No. 04-107

In the Supreme Court of the United States

CIBAO MEAT PRODUCTS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board (the Board) reasonably concluded that petitioner unlawfully discharged employees based on a belief that those employees would engage in concerted activity protesting the suspension of another employee.

2. Whether the Board reasonably concluded that an employee was engaged in concerted activity when he protested a change in an employment term during a meeting at which the change was announced to all employees.

3. Whether substantial evidence supported the Board's determination that petitioner engaged in unfair labor practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter*, but is *reprinted in* 84 Fed. Appx. 155. The decision and order of the National Labor Relations Board (Pet. App. 4a-13a) and the decision of the administrative law judge (Pet. App. 13a-35a) are reported at 338 N.L.R.B. No. 134.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2004. A petition for rehearing was denied on April 22, 2004 (Pet. App. 36a-37a). The petition for a

writ of certiorari was filed on July 21, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner processes and sells meat products. Pet. App. 14a. Approximately 30 production employees work at its facility in Bronx, New York. *Id.* at 15a. Petitioner also employs several security employees, who usually assist a member of management in unlocking the facility's gated entrance each morning. *Ibid.*

On the morning of January 17, 2000, long-time production employees Mario Mendez, Jose Luis Mendez, Modesto Flores and Cayetano Flores arrived together to work at petitioner's Bronx facility. Pet. App. 15a, 18a, 22a-23a. Mario Mendez and Jose Luis Mendez are brothers, Modesto Flores and Cayetano Flores also are brothers, and the two pairs of brothers are related to one another by marriage. *Id.* at 22a-23a. When the four of them arrived to work, the entrance gate was locked. *Id.* at 15a. Consistent with the usual practice, they remained in their car and waited for a manager or a security employee to open the entrance gate. *Ibid.* In a short time, petitioner's vice president, Lutzi Vieluf-Isidor arrived and unlocked the gate. *Ibid.* Vieluf-Isidor briefly waited for someone to assist her in lifting the gate. When no security guard came to assist her, another employee volunteered to lift the gate. *Ibid.*

Vice President Vieluf-Isidor then directed petitioner's quality control manager, Elisabeth Sandner, to summon all employees to a meeting. Pet. 3; Pet. App. 15a. At the meeting, Sandner stated that the vice president was very upset because no production employee had immediately assisted her with opening the gate that morning. *Id.* at 15a. Sandner further stated

that petitioner would immediately be implementing a new policy under which all employees would be responsible for opening the gate. *Ibid.* Sandner added that petitioner would issue a one-day suspension to any employee who did not voluntarily comply with the policy. *Id.* at 15a-16a. Mario Mendez spoke up in response to the new policy, stating that it was not his job, but was the job of the security guards, to open the gate. *Id.* at 16a. He added, "we are the workers, the employees, after you open the factory." *Ibid.*

After the meeting, Sandner reported to Vice President Vieluf-Isidor that Mario Mendez did not want to open the gate or abide by the new policy. Pet. App. 16a. The vice president immediately announced over petitioner's intercom system that Mario Mendez was suspended for one day. *Ibid.* Mendez returned to the locker room to change into his street clothes. *Ibid.* While Mendez was changing his clothes, other employees, including Jose Luis Mendez, Cayetano Flores, and Modesto Flores, decided to speak to the vice president on Mario Mendez's behalf. *Ibid.* When the group of about 30 employees approached the vice president, she grew upset and stated that if the employees did not want to work she would close the factory. *Ibid.* Cayetano Flores explained that he wanted to work but that he also wanted Mario Mendez to keep his job. *Ibid.* A security guard added that the job of opening the gate was traditionally security's responsibility. *Ibid.* The vice president told the workers that Mario Mendez could return to work the next day but that he was still suspended because she wanted her word to count for something. *Id.* at 16a-17a.

After meeting with the employees, the vice president met privately with Mario Mendez. She explained that she had suspended him because he protested the new

policy in front of other employees. Pet. App. 17a. She later admitted that she would not have suspended Mendez if he had spoken with her privately about his concerns with the new policy. *Ibid.* Later that afternoon, Jose Luis Mendez, Cayetano Flores, and Modesto Flores initiated a second meeting with the other employees to discuss Mendez's suspension and how the employees could more effectively represent themselves before management. *Ibid.*

That evening, Vice President Vieluf-Isidor spoke by telephone to her brother, petitioner's president, Heinz Vieluf, about the gate incident and Mendez's suspension. Pet. App. 17a. Vieluf had already discussed the incident with Sandner. *Ibid.* Vieluf, without explanation, told his sister to fire Cayetano Flores, Modesto Flores, and Jose Luis Mendez. *Ibid.* The following day, Vice President Vieluf-Isidor discharged those employees. *Ibid.* When asked to give the reason for their termination, the vice president said that she did not know. *Ibid.* Cayetano Flores asked for a dismissal letter, which the vice president agreed to provide. *Id.* at 17a-18a. Later that day, the employees picked up their dismissal letters, as well as a letter of suspension addressed to Mario Mendez. *Ibid.* The dismissal letters to Jose Luis Mendez, Modesto Flores, and Cayetano Flores stated that they were being temporarily laid off because of lack of work. *Ibid.* Mario Mendez's suspension letter stated that he was suspended for one day. *Ibid.*

Sometime after the discharges, President Vieluf held a meeting of employees. Pet. App. 19a. When asked why the three men had been terminated, Vieluf explained that Jose Luis Mendez was dismissed because he "was an agitator within the company," and that Cayetano and Modesto Flores were dismissed because

they were related to Mendez and "they may all have the same ideas." *Ibid.*

2. Acting in response to charges filed by the Union representing petitioner's employees,[1] the Board's General Counsel issued a complaint alleging, *inter alia*, that petitioner violated Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1), by suspending Mario Mendez and by discharging Cayetano Flores, Modesto Flores, and Jose Luis Mendez. Pet. App. 14a. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the NLRA, 29 U.S.C. 157. Those protected rights include "the right * * * to engage in * * * concerted activities for the purpose of * * * mutual aid or protection." 29 U.S.C. 157.

a. After a hearing, an administrative law judge (ALJ) ruled that petitioner had violated Section 8(a)(1) of the NLRA. Pet. App. 13a-31a. The ALJ first concluded that petitioner violated Section 8(a)(1) by suspending Mario Mendez for "speaking out at the meeting to protest [petitioner's] new policy of requiring the production employees to open the plant gate in the morning." *Id.* at 20a. The ALJ explained that "individual action is concerted as long as it is 'engaged in with the object of initiating or inducing . . . group action.'" *Id.* at 21a (quoting *Mushroom Transp. Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). The ALJ further explained that, "[p]articularly in a group-meeting context, a concerted objective may be inferred from the

[1] Shortly after the events in this case took place, Local 169, Union of Needletrades, Industrial and Textile Employees, AFL-CIO, became the certified collective-bargaining representative of petitioner's employees. Pet. App. 19a-20a.

circumstances." *Ibid.* (quoting *Whittaker Corp.*, 289 N.L.R.B. 933, 934 (1988)). The ALJ found that the evidence established that "Mario Mendez was protesting [petitioner's] new policy on behalf of all employees," noting that Mendez had stated that "we are the workers, the employees, after you open the factory." *Ibid.* The ALJ also rejected petitioner's contention that it had no knowledge that Mendez was engaged in protected activity. *Id.* at 22a.

The ALJ next concluded that petitioner violated Section 8(a)(1) by discharging Cayetano Flores, Modesto Flores, and Jose Luis Mendez because of concerns that they might protest the discharge of Mario Mendez. Pet. App. 22a-27a. The ALJ relied on the statements of petitioner's president at an employee meeting to the effect that Jose Luis Mendez was discharged because he "was an agitator within the company," and that Cayetano Flores and Modesto Flores were discharged because, as Jose Luis Mendez's brothers-in-law, they might be in agreement with Jose Luis Mendez. *Id.* at 23a. The ALJ also found that the "timing of the discharges, one day after Mario Mendez's suspension, confirm[s] that the discharges were solely motivated by the employees['] familial relationship with Mario Mendez." *Id.* at 24a.

The ALJ rejected petitioner's unsupported claim that President Vieluf discharged Jose Luis Mendez because he suspected that Mendez may have been responsible for improperly mixing a batch of meat in July 1999—six months before the Mendez incident. Pet. App. 18a, 25a. The ALJ also rejected petitioner's uncorroborated contention that President Vieluf discharged Modesto Flores because he believed that Modesto had been involved in an altercation with one of petitioner's employees. *Id.* at 17a-19a, 26a-27a, 31a n.2.

b. The Board affirmed the ALJ's findings and conclusions in pertinent part. Pet. App. 4a-13a. The Board rejected petitioner's argument that Mario Mendez engaged in unprotected insubordination by protesting a management decision. Recognizing that "an employee's right to engage in concerted activity must be balanced against the employer's right to maintain order and respect," the Board explained that some concerted activity may, if sufficiently egregious or offensive, lose the protection of the Act. *Id.* at 6a-7a. The Board found no evidence in this case, however, that "Mendez' statement was an intemperate outburst in response to [petitioner's] directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act." *Id.* at 7a.

The Board ordered petitioner to cease and desist from discharging, suspending, or laying off its employees because of their protected activity; to make the employees whole for any lost earnings and benefits suffered as a result of petitioner's discriminatory conduct; and to post an appropriate remedial notice at petitioner's Bronx facility. Pet. App. 8a-9a.

3. The Board filed an application in the court of appeals for enforcement of its order, and petitioner filed a cross-petition for review. Pet. App. 1a-2a. In an unpublished summary order, the court enforced the Board's order and denied petitioner's cross-petition for review. *Ibid.* The court stated that petitioner argued for "alternative findings and inferences that were available and permissible," but that "the Board's legal conclusions are reasonably based, and substantial evidence supports its factual findings." *Ibid.*

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore unwarranted.

1. Petitioner challenges (Pet. 10-16) the court of appeals' affirmance of the Board's conclusion that petitioner violated Section 8(a)(1) of the NLRA by discharging employees Jose Luis Mendez, Modesto Flores, and Cayetano Flores based on concerns that those employees would engage in concerted action protesting the suspension of Mario Mendez. According to petitioner (Pet. 8), the Board expanded the meaning and the scope of Section 7 of the NLRA by "requir[ing] an 8(a)(1) violation in all situations where employers fear that employees intended to engage in concerted activity —irrespective of whether the feared employee conduct is protected or unprotected by the Act." Petitioner's argument mischaracterizes the Board's findings and presents no issue warranting review by this Court.

a. As petitioner acknowledges (Pet. 12), an employer acts unlawfully by taking action against employees based on a belief that the employees engaged (or intended to engage) in protected concerted activity, regardless of whether the employees in fact engaged in or intended to engage in such activity. See *JCR Hotel, Inc.* v. *NLRB*, 342 F.3d 837, 840 (8th Cir. 2003); see also *NLRB* v. *Link-Belt Co.*, 311 U.S. 584, 589-90 (1941) (violation of NLRA to discharge employee for apparent mistaken belief that he was member of, and solicited for, union). The court of appeals correctly upheld the Board's application of that principle here, holding that the Board reasonably found that petitioner believed that the employees would engage in concerted activity

protesting Mario Mendez's unlawful suspension. As soon as petitioner's president learned about the gate incident and the suspension of Mario Mendez, the president singled out Mendez's relatives and, without giving a reason, ordered their discharge. As the Board explained (Pet. App. 23a), petitioner "believed that a family relationship was a sufficient basis to assume that [the three employees] would act concertedly" to protest the unlawful suspension of Mario Mendez.[2]

b. Contrary to petitioner's contention (Pet. 14-15), the Board's decision does not depart from the settled principle that an employer must have knowledge of the concerted nature of activity. As the Board found, petitioner clearly believed that the employees would take action in support of Mario Mendez, which in itself indicates suspected concerted activity. Pet. App. 19a, 23a-24a. Moreover, petitioner's admission that it discharged Jose Luis Mendez because he was an "agitator," and its admitted assumption that the three discharged employees held shared ideas by virtue of their familial relationship, support an inference that

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[2] In so finding, the Board drew on precedent that employers violate the NLRA by discharging employees because of their family relationship to other employees who have engaged in protected activities. Pet. App. 24a (citing *Thorgren Tool & Molding, Inc.*, 312 N.L.R.B. 628, 630-631 (1993) (holding that employer violated Section 8(a)(3) and (1) of the NLRA by discharging employee because of union activity of employee's wife and mother-in-law)); see *Kenrich Petrochems., Inc.* v. *NLRB*, 907 F.2d 400, 402-404, 406 (3d Cir.) (en banc) (Board properly ordered reinstatement of supervisor who was unlawfully discharged because of union activities of her family members), cert. denied, 498 U.S. 981 (1990); *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-1089 (7th Cir. 1987) (employer violated Section 8(a)(1) of the NLRA by discharging supervisor because of her son's union activity).

petitioner believed they would act in concert. *Id.* at 19a.[3]

There also is no merit to petitioner's related suggestion (Pet. 10) that the Board's decision subjects employers to unfair labor practice findings "irrespective of whether the * * * concerted activity is protected or unprotected by the Act." The Board found that petitioner discharged the three employees based on a belief that "they would act concertedly in the protected endeavor of protesting Mario Mendez' unlawful suspension." Pet. App. 13a. The three employees, along with virtually all of their co-workers, had already met with petitioner's vice president to express their opposition to Mario Mendez' suspension. In those circum-

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[3] The cases relied on by petitioner (Pet. 14-15) are inapposite, because there was no factual basis in those cases to support any inference of employer knowledge that a discharged employee had acted (or would act) in concert with other employees. In *Air Surrey Corp.* v. *NLRB*, 601 F.2d 256, 257 (6th Cir. 1979), the court held that there was no employer knowledge of concerted activity where the employer knew only that one employee had gone to the employer's bank to inquire whether sufficient funds existed to cover the payroll, and other employees, who had intended to go along, told the employer that they were not involved. *NLRB* v. *Office Towel Supply Co.*, 201 F.2d 838, 840 (2d Cir. 1953), held that an employer that discharged an employee for complaining about workload was unaware that the employee had engaged in concerted activity, because the employer knew only that the employee had made the statement but had no knowledge that the statement was made during a discussion with other employees about the need for a union. *NLRB* v. *Westinghouse Elec. Corp.*, 179 F.2d 507, 509 (6th Cir. 1949) (per curiam), held that an employer lawfully discharged an employee for disturbing other workers and destroying morale by telling employees, incorrectly, that they were making less money than employees at another plant; the employer did not know that the employee was working in concert with other employees.

stances, the Board is entitled to conclude that, by discharging the employees, petitioner intended to prevent them from engaging in additional statutorily protected forms of protest.

Petitioner misconstrues the Board's decision in arguing (Pet. 8, 10-11) that the decision subjects employers to unfair labor practice findings even if they act based on a belief that employees will engage in unprotected activity. In fact, the Board found (Pet. App. 24a-27a) that petitioner failed to meet its burden under *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 400-403 (1983), to establish that it would have discharged the three employees based on a good faith belief that they would engage in unprotected activity. The Board, as petitioner acknowledges (Pet. 13-14), rejected, as not credible, petitioner's claim that it discharged two of the employees based on a belief that the employees might have sabotaged petitioner's product to retaliate for Mario Mendez's suspension. See Pet. App. 24a-27a. Petitioner's fact-bound disagreement with the Board's rejection of that asserted basis for the discharges warrants no further review.

2. Petitioner argues (Pet. 16-21) that the Board erred in finding that petitioner violated Section 8(a)(1) of the NLRA by suspending Mario Mendez for engaging in concerted activity. That fact-bound contention lacks merit and does not warrant review.

a. Petitioner asserts (Pet. 17) that, in finding its suspension of Mario Mendez unlawful, the Board impermissibly held "that an employee who speaks out at an employee group meeting is *per se* engaging in concerted activity." Because petitioner failed to raise that argument before the Board (or in a motion for reconsideration with the Board), the NLRA prevents the Court from considering it in the first instance. See

29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982) (bar against judicial review under 29 U.S.C. 160(e) applies where party fails to preserve objection to Board's decision by filing petition for reconsideration with Board); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (same). Petitioner also failed to raise its "*per se*" argument in the court of appeals. This Court typically does not consider claims that were neither raised nor decided below, see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984), and there is no reason for departing from that customary practice here.

In any event, petitioner's characterization of the Board's decision is incorrect. The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986), enforced, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988); see *Mushroom Transp. Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or * * * it had some relation to group action in the interest of the employees"). See also *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing

as an example "the lone employee" who "intends to induce group activity").

In deciding "when the act of a single employee is or is not 'concerted,'" the Board has held that the "object of inducing group action need not be express," but "may be inferred from the circumstances." *Whittaker Corp.*, 289 N.L.R.B. 933, 933-934 (1988); accord *NLRB* v. *Caval Tool Div.*, 272 F.3d 184, 190 (2d Cir. 2001); see *El Gran Combo* v. *NLRB*, 853 F.2d 996, 1005 (1st Cir. 1988) ("There is little doubt" that employee's objection at meeting "was meant to light a fire under" co-workers.); *Ajax Paving Indus., Inc.* v. *NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (per curiam) (Board reasonably inferred that employee's conduct "reflected commonality of purpose"); *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 412*, 328 N.L.R.B. 1079, 1081 (1999) (object of inducing group action need not be express).

Contrary to petitioner's claim (Pet. 17), the Board did not hold "as a matter of law" that an employee who speaks out during an employee group meeting "has done so with the object of initiating" group action. Instead, the Board based its finding of concerted activity on "reasonable inferences raised by the totality of the circumstances surrounding [the employees'] conduct." *Ajax Paving Indus., Inc.* v. *NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (per curiam). In particular, the Board's determination was based on considerations that have been identified as relevant in the context of an employee meeting, including whether the employee protests a management action that affects a large number of employees.[4] Petitioner called an all-employee

[4] See *NLRB* v. *Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (employee questioned employer safety measures that affected the

meeting to announce a new work rule requiring all production employees to assist management in opening the gated front entrance, and Mendez protested the new rule at the meeting in the presence of the other employees, using the collective form—"*we* are the workers, the employees, after you open the gate." Pet. App. 16a (emphasis added); see *NLRB* v. *Caval Tool Div.*, 272 F.3d at 189-190 (employee's comments concerted not merely because they were made at an employee meeting called by employer, but because they were directed at an announced change in the terms and conditions of employment); *Rockwell Int'l Corp.* v. *NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (employee voiced concern common to the employees in the group meeting; the group was aware of the actions, since they were present at the meeting).

b. Petitioner contends (Pet. 18-21) that, even if Mario Mendez engaged in protected, concerted activity, petitioner lacked knowledge that Mendez was engaged in such activity when it disciplined him. Petitioner's disagreement with the Board's factual finding regarding petitioner's knowledge does not warrant this Court's review. In any event, the Board reasonably found that petitioner knew about Mendez's protected concerted activity when it suspended him. Petitioner's vice president admitted that she suspended Mendez

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entire plant); *Rockwell Int'l Corp.* v. *NLRB*, 814 F.2d 1530, 1535 (11th Cir. 1987) (employee objected to employer's lecturing employees about volume of radio headsets worn by employees and also commented on noise in the workplace). Because the Board considers whether the subject of the employee's protest affects the other employees present at the meeting, petitioner errs in asserting (Pet. 17) that the Board will find a concerted objective "even in the absence of evidence that the issue was important to anyone other than the speaker."

because he spoke up at the meeting, and that she would not have suspended him if he had come to her privately with his concerns rather than raising them at the group meeting. Pet. App. 17a. Here, as in *NLRB* v. *Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998), the context of the group meeting made the employer "very aware" that the complaining employee's conduct "might induce [other] employees to act."

c. Petitioner errs in suggesting (Pet. 9, 17) that the Board's interpretation of Section 7 renders employers powerless to control employee conduct during group meetings or to discipline employees who challenge authority. The Board specifically observed that "an employee who is engaged in concerted activity may, by conduct that is sufficiently egregious or offensive, lose the protection of the Act." Pet. App. 6a-7a; see *NLRB* v. *City Disposal Sys., Inc.*, 465 U.S. 822, 837 (1984) ("An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7."). The Board reasonably applied that rule here in finding that "[t]here is no indication in the record * * * that Mendez' statement was an intemperate outburst in response to [petitioner's] directive, that it was disruptive or that it was otherwise so egregious or offensive as to forfeit the protections of the Act." Pet. App. 7a.

3. Finally, petitioner contends (Pet. 21-25) that the court of appeals erred in concluding that substantial evidence supports the Board's factual findings. As this Court has explained: "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misappre-

hended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). The court of appeals did not "misapprehend" the substantial evidence standard, and there is no warrant for reviewing the court's fact-bound application of that standard in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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