**Nos. 15-2146 & 15-2258**

# UNITED STATES COURT OF APPEALS
## FOR THE FIRST CIRCUIT

**SOUTHCOAST HOSPITALS GROUP, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**ROBERT J. ENGLEHART**
*Supervisory Attorney*

**MATTHEW BRUENIG**
*Attorney*

*National Labor Relations Board*
**1015 Half Street, SE**
**Washington, DC 20570**
**(202) 273-2978**
**(202) 273-3831**

**RICHARD F. GRIFFIN, JR.**
*General Counsel*
**JENNIFER ABRUZZO**
*Deputy General Counsel*
**JOHN H. FERGUSON**
*Associate General Counsel*
**LINDA DREEBEN**
*Deputy Associate General Counsel*

**National Labor Relations Board**

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition for review of Southcoast Hospitals Group, Inc. ("Southcoast"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Decision and Order issued by the Board on September 16, 2015, and reported at 363 NLRB No. 9. (A. 40-

61.)[1] The Board's Decision and Order is final under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §§ 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Court has jurisdiction over the proceeding pursuant to Section 10(e) and 10(f) of the Act, as the unfair labor practices occurred in Massachusetts. *Id.* § 160(e), (f). The Company's petition for review and the Board's cross-application for enforcement are timely, as the Act places no time limitation on such filings.

## STATEMENT OF ISSUE

Whether substantial evidence supports the Board's finding that Southcoast violated Sections 8(a)(3) and (1) of the Act by maintaining and enforcing a hiring/transfer policy, HR 4.06, which gives preference to unrepresented employees, over the represented employees at its Tobey facility, when filling positions at all of its nonunion facilities.

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[1] "A." references are to the Joint Appendix. The Board's Decision and Order, which incorporates the decision of the administrative law judge, is located at pages A. 40-61. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the brief submitted by Southcoast to this Court.

## STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by 1199 SEIU United Healthcare Workers East ("the Union"), the Board's General Counsel issued a complaint against Southcoast, alleging violations of Sections 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (A. 316-20.) After conducting a hearing, an administrative law judge issued a decision on June 12, 2013. (A. 1-24.) The judge found that Southcoast violated Section 8(a)(1) of the Act by promulgating and maintaining a policy, HR 4.06, that gave first consideration to unrepresented employee applicants at its nonunion facilities, and by not considering union represented employee applicants until the second round of the employment selection process, solely because they were covered by the collective-bargaining agreement at its Tobey facility. (A. 21.) The judge also found that Southcoast violated Section 8(a)(3) and (1) of the Act when it relied upon HR 4.06 to refuse to consider the applications of two particular employees, as well as other "similarly situated employees for hire." (A. 60.) After Southcoast filed exceptions to the judge's decision, the Board issued a Decision and Order, affirming, with slight modifications, the judge's findings and conclusions. (A. 42.)

## STATEMENT OF FACTS

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

#### A. Background

Southcoast was created in 1996 and comprises three hospitals located in Massachusetts: Tobey Hospital ("Tobey"), Charlton Hospital ("Charlton"), and St. Luke's Hospital ("St. Luke's"). (A. 49.) The Union represents approximately 215 of the 550 employees at Tobey. The approximately 2100 employees at Charlton and 2700 employees at St. Luke's are unrepresented. (A. 221-22.)

#### B. The Hiring Preference in the Parties' Collective-Bargaining Agreement

Under Section 8.2 of Southcoast's collective-bargaining agreement with the Union covering the 215 employees at its Tobey facility, those employees receive a hiring preference for vacant bargaining-unit positions at the Tobey facility. (A. 49.) The preference requires Southcoast to hire the most senior qualified applicant within the bargaining unit for open positions in the bargaining unit. If a qualified applicant cannot be found among the represented employees in the first round of interviews, Southcoast considers unrepresented employees at its other facilities in a second round of interviews.

**C. The Hiring Preference in HR 4.06**

Since April 1999, Southcoast has maintained and enforced a hiring/transfer policy, HR 4.06, which states in relevant part:

> A. Internal Applicants:
>
> Upon application, regular status employees who are beyond the introductionary [sic] period will be given first consideration for job postings providing the regular status employee's qualifications substantially equal the qualifications of external candidates. **Employees in a union will be considered internal candidates if the collective bargaining contract provides reciprocal opportunity to employees who are not members of the union for open positions at the unionized site.** Temporary and per diem status employees will be considered prior to external applicants.
>
> B. External Applicants:
>
> **Employees in a union whose collective bargaining contract does not provide reciprocal opportunity to employees, who are not members of the union, will be considered external candidates**.
>
> External candidates may be selected if no employee is an ideal candidate, and if there is not an opportunity to train inexperienced internal candidates due to clinical/operational imperatives, turnover, lack of training resources, etc.

(A. 49; emphasis added.) Because of Section 8.2 of the Tobey collective-bargaining agreement, HR 4.06 requires that the represented Tobey employees be considered external applicants for open positions at Charlton and St. Luke's. This means that represented Tobey employees applying for positions at Charlton and St. Luke's are considered in the second round of interviews, which only take place if no unrepresented employee has been selected in the first round. (A. 50.)

Pursuant to this policy, Southcoast refused to consider represented employee Christopher Souza for an open building superintendent position at St. Luke's in May 2011. (A. 51.) When Souza inquired into why he was never interviewed, he received an email explaining that, according to HR 4.06, he could not be considered in the first round of interviews because he works at Tobey in a bargaining-unit position. Shortly after receiving this email, Souza contacted union organizer Lisa Lemieux, who subsequently filed the unfair labor practice charge in this case. (A. 51.)

Also pursuant to this policy, Southcoast repeatedly refused to consider Noelia Nunes for open positions at St. Luke's, including a certified nursing assistant position, two operating room assistant positions, and a mobility aide position. (A. 52-53.) Southcoast's initial refusal to consider Nunes for a mobility aide position also led to a delay in her being eventually hired for that position. (A. 58-59.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On September 16, 2015, a three-member panel of the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra dissenting) issued its Decision and Order finding that Southcoast violated Sections 8(a)(3) and (1) of the Act (29

U.S.C. § 158(3) and (1)) by maintaining and enforcing HR 4.06.[2] Specifically, the Board concluded that HR 4.06 "is a discriminatory hiring/transfer policy that deprives represented employees of job opportunities on the basis of their representational status and their having obtained a contractual benefit through collective bargaining, in order to discourage membership in the Union or any other labor organization." (A. 42.) The Board also found that Southcoast violated Sections 8(a)(3) and (1) of the Act (29 U.S.C. § 158(3) and (1)) by "refusing to consider applicants Christopher Souza and Noelia Nunes, by delaying its hiring of Nunes, and by refusing to consider and/or hire similarly situated employees." (A. 43.)

To remedy the violations, the Board's Order requires Southcoast to cease and desist from maintaining and enforcing HR 4.06. The Board's Order also requires Southcoast to cease and desist from refusing to consider, refusing to hire, or delaying the hiring of employees for positions that they would otherwise be considered for but for Southcoast's hiring/transfer policy. The Board orders Southcoast to consider employees Souza, Nunes, and other similarly situated employees for future openings in positions they previously applied for. The Board also orders Southcoast to place any applicants into positions for which they would

[2] Although the judge found that Southcoast violated the Act by "promulgating and maintaining" HR 4.06. (A. 59.) The Board only found that Southcoast violated the Act by "maintaining and enforcing" HR 4.06. (A. 43.)

have been selected but for the application of HR 4.06. Finally, the Board requires Southcoast to post a remedial notice. (A. 43.)

## SUMMARY OF ARGUMENT

This case involves Southcoast's maintenance and enforcement of a hiring/transfer policy, HR 4.06, that explicitly discriminates against employees on the basis of union membership and bargained-for contractual benefits. By maintaining such a policy, Southcoast harmed the employees represented by the Union and violated their rights under the Act. To avoid a finding that this policy violated Section 8(a)(3) and (1) of the Act, Southcoast carries the burden of proving that it had legitimate and substantial business justifications for its policy, which it has failed to do.

Southcoast has offered two business justifications for HR 4.06. First, Southcoast claims that it believed that the unrepresented employees would be upset by the Union's hiring preference at Tobey if they did not have a reciprocal hiring preference at St. Luke's and Charlton. The Board properly rejected this business justification because Southcoast could not provide specific evidence that unrepresented employees at Southcoast had ever complained about the Tobey hiring preference. Speculation about the potential future complaints of unrepresented employees does not qualify as a legitimate and substantial business justification for enacting discriminatory policies.

The second business justification offered by Southcoast is that it wanted to level the playing field between the represented employees at Tobey and the unrepresented employees at St. Luke's and Charlton. The Board correctly found that this business justification was undermined by the nature of HR 4.06. If Southcoast intended merely to level the playing field, then it could have enacted facility-based hiring preferences throughout the company, rather than a preference drawn specifically along union membership and contractual coverage lines. By not doing so, Southcoast created a hiring-preference regime that made it more difficult for Tobey employees to transfer to other facilities than it was for employees at St. Luke's and Charlton to transfer to other facilities. This is the opposite of leveling the playing field.

In addition to its substantive arguments, Southcoast also claims that the Board erred when it rejected Southcoast's estoppel defense. This claim lacks merit as the Board properly concluded that the Union lacked sufficient knowledge of HR 4.06 to have acquiesced to it. Without acquiescence to HR 4.06, there can be no estoppel defense.

## STANDARD OF REVIEW

This Court has recognized that "the Board is primarily responsible for developing and applying a coherent national labor policy." *NLRB v. Int'l Bhd. of Teamsters, Local 251*, 691 F.3d 49, 55 (1st Cir. 2012) (quoting *Yesterday's*

*Children, Inc. v. NLRB*, 115 F.3d 36, 44 (1st Cir. 1997)). Therefore, the Court grants the Board "deference with regard to its interpretation of the Act as long as its interpretation is rational and consistent with the statute." *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001) (quoting *NLRB v. Beverly Enters.-Mass, Inc.*, 174 F.3d 13, 22 (1st Cir. 1999). In cases like this, "it is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1976)). Thus, the Court should "give deference to the Board's expertise in determining whether employer conduct is reasonable and supported by legitimate and substantial business justifications." *Fresh Fruit & Vegetable Workers Local 1096, United Fruit Commercial Workers Int'l Union v. NLRB*, 539 F.3d 1089, 1098 (9th Cir. 2008) (citing *Fleetwood Trailer Co.*, 389 U.S. at 378).

Under Section 10(e) of the Act, the Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *NLRB v. Int'l Bhd. of Teamsters, Local 251* 651 F.3d 49, 55 (1st Cir. 2001) (citation omitted). The Court will not substitute its judgment for the Board's when the choice is "between two fairly conflicting views

[of the facts], even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). "In particular, the credibility determinations of the Administrative Law Judge who heard and saw the witnesses are entitled to great weight." *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 70 (1st Cir. 2000).

## ARGUMENT

### SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SOUTHCOAST VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY MAINTAINING AND ENFORCING A FACIALLY DISCRIMINATORY HIRING/TRANSFER POLICY

#### A. Applicable Principles

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. In turn, Section 8(a)(3) makes it an unfair labor practice to discriminate in regard to hire or tenure of employment to discourage union activity. 29 U.S.C. § 158(a)(3); *see Radio Officers v. NLRB*, 347 U.S. 17 (1954). A Section 8(a)(3) violation also produces a derivative violation of Section 8(a)(1), which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of their rights under Section 7. 29 U.S.C. § 158(a)(1); *see Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

The great majority of Section 8(a)(3) cases involve an employer's adverse action against an employee. In such cases, the employer's action violates Section 8(a)(3) if it is motivated by the employee's union activity. In cases of that type, the Board applies the well-established *Wright Line* burden-shifting framework to determine the employer's motivation. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court, *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983).

By contrast, where, as in this case, an employer's policy "concededly does discriminate against" union activity (*Wright Line*, 662 F.2d at 904 n.8), and the issue is only whether the conduct was undertaken for the purpose of discouraging union activity, the Board applies the *Great Dane* framework of analysis. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1976). Under *Great Dane*, the Board must initially "find a discrimination and a resulting discouragement of union membership." *Great Dane*, 388 U.S. at 32. Once discrimination has been found, the burden shifts to the employer to establish that it had "legitimate and substantial business justifications" for its discriminatory conduct. *Id.* at 34 (after "it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of

motivation is most accessible to him"); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) ("The burden for proving justification is on the employer."). If the employer fails to prove it has a legitimate and substantial business justification for its discrimination, a violation is established and the inquiry ends. *See NLRB v. Borden, Inc. (Borden II)*, 645 F.2d 87, 88 (1st Cir. 1981) (where "employer's response to the Board's initial showing of discrimination … does not prove a legitimate business justification, however, the Board is entitled to prevail on its initial showing").

When scrutinizing an employer's stated business justifications, the Board's task is to determine whether the justifications are objectively "legitimate and substantial," not to determine the employer's subjective intent. *Great Dane*, 388 U.S. at 34; *Fleetwood Trailer Co.*, 389 U.S. at 380 (if employer "has not shown legitimate and substantial business justifications, the conduct constitutes an unfair labor practice *without reference to intent*"). When an employer's given reasons for its discriminatory conduct do not sufficiently justify that conduct – e.g. because the reasons are not logically related to the conduct, because the conduct is not necessary to achieve the employer's stated purpose, or because the reasons are frivolous in some way – the Board must reject the reasons as not meeting the "legitimate and substantial" standard. *Borden II*, 645 F.2d at 88 (employer's business justification rejected as "illogical"); *Local 15, Int'l Bhd. of Elec. Workers*,

*AFL-CIO v. NLRB*, 429 F.3d 651, 657 (9th Cir. 2005) (rejecting employer's "operational needs" justification because it could have met those needs without locking out employees).

### B. Southcoast's Hiring/Transfer Policy of HR 4.06 Facially Discriminates Against Union Activity and Substantial Evidence Supports the Board's Finding that Southcoast Did Not Prove It Had a Legitimate and Substantial Business Justification for Adopting It

Southcoast acknowledges (Br. 13) that *Great Dane* is the appropriate framework for analyzing whether the facially discriminatory hiring/transfer policy of HR 4.06 is unlawful. In addition, it does not dispute that HR 4.06 has, as the Board found (A. 41), at least a "comparatively slight" impact on represented employees' Section 7 rights under *Great Dane*.[3] Under HR 4.06, when any Southcoast employee in the Tobey bargaining unit applies for hire or transfer to any other Southcoast facility, that employee—as distinct from all other current Southcoast employees—is labeled an external candidate and given secondary consideration for the position. As the Board found (A. 41), this "discriminates

[3] Under *Great Dane*, after an employer has proven it has legitimate and substantial business justifications for its discrimination, the Board can still find a violation if it determines that the employer's conduct was "inherently destructive of employee interests." 388 U.S. at 33. If, however, the employer proves its business justifications and the Board determines that its discriminatory conduct only had a "comparatively slight" harm on employee rights, the Board must show that the employer acted with an antiunion motivation in order to find a violation. *Id.* at 33-34. Where, as in this case, the employer has not proven its business justifications, "it is not necessary for us to decide the degree to which the challenged conduct might have affected employee rights." *Id.* at 34.

against [Southcoast's] represented employees based on their representational status and their having obtained a contractual benefit through collective bargaining—both of which are protected by Section 7." Accordingly, under *Great Dane*, the burden shifted to Southcoast to establish a "legitimate and substantial business justification" for the policy.

Southcoast advanced two justifications for its policy. As shown below, the Board properly rejected both of them.

**1. Southcoast failed to prove its complaint-avoidance business justification for HR 4.06**

Southcoast first claims (Br. 22) that its policy is necessary to ensure that unrepresented employees at St. Luke's and Charlton are not upset by the hiring preference secured by represented Tobey employees under Section 8.2 of their collective-bargaining agreement. Specifically, Southcoast claims that David DeJesus, Southcoast's Vice-President for Human Resources, implemented HR 4.06 because, in his prior position at a multi-facility employer, employees had complained about a similar hiring preference. DeJesus, therefore, sought to avoid similar employee complaints at Southcoast.

The Board, however, reasonably found (A. 41) that "the evidence undermines DeJesus's complaint-avoidance rationale." Indeed, at the hearing, when specifically asked if he had received complaints from Southcoast employees at the nonunion facilities about the alleged inequity when applying for bargaining-

unit positions at Tobey, "Dejesus did not identify a single unrepresented employee who had complained to him about the preference received by represented employees at Tobey." (A. 41.) DeJesus similarly was unable to "recall any complaints from unrepresented job applicants who were denied consideration for open bargaining-unit positions at Tobey." (A. 41.)

Moreover, when an employer takes discriminatory actions to avoid a speculative future problem, it is reasonable for the Board to insist on concrete evidence that the future problem is likely to materialize. The fact that there is a small risk that a speculative future problem will materialize is not enough to establish a legitimate and substantial business justification. *See Diamond Walnut Growers v. NLRB*, 113 F.3d 1259, 1266 (D.C. Cir. 1997) (where employer discriminates against returning strikers out of concern for their safety, "it is hardly unreasonable for the Board to insist, at minimum, on *evidence of a concrete threat* to those strikers"). *Cf. NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1311-12 (1st Cir. 1969) (employer had legitimate and substantial business justification for actions because, while already facing manpower difficulties, significant number of employees threatened to quit if wages were not increased and two employees actually did quit). As a result, the Board here reasonably concluded: "In essence, HR 4.06 was DeJesus's solution in search of a problem, and, as such, his reason for

promulgating it does not establish a legitimate and substantial business justification." (A. 41.)

Indeed, HR 4.06 creates the evil that Southcoast claims DeJesus was trying to fix. Under the policy, unionized employees at Tobey are essentially shut out of all other Southcoast facilities, while all other Southcoast employees are not. As a result, Southcoast's purported justification for HR 4.06 fails not only because it devised a solution for a problem that was not shown to exist but it devised a solution that actually aggravated—for Tobey employees—the problem that DeJesus said he wanted to fix. The application of HR 4.06 has caused unhappiness and complaints among the represented Southcoast workforce, which is the reason that the Union filed the charge that gave rise to this case.

**2. Southcoast failed to prove its "level the playing field" justification for HR 4.06**

Southcoast's second proffered business justification for HR 4.06 (Br. 20-21; see A. 42, A. 56) is that it wanted to level the playing field with respect to hiring preferences between the represented and unrepresented employees as a matter of basic fairness and equity. (A. 56; Br. 20-21.) The Board properly rejected this justification because Southcoast failed to show that it could not have achieved the same goal without adopting a hiring/transfer policy that explicitly discriminates on the basis of union membership and bargained-for contractual benefits. (A. 41.) Where an employer's discriminatory action is not necessary to achieve its stated

goal, it lacks a legitimate and substantial business justification. *Local 15, Int'l Bhd. of Elec. Workers*, 429 F.3d at 657 ("to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary").

It is important to emphasize how HR 4.06 actually works. Tobey represented employees do not have first access to jobs at Charlton, but St. Luke's employees do, as do Charlton employees. And Tobey represented employees do not have first access to jobs at St. Luke's, but Charlton employees do, as do St. Luke's. As a result, St. Luke's employees have a preference for all of the jobs at St. Luke's and 2100 jobs at another facility, Charlton. Charlton employees have a preference for all of the jobs at Charlton and 2700 jobs at another facility, St. Luke's. Tobey workers have a preference for all of the bargaining-unit jobs at Tobey and 0 jobs at other facilities. In other words, as the Board found (A. 41), "[t]he number of unit positions for which represented employees receive a hiring preference under Section 8.2 0f the [collective-bargaining agreement] pales in comparison to the number of nonbargaining-unit position for which unrepresented employees receive a preference under HR 4.06."

Moreover, as the Board noted (A. 41), Southcoast could have adopted a neutral facility-based hiring preference. Such a policy would allow Tobey employees first considerations for positions at Tobey, St. Luke's employees first

consideration for positions at St. Luke's, and Charlton employees first consideration for positions at Charlton. It would not draw lines based on union membership and contractual-benefit, but would achieve the goal of providing equitable hiring preferences to all of its employees.

Southcoast claims (Br. 21) that a facility-based preference would make no difference to the represented employees at Tobey because "they will still need to wait until the second round when applying for positions at St. Luke's or Charlton." This argument is mistaken for two reasons. First, a facility-based preference would make a significant difference to Tobey employees because it would reduce the number of applicants who receive a preference over them for vacant positions at St. Luke's and Charlton. Under the current discriminatory policy, if a job opens up at St. Luke's, both St. Luke's and Charlton's employees receive a preference over Tobey employees for the job. Under a facility-based policy, only employees at St. Luke's would receive a preference over Tobey employees. It is true that, under both HR 4.06 and a facility-based rule, Tobey employees would interview in the second round, but under the facility-based rule, fewer applicants would interview ahead of Tobey employees in the first round.

Second, a facility-based rule would differ in that it would not discriminate against employees on the basis of union membership and bargained-for contractual benefits. Such discrimination makes a difference to employees because it tends to

coerce, intimidate, and discourage them from engaging in union activities protected by the Act. This is the basic premise of the prohibition on discrimination in Section 8(a)(3) of the Act. *See* 29 U.S.C. § 158(a)(3); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963).

Southcoast also argues (Br. 22) that a facility-based rule would "needlessly impede the ability of non-bargaining-unit employees to transfer freely between St. Luke's and Charlton." However, this kind of impediment is precisely what is called for by the "level the playing field" rationale. Under the combined transfer regime established by HR 4.06 and Section 8.2 of the collective-bargaining agreement, Tobey employees are impeded from freely transferring to two facilities (St. Luke's and Charlton), while St. Luke's and Charlton employees are only impeded from freely transferring to one facility (Tobey). Under a facility-based rule, all employees would be equally impeded from freely transferring to two facilities. Thus, the Board was correct to reject Southcoast's "level the playing field" business justification as it is illogical, given that HR 4.06, by affirmatively penalizing Tobey's unionized employees, went much further than leveling the playing field with respect to them. *Borden II*, 645 F.2d at 88 (rejecting employer's business justification as "illogical").

### 3. Southcoast erred in arguing for more deferential scrutiny of business justifications

For the above reasons, Southcoast did not prove that it had a "legitimate and substantial business justification" for its discriminatory hiring/transfer policy. Southcoast, however, incorrectly argues (Br.19-20) that it is entitled to a much more deferential scrutiny of its business justifications. In doing so, it relies solely on *Borden I* (*NLRB v. Borden*, 600 F.2d 313 (1st Cir. 1979)), a case that this Court has disavowed. In *Borden I*, the employer claimed that it discriminatorily delayed vacation pay because its collective-bargaining agreement required it to do so. 600 F.2d at 231. The Board found that the collective-bargaining agreement did not require such a delay and thus concluded that the employer lacked a legitimate and substantial business justification for its conduct. *Id.* In reviewing the Board's decision, the Court gave an erroneous account of the kind of scrutiny required by *Great Dane*:

> The Board had a duty to determine whether Borden was motivated by its reliance on the collective bargaining agreement or by antiunion animus when it withheld the accrued vacation benefits. We caution the Board that it is neither our function nor the Board's to second-guess business decisions. The Act was not intended to guarantee that business decisions be sound, only that they not be the product of antiunion motivation.

*Borden I*, 600 F.2d at 231. According to this account, the Board's inquiry after finding discrimination is supposed to be focused, not on the objective legitimacy and substantiality of the employer's business justifications, but instead on the

employer's motivations for its actions. On this account, the "only" requirement of the employer's actions is "that they not be the product of antiunion motivation." *Id.*

Recognizing that it applied the wrong legal standard, the Court disavowed *Borden I* two years later. *Statler Indus., Inc. v. NLRB*, 644 F.2d 902, 905 n.4 (1st Cir. 1981) ("In retrospect we do view as erroneous the last sentence of our opinion in [*Borden I*] where we assigned the burden to the Board of establishing that the employer would not have taken an action but for an improper motivation."). Contrary to the Court's pronouncements in *Borden I*, the Board's task at step two of *Great Dane* is to examine whether the employer proved a legitimate and substantial business justification, and not to inquire into its motivations. *Fleetwood Trailer Co.*, 389 U.S. at 380; *Borden II*, 645 F.2d at 88 (1st Cir. 1981) (where "employer's response to the Board's initial showing of discrimination … does not prove a legitimate business justification, however, the Board is entitled to prevail on its initial showing").

### C. Substantial Evidence Supports the Board's Determination that Southcoast Violated the Act by Applying HR 4.06 to Refuse to Consider and Delay the Hiring of Christoper Souza, Noelia Nunes, and Similarly Situated Employees

After finding that HR 4.06 violated the Act, the Board also properly determined that Southcoast's application of HR 4.06 in the cases of Souza , Nunes, and similarly situated employees, violated the Act and remedied those violations appropriately. (A. 42.) It necessarily follows that, if HR 4.06 is a discriminatory

policy that violates Sections 8(a)(3) and (1) of the Act, then each particular application of HR 4.06 to individual job applicants also violates Section 8(a)(3) and (1) of the Act. Thus, when Southcoast refused to consider Christopher Souza for a building superintendent position at St. Luke's, it violated the Act. (A. 51.) When Southcoast refused to consider Nunes for four separate jobs at St. Luke's and delayed the hiring of Nunes for a job at St. Luke's, it violated the Act. (A. 52-53.) The same is true of any other similarly situated represented employees who may also have been harmed by the application of HR 4.06 in their bids for open positions at St. Luke's and Charlton.

In these proceedings, Southcoast has not challenged the Board's conclusion that, if HR 4.06 is unlawful, then Southcoast's treatment of Souza, Nunes, and similarly situated employees was also unlawful. Accordingly, as long as the Court affirms the Board's finding that HR 4.06 is unlawful, the Board is entitled to enforcement of its additional finding that the policy effectuated unlawful discrimination against both the individuals and the class identified. *See NLRB v. Hotel Employees & Rest. Employees Int'l Union Local 26, AFL-CIO*, 446 F.3d 200, 206 (1st Cir. 2006) (argument not raised in opening brief waived).

### D. Substantial Evidence Supports the Board's Determination that the Union Was Not Equitably Estopped from Challenging the Maintenance and Enforcement of HR 4.06

Southcoast argues that the Union acquiesced to its unilateral implementation of HR 4.06 for more than 11 years before filing its unfair labor practice charge and, for this reason, should be equitably estopped from complaining about it now. Substantial evidence, however, supports the Board's the finding that the Union could not have acquiesced to the policy because it lacked sufficient knowledge of the policy's existence until 2011, when it timely filed its unfair labor practice charge.

As an initial matter, the Board found (A. 54) that the Union did not clearly and unmistakably waive, during its 1997-98 contract negotiations or in the resulting collective-bargaining agreement, its right to bargain over the 1999 promulgation of HR 4.06. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (courts "will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.") During those negotiations, Southcoast offered to give Tobey workers the same kind of preference for positions at St. Luke's and Charlton, as St. Luke's employees had at Charlton, and as Charlton employees had at St. Luke's, provided the Union would agree to change the "most senior qualified" provision of the

Tobey preference to "best qualified." (A. 54; A. 214-19, A. 1570.) The Union rejected this proposal. (A. 54.) Although the exact nature of the preference that prevailed for employees at St. Luke's and Charlton in 1997-1998 remains unclear, Southcoast Vice-President DeJesus testified that it "wasn't a prior version of the policy," referring to HR 4.06. (A. 218.) DeJesus also testified that Southcoast had no meetings or discussions with the Union regarding HR 4.06 prior to its implementation and that there was no written or unwritten agreement between the parties to implement HR 4.06. (A. 222-23.) Given these facts, substantial evidence supports the Board's finding that the Union did not clearly and unmistakably waive its right to bargain about the initial promulgation of HR 4.06. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Bath Marine Draftsmen Ass'n v. NLRB*, 475 F.3d 14, 22 (1st Cir. 2007).

After determining that Southcoast had not waived its rights during or before the initial promulgation of HR 4.06, the Board turned to the question of whether the Union had subsequently acquiesced to the policy during its 11-year existence, thereby giving rise to an estoppel defense. Ample evidence supports the Board's finding (A. 40 n. 3; A. 54-55) that the Union could not have acquiesced to the policy over time because it did not know of the policy's existence. Specifically, the Board found that the Union was not aware of HR 4.06 until 2011 when Christopher Souza, a represented employee working at Tobey, brought it to the

attention of Lisa Lemieux, a Union organizer. (A. 54; A. 109.) Lemieux filed an unfair labor practice charge with the Board shortly thereafter. In her testimony, which the Board credited "in its entirety" (A. 54), Lemieux denied knowing (A. 125) that HR 4.06 existed prior to Souza's complaint about it. Although she vaguely remembered discussions about job bidding in 1998, one year prior to the adoption of HR 4.06, she had not heard anything else about the topic since. (A. 125.) Because it is impossible to acquiesce to a policy without sufficient knowledge of its existence, the Board correctly concluded that nothing in the Union's course of conduct gave rise to an estoppel defense. *See, e.g., Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005).

In its brief, Southcoast lists several facts (Br. 27-28) that it believes provide enough evidence for its estoppel defense. But these facts, neither individually nor taken together, prove that the Union had knowledge of HR 4.06's existence. For example, the mere fact that HR 4.06 had been in effect for 11 years prior to the Union's charge and that Southcoast had some kind of hiring preference at St. Luke's and Charlton before HR 4.06, without more, fails to show that the Union had knowledge of HR 4.06. Moreover, with respect to the earlier policy, as noted above, Southcoast Vice President DeJesus specifically testified (A. 218) that it was not a prior version of HR 4.06.

Similarly, that Union organizer Lemieux had received complaints from bargaining-unit members about unsuccessful bids for jobs at St. Luke's and Charlton does not prove that Lemieux knew of HR 4.06. Lemieux recalled complaints about Tobey employee transfer bids being unsuccessful (A. 136), but specifically did not say that anyone had complained that their lack of success was due to a preference policy. Therefore, Lemieux's testimony that she received such complaints in no way undermines her credited testimony that she did not know of the policy, and Southcoast has provided no basis to overturn the Board's credibility determination. *NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, (1st Cir. 2000) (finding no basis for setting aside credibility determinations where judge did not overstep "the bounds of reason").[4] Southcoast does not contend that its estoppel defense can succeed if the Union did not have knowledge of HR 4.06's existence. Indeed, the main case that Southcoast relies on (Br. 17) turns upon the Union's knowledge of the offending policy. *See Manitowoc Ice, Inc.*, 344 NLRB at 1224 (2005) (union's repeated and knowing acquiescence to employer's unilateral changes in profit-sharing plan estopped its unfair labor practice charge concerning

[4] The fact that Christine, a bargaining-unit member, received an email in November 2011 (A. 1694-97) explicitly informing her that she would not be considered in the first round for an open job because she was a union member does not prove that the Union had knowledge of the existence of HR 4.06 prior to July 2011, the month that Souza brought it to the attention of Lemieux. (A.54; A. 109.)

unilateral changes to plan). As a result, there is nothing to Southcoast's argument (Br. 25-28) that the Board's applied the wrong legal standard when it rejected Southcoast's defense of equitable estoppel.[5]

[5] Southcoast contends that the Board applied a waiver analysis *rather* than an estoppel analysis. Actually, the judge applied both. (A. 54-55.) After applying a waiver analysis (discussed above), the judge went on to "*also* find that the Union did not implicitly waive bargaining and acquiesced to the policy when [Southcoast] promulgated HR 4.06." (A. 54; emphasis added). While the judge used the phrase "implicitly waive" to refer to the kind of acquiescing course of conduct that can give rise to an estoppel defense, that is to be contrasted with the judge's earlier discussion of explicit waiver. The Board squarely met Southcoast's equitable-estoppel argument when, at footnote 3 (A. 40 n.3), it rejected Southcoast's contention that the Union had acquiesced in Southcoast's unilateral implementation of HR 4.06 for more than 11 years before filing its unfair labor practice charge.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Southcoast's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

/s/ Robert J. Englehart

ROBERT J. ENGLEHART
*Supervisory Attorney*

/s/ Matthew Bruenig

MATTHEW BRUENIG
*Attorney*

National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001
(202) 273-2978
(202) 273-3831

RICHARD F. GRIFFIN, JR.
*General Counsel*

JENNIFER ABRUZZO
*Deputy General Counsel*

JOHN H. FERGUSON
*Associate General Counsel*

LINDA DREEBEN
*Deputy Associate General Counsel*

May 2016

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

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| Petitioner/Cross-Respondent | * | Nos. 15-2146 & |
| | * | 15-2258 |
| v. | * | |
| | * | Board Case No. |
| NATIONAL LABOR RELATIONS BOARD | * | 01-CA-067303 |
| | * | |
| Respondent/Cross-Petitioner | * | |
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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,370 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3th day of May, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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

Matthew Hayes Parker
Joseph D. Whelan
Whelan Corrente Kinder & Siket LLP
100 Westminster St, Ste 710
Providence, RI 02903-2319

Southcoast Hospitals Group, Inc.
Attn: Ann Colwell
43 High St
Wareham, MA 02571-2097

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 3th day of May, 2016