's] unfair labor practice." *Id.* at *11.

But when the Board has granted monetary relief for pecuniary losses other than back pay, it has generally done so with respect to *discrete* monetary losses that are directly tied to the employment contract or the employee's wages—like the loss of employment benefits—and only when the link between the unfair labor practice and the loss is especially clear. *See, e.g.*, *Va. Elec. & Power Co.*, 319 U.S. at 540–41 (enforcing order requiring employer to refund mandatory union dues that were deducted from workers' wages); *NLRB v. Louton, Inc.*, 822 F.2d 412, 413–14 (3d Cir. 1987) (enforcing order awarding lost health insurance benefits as part of back pay award); *Lou's Transp., Inc. v. NLRB*, 945 F.3d 1012, 1026 (6th Cir. 2019) (enforcing

order awarding lost retirement benefits as part of back pay award); *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6 (2016), *enfd.* 976 F.3d 30 (D.C. Cir. 2020) (similar); *Voorhees Care & Rehab. Ctr.*, 371 NLRB No. 22 (2021) (similar). Because those awards encompass discrete losses related to an employee's lost wages or benefits that were unlawfully withheld, they are "closely tied to the equitable remedy of backpay" and are therefore distinct from ordinary compensatory damages. *See Starbucks*, 125 F.4th at 96.

Taken together, all of this confirms what the NLRA's text suggests: the Board has no power to award compensatory or consequential damages. Instead, the Board's remedial authority is limited to equitable relief—including monetary relief that is incidental and closely tied to the equitable remedies authorized under the NLRA.

B.

For decades, the Board has abided that limitation. Then, in 2022, the Board changed course, holding for the first time that, in *all* cases "in which [its] standard remedy would include an order for make-whole relief," the Board will now also "expressly order that the [employer] compensate affected employees for *all direct or foreseeable pecuniary harms*" suffered as a result of the employer's unfair labor practice. *Thryv*, 2022 WL 17974951 at *9 (emphasis original).

Unsurprisingly, the Board in *Thryv* insisted that its newly contemplated remedy is *not* a form of compensatory or consequential damages. *Id.* at *16. The Board asserted, moreover, that the remedy is not "akin to those [remedies] awarded in tort proceedings," even though it "may 'somewhat resemble compensation for

private injury' like that imposed in a tort proceeding." *Id.* (quoting *Va. Elec. & Power Co.*, 319 U.S. at 543). And the Board has doubled down on that view in this case, arguing before us that its remedy is not a form of damages, but rather a form of "relief designed to undo the effects of an unfair labor practice and to advance the broader public policies" of the NLRA. Aple. Br. at 33–34.

The Board's statements are little more than window dressing. In reality, the Board's new remedy constitutes the very sort of tort-like damages that the Board is without power to award. *Thryv* itself makes this clear. Although the Board there declined "to enumerate all the pecuniary harms that may be considered direct or foreseeable," the Board nevertheless set out an expansive list of examples that would be included "at a minimum." *Thryv*, 2022 WL 17974951 at *20 & n.13. According to the Board, the new remedy encompasses "out-of-pocket medical expenses, credit card debt, or other costs" that an employee may incur "simply in order to make ends meet." *Id.* at *15. It also covers other pecuniary harms, such as "interest and late fees on credit cards, or penalties if [an employee] must make early withdrawals from her retirement account in order to cover her living expenses" after an unlawful termination. *Id.* And it even permits compensation for an employee's "loan or mortgage payments," as well as any "transportation or childcare costs." *Id.*

That list looks like something out of a torts treatise. Each of those examples is a quintessential basis for compensatory or consequential damages, awarding an employee money for losses that are not directly tied to an unfair labor practice, rather than for lost wages or benefits that were unlawfully withheld. *See, e.g.*, Restatement

(Third) of Torts §§ 4 cmt. b (Am. L. Inst. 2022) (describing "medical expenses and lost earnings" and "rental-car expenses" as two forms of consequential damages); *id.* § 19 (Am. L. Inst. 2023) (establishing that tort plaintiffs may recover "reasonable past and reasonable expected future medical expenses"); 2 American Law of Torts § 8:8 (2025) (listing, as examples of compensatory damages, "past (accrued) medical expenses," "transportation and travel" expenses, costs of "domestic help (housekeeper, maid, child care personnel)," and others); 5 Modern Tort Law: Liability and Litigation § 43:66 (2d ed. 2010) (similar). And, as two dissenting Board members in *Thryv* correctly pointed out, the Board's "foreseeability" limitation provides no help—and actually makes the remedy more problematic—because "'foreseeability' is a central element of tort law." *Thryv*, 2022 WL 17974951 at *27 (Members Kaplan and Ring, concurring in part and dissenting in part).

In that way, the Board's new remedy fits squarely within the bedrock definition of compensatory and consequential damages, which have long been understood to encompass monetary awards "ordered to be paid to [ ] a person as compensation for loss or injury," including, for consequential damages, "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act." *Damages*, Black's Law Dictionary (12th ed. 2024). Indeed, the Board's own description of the remedy—that it is "designed to undo the effects of an unfair labor practice," Res. Br. at 33—is remarkably similar to the way the Supreme Court has described ordinary compensatory damages. *State Farm Mut. Auto. Ins. v.*

Campbell, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" (quoting *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 432 (2001)).

Thus, try as the Board might, its attempt to skirt the "damages" label is nothing more than an end-run around that long-held understanding of the nature of compensatory and consequential damages. If monetary relief "for *all direct or foreseeable pecuniary harms*," *Thryv*, 2022 WL 17974951 at *9 (emphasis in original), were not a form of a compensatory and consequential damages, it is entirely unclear what else that relief could be. Before us, the Board offers no answer. Although the Board insisted in *Thryv* that "'consequential damages is a term of art . . . [that] fails to accurately describe the [Board's new] make-whole remedial policy," its decision there offered no other way to describe the remedy. *See id.* at *13–14. Instead, the Board simply cloaked the remedy in language that vaguely referred to "effectuating the purpose" of the NLRA. *Id.* But that language does not change the tort-like legal nature of the remedy—it is still a form of damages, "no matter how it's spun." *Int'l Union of Operating Engs., Stationary Engs., Loc. 39 v. NLRB*, 127 F.4th 58, 91 (9th Cir. 2025) (Bumatay, J., dissenting in part).

Perhaps wary of that fact, the Board also argues before us that its remedial authority under the NLRA is not limited to equitable remedies; instead, the Board suggests, it is authorized to award *either* legal or equitable relief, because the NLRA does not expressly distinguish between the two. *See* Res. Br. at 34–36. In support,

the Board relies on the Supreme Court's decision in *Phelps Dodge*, which stated that the Board's remedial authority "must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." 313 U.S. at 188.

But that view is equally misplaced. For one thing, *Phelps Dodge* dealt with distinctions between different types of equitable relief—specifically, whether there was a difference between reinstatement of a wrongfully fired employee versus reinstatement of an employee who had wrongfully not been hired—not a distinction between legal and equitable relief. *See id.* at 187–88. Thus, *Phelps Dodge* did not hold that the NLRA permits the Board to award legal remedies. Instead, as explained above, the Board has long been understood as having the authority *only* to order equitable (or equitable-adjacent) remedies, such as the restitution-like award of backpay. *See Russell*, 356 U.S. at 642–43; *Loc. 60 v. NLRB*, 365 U.S. 651, 655 (1961); *cf. Va. Elec. & Power Co.*, 319 U.S. at 543; *Curtis*, 415 U.S. at 196.

Accordingly, in my view, the NLRA authorizes the Board to award monetary relief only for losses that are clearly or directly caused by the employer's unfair labor practice—essentially, the amount of money representing what the employer unlawfully withheld or directly caused the employee to lose out on. This view is consistent with how the Board—until *Thryv*—long interpreted its own remedial power. *See Freeman Decorating Co.*, 288 NLRB at 1235 n.2 (concluding that the Board is not empowered to remedy tortious acts" and noting that it "does not award tort remedies"); *Viking Delivery Serv.*, 186 NLRB at 474; *cf. Mass. Comm'n Against*

Comm'n, 2004 WL 1852966, at *31 (noting a "general impression that the NLRA's protections end where tortious acts begin"). And this view avoids the many untold constitutional concerns that would arise if the Board were statutorily authorized to award a full array of tort-like legal damages, including nondelegation and due process issues and tensions with the Seventh Amendment and Article III. *See Int'l Union of Operating Engs.*, 127 F.4th at 95–99 (Bumatay, J., dissenting in part) (discussing some of the constitutional implications of the Board's remedy). Finally, this view also gives credence to the Supreme Court's clear admonition that the NLRA does not "authoriz[e] the Board to award to full compensatory damages for injuries caused by wrongful conduct." *Russell*, 356 U.S. at 642–43.

Because the Board's remedy here requires 3486 to compensate the striking drivers for such harms, the order exceeds the Board's statutory authority under the NLRA. I therefore would vacate that portion of the Board's order and remand for further proceedings.

IV.

For these reasons, I concur in part and dissent in part.