

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

No. 01-2338

ALLEGHENY LUDLUM CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court upon the petition of Allegheny Ludlum Corporation (“the Company”) to review a final order of the National Labor

Relations Board (“the Board”). The Board has filed a cross-application for enforcement of its order, and United Steelworkers of America, AFL-CIO-CLC (“the Union”) has intervened on the side of the Board.

The Board had jurisdiction below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices. This Court has appellate jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Pennsylvania. The Board’s Supplemental Decision and Order issued on March 30, 2001, and is reported at 333 NLRB No. 109. (A 199-218.)¹ The Company filed its petition for review on May 25, 2001, and the Board filed its cross-application for enforcement on July 3, 2001. Both filings were timely; the Act places no time limits on challenging or seeking enforcement of Board orders.

¹ “A” references are to the Appendix filed by the Company. When an “A” reference contains a semicolon, references preceding the semicolon are to findings of the Board, and references following the semicolon are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board adopted a reasonable standard to govern the manner in which employers solicit employees to appear in antiunion videos.

2. Whether substantial evidence supports the Board's finding that the Company's method of solicitation in the instant case violated that standard.

3. Whether the Company's belated retroactivity argument is barred by Section 10(e) of the Act and, in any event, contrary to this Court's teaching that a new legal standard should apply to the decision in which it is announced.

STATEMENT OF THE CASE

This case arose out events surrounding a representation election involving the Company's clerical employees. Based upon charges filed by the Union, the Board's General Counsel issued a complaint against the Company alleging that it committed several unfair labor practices. (A 126-127.) Following a hearing, an administrative law judge issued a decision finding merit in most of the General Counsel's allegations. (A 126, 156.)

Specifically, the judge found that the Company had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) in the weeks preceding the secret-ballot election by (1) interrogating employee James Borgan about his support of the Union, (2) threatening employees with more onerous working conditions if they selected the Union as their representative, (3) polling employees about their union

sentiments by soliciting them to appear in an antiunion campaign video, (4) sending a newsletter to employees at their homes that threatened them with loss of jobs and loss of job security if they supported the Union, and (5) threatening employees in a variety of ways through statements made by its chief executive officer at group meetings with employees. (A 156.) In addition, the judge found that the Company had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Borgan after the election because of his union activity. (A 155, 156.) After considering the Company's exceptions to the administrative law judge's decision, the Board (Chairman Gould and Member Truesdale; Member Cohen concurring in the result) affirmed the judge's findings, rulings, and conclusions, and adopted his recommended order. (A 124.)

The Company challenged the Board's order by filing a petition for review with the D.C. Circuit, and that court enforced the Board's order except insofar as it related to the Company's solicitations of employees to appear in its antiunion video. (A 162, 175.) With respect to that one issue, the D.C. Circuit remanded the case to the Board "with instructions to develop a standard that is comprehensible to employers and that it will consistently apply." (A 164.) On remand, the Board (Chairman Truesdale and Members Liebman and Walsh; Member Hurtgen dissenting in part) issued a supplemental decision that articulated a five-part standard for judging the conduct of employers who solicit their employees to

appear in antiunion videos. (A 199, 207.) After applying that standard to the Company's conduct, the Board reaffirmed its initial finding that the Company had violated Section 8(a)(1) of the Act. (A 209-210.) The Company now seeks review, and the Board seeks enforcement, of the order contained in the Board's supplemental decision.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

On October 4, 1994, the Union filed a petition with the Board to represent clerical employees working for the Company, which manufactures specialty steel products at several sites in Pennsylvania and maintains a corporate headquarters in Pittsburgh. (A 126; 11-12, 109.)² After the Board scheduled a representation election for December 2, the Company waged an active campaign to oppose union representation. (A 128, 163, 199.)

As part of its campaign, the Company produced three antiunion videotapes that it showed to its clerical employees at meetings conducted during work hours. (A 128, 131; 68.) The video at issue in this case, entitled "The 25th Hour," contains segments in which company employees express dissatisfaction with union representation at prior workplaces and state that they intend to vote "no" in the

² The Company's clerical employees are also referred to in the record as the "salaried non-exempt" employees.

upcoming election. (A 200; 107.) The video also includes antiunion testimonials from employees of other companies, and then closes with images of the Company's employees smiling and waving while the narrator explains why they should vote against the Union. (A 200; 107.) The Company's manager of communication services, Mark Ziemianski, personally supervised the filming of the video a few weeks before the election. (A 199; 61, 107.)

On November 14, the first day of filming, Ziemianski, accompanied by an outside video crew, approached several employees and asked them if they would consent to being filmed. (A 199; 70.) Employees who agreed were instructed to sit at their desks and, upon hearing a cue, turn towards the camera, smile, and wave. (A 199; 32-33.) Some employees filmed on November 14 were given an advance written notice explaining that they could decline to participate, but others only learned of the notice after being filmed. (A 199; 33.) The notice explained that the video would be used in the election campaign and stated that employees who wished not to appear should contact one of two company managers. (A 199; 33-34.)

On November 15, Ziemianski continued to ask employees if they would participate in the filming (A 74), but first distributed written notices advising the employees that the Company was preparing the video for use in the representation campaign. (A 199; 61.) One version of the notice directed employees who did

not wish to appear in the video to contact either Joyce Kurcina, the Company's director of employee relations, or Steven Spolar, the Company's human relations counsel. (A 199; 122.) The other version directed employees to notify the video crew. (A 199; 123.) These notices were again distributed by Ziemianski on November 16, the final day of filming. (A 199; 61.)

The Company filmed approximately 80 employees and compiled a written list of approximately 30 employees who had indicated to either Ziemianski, Kurcina, or Spolar that they did not wish to be filmed. (A 199-200; 62-63, 71, 111-21.) One of those employees, James Goralka, was filmed on November 14, and called Kurcina after finding a copy of one of the Company's notices. (A 199; 33-34.) Goralka told Kurcina that he and several of his coworkers did not wish to appear in the video, and Kurcina told Goralka to contact Ziemianski directly. (A 199; 34.) Goralka then called Ziemianski, who asked Goralka to put the names of the objecting employees in writing and told him that removing their images would not be a problem. (A 132; 34.)³ None of the objecting employees appeared in the final version of the film. (A 200.)

Many employees complained to the Union about the Company's filming procedure, and union representative Peter Passarelli contacted the Company and

³ In its supplemental decision, the Board inadvertently states that Kurcina, not Ziemianski, asked for the written list of the objecting employees. (A 199.)

complained that its conduct was coercive and constituted polling of the employees regarding their union sympathies. (A 200; 28.) The Company continued filming employees after hearing from Passarelli. (A 200.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On remand from the D.C. Circuit, which directed the Board to develop a clear standard (A 164), the Board announced the following five-part standard setting forth the circumstances under which an employer can lawfully solicit its employees to appear in an antiunion video:

1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
2. Employees are not pressured into making the decision in the presence of a supervisor.
3. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.
4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.
5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

(A 207.)

The Board then applied that standard to the Company's conduct and reaffirmed its initial decision that the Company had engaged in unlawful polling. (A 209-10.)

The Board's order requires the Company to cease and desist from engaging in unlawful polling and from, in any like or related manner, interfering with employees in the exercise of their statutory rights. Affirmatively, the Board's order requires the Company to post a remedial notice. (A 210.)

STATEMENT OF RELATED CASES

This case has not previously been before this Court, but has previously been before the D.C. Circuit. (A 162.) Board counsel are not aware of any related case that has been completed, is pending, or is about to be presented in this Court, any other court, or any state or federal agency.

STATEMENT OF THE STANDARD OF REVIEW

The Board's construction of the Act should be upheld if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). *Accord Quick v. NLRB*, 245 F.3d 231, 241 (3d Cir. 2001). If "Congress has directly spoken to the precise question at issue," then "that is the end of the matter." *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 147 (3d Cir. 1994) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984)). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is

whether the agency's answer is based on a permissible construction of the statute.” *Id.* (quoting *Chevron*, 467 U.S. at 843). For the Board to prevail, “it need not show that its construction is the *best* way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one.” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (emphasis in original). *See also NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 147 (3d Cir. 1991) (explaining that “this court is not free to substitute its preference for that of the Board”).

When reviewing the Board's application of its policy to the facts of a particular case, this court must “accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence.” *Stardyne, Inc. v. NLRB*, 41 F.3d at 151. *See* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

SUMMARY OF ARGUMENT

Under longstanding Board precedent, an employer is free to make antiunion paraphernalia generally available to its employees at central locations, but cannot directly solicit individual employees to wear such paraphernalia. As both the Board and the courts have recognized, direct solicitations tend to coerce employees by putting them in the position of having to openly declare their position on unionization to their antiunion employer.

In the instant case, the Board applied the well-settled rule from its antiunion paraphernalia cases to the similar context of antiunion videos. Thus, the Board concluded that an employer is free to make general announcements seeking employee volunteers to participate in an antiunion video, but cannot directly solicit individual employees to appear in such a video. Although the Board's approach is not the one favored by the Union—which would prohibit both general and direct solicitations—or the Company—which would permit both general and direct solicitations—it is an approach that reasonably balances the right of employees to be free from coercive polling of their union sentiments with the right of employers to express their opposition to unionization.

The Board's decision is also reasonable insofar as it provides a five-part standard that details exactly what an employer needs to do to ensure that its solicitations will be considered lawful. That standard, which is rooted in prior

polling precedent, directly addresses the concern expressed by the D.C. Circuit in its remand order about the lack of clear guidelines for employer videotaping. Of specific relevance to this case, the Board's standard requires employers to (1) use general announcements rather than direct solicitations when seeking employee participants for antiunion videos, (2) provide employees with specific assurances about the consequences of participation and nonparticipation, and (3) refrain from engaging in other unfair labor practices that create a coercive atmosphere.

Turning to the facts of this case, it is undisputed that (1) a company manager directly solicited numerous employees to appear in the Company's antiunion video, (2) the solicited employees did not receive any specific assurances about the consequences of their participation or nonparticipation, and (3) the Company engaged in a series of other unfair labor practices during its antiunion campaign. Given these circumstances, substantial evidence supports the Board's finding that the Company's systematic solicitation process constituted an unlawful poll.

Contrary to the Company's lead contention, the fact that it may have lacked an "intent" to poll employees does not constitute a valid defense. It is black-letter law that an employer's subjective intent is irrelevant in determining whether its conduct would have a reasonable tendency to coerce employees. Nor is there any merit to the Company's contention that the solicitation standard adopted by the Board violates its right to express antiunion views. The Company remains free to

produce videos in which management officials and employee volunteers express their antiunion views. All the Company is precluded from doing is using employees who are not willing to come forward as volunteers in response to a noncoercive, general announcement.

This Court should also reject the Company's argument that the Board erred by retroactively applying its solicitation standard to the Company's conduct. The Company waived this argument by failing to raise it before the Board; in any event, it has failed to meet its burden of showing that retroactive application of the Board's standard in this case would lead to a "manifest injustice." This is especially so because the Board's order does not impose any monetary liability and simply requires the posting of a remedial notice.

ARGUMENT

I. THE BOARD ADOPTED A REASONABLE STANDARD TO GOVERN THE MANNER IN WHICH EMPLOYERS SOLICIT EMPLOYEES TO APPEAR IN ANTIUNION VIDEOS

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to “form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) of the Act (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 Section 7 rights. To establish a violation of Section 8(a)(1), there “need be no proof of any actual interference with employees’ rights; there need only be a finding that the statements or acts of the employer would tend to coerce a reasonable employee.” *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (3d Cir. 1980). *Accord NLRB v. Armcor Indus.*, 535 F.2d 239, 242 (3d Cir. 1976).

The Board, with court approval, has long held that an employer violates Section 8(a)(1) when it polls employees concerning their union sentiments prior to a secret-ballot election. *See Struksnes Constr. Co.*, 165 NLRB 1062, 1063 & n.18 (1967) (collecting cases). Such polling “generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on Section 7 rights.” *Id.* at 1062. *See Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir. 1989) (identifying “several problems associated with employer

polls, including [their] tendency ‘to cause fear of reprisal in the mind of the employee’”) (quoting *Struksnes*, 165 NLRB at 1062).

In reviewing the Board’s initial decision in this case, the D.C. Circuit recognized that the prohibition on polling is not limited to “formal surveys,” but extends more broadly to conduct that “would tend to give employees the reasonable impression that the employer was attempting to discern their union sentiments.” (A 168.) More specifically, the D.C. Circuit observed that an employer engages in unlawful polling when its agents directly ask employees to wear antiunion paraphernalia because such conduct puts the employees “in the position of disclosing their preference for or against the Union by the acceptance or rejection of the” paraphernalia. (A 168) (quoting *Laidlaw Transit*, 310 NLRB 15, 17 (1993)).

Consistent with those principles, the Board held in its supplemental decision that an employer engages in unlawful polling when its agents directly solicit individual employees to appear in an antiunion campaign video. (A 204-05.) However, cognizant of the free speech rights of employers, the Board held that an employer may use general announcements to solicit employee volunteers to appear in such videos. Moreover, pursuant to the D.C. Circuit’s directive to provide employers with clear guidance, the Board detailed exactly how employers can

avoid incurring liability under Section 8(a)(1) when they engage in such general solicitations. (A 207.)

A. The Board Properly Applied the Well-Established Distinction Between Impermissible Direct Solicitations and Permissible General Solicitations to the Context of Antiunion Videotaping

In no less than 25 cases decided over the past 4 decades, the Board has held that employers cannot directly solicit employees to wear antiunion paraphernalia prior to a secret-ballot election. *See, e.g., ITT Auto.*, 324 NLRB 609, 622 (1997), *enforced*, 188 F.3d 375, 386-87 (6th Cir. 1999); *Lott's Elec. Co.*, 293 NLRB 297, 303-04 (1989), *enforced mem.*, 891 F.2d 281 (3d Cir. 1989); *Kurz-Kasch, Inc.*, 239 NLRB 1044, 1044 (1978); *Garland Knitting Mills*, 170 NLRB 821 (1968), *enforced in relevant part*, 414 F.2d 1214, 1215 & n.4 (D.C. Cir. 1969).⁴ As both

⁴ *See also Shepherd Tissue, Inc.*, 327 NLRB 98, 101-01 (1998); *Dual Temp Co.*, 322 NLRB 270, 271, 273-74 (1996); *Barton Nelson, Inc.*, 318 NLRB 712, 712 & n.6 (1995); *A.O. Smith Auto. Prods. Co.*, 315 NLRB 994, 994 (1994); *Laidlaw Transit*, 310 NLRB 15, 17 (1993); *Gonzales Packing Co.*, 304 NLRB 805, 805, 814-16 (1991); *Dominguez Valley Hosp.*, 287 NLRB 149, 150, 154 (1987), *enforced*, 907 F.2d 905, 910 (9th Cir. 1990); *Seville Flexpack Corp.*, 288 NLRB 518, 519, 524 (1988); *Advanced Mining Group*, 260 NLRB 486, 486, 504 (1982); *Houston Coca Cola Bottling Co.*, 256 NLRB 520, 520 (1981); *The Tappan Co.*, 254 NLRB 656, 656 (1981); *Catalina Yachts*, 250 NLRB 283, 288 (1980); *Porta Sys. Corp.*, 238 NLRB 192, 199 (1978), *enforced*, 625 F.2d 399 (2d Cir. 1980); *Pillowtex Corp.*, 234 NLRB 560, 560 (1978); *Capitol Records, Inc.*, 232 NLRB 228, 234-35, 238-29 (1977); *Borg-Warner Corp.*, 229 NLRB 1149, 1151 (1977); *Bancroft Mfg. Co.*, 189 NLRB 619, 629 (1971); *Macklanburg-Duncan Co.*, 179 NLRB 848, 848-49 (1969); *Kawneer Co.*, 164 NLRB 983, 995 (1967), *enforced*, 413 F.2d 191 (6th Cir. 1969); *Beiser Aviation Corp.*, 135 NLRB 399, 400 (1962); *Chas. v. Weise Co.*, 133 NLRB 765, 765-76 (1961).

the Board and the courts have explained, “such behavior pressures employees to make a choice in public about whether to acknowledge their union sentiments” by “effectively put[ting] employees in the position of either having to accept or reject the [employer’s] proffer.” *ITT Auto.*, 188 F.3d 386-87 (quoting *A.O. Smith Auto. Prods. Co.*, 315 NLRB 994, 1009 (1994)).⁵ If an employee refuses the employer’s proffer of antiunion paraphernalia, such as a “Vote No” button,

he is very likely to be a union supporter. If an employee accepts such a button he [likely] opposes the Union. Or, if an employee accepts such a button (even though a secret union supporter) because he feels pressured to do so, his ardor in exercising his Section 7 right to support the Union is necessarily dampened.

Porta Sys. Corp., 238 NLRB 192, 199 (1978), *enforced*, 625 F.2d 399 (2d Cir. 1980). *Accord Pillowtex Corp.*, 234 NLRB 560, 560 (1978).

Notwithstanding the prohibition against directly soliciting employees to wear antiunion paraphernalia, it is well established that an employer can make such paraphernalia generally available to employees “at a central location unaccompanied by any coercive conduct.” *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995). As the Board has observed, employers have the right to “engage in

⁵ See also *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995) (explaining that direct solicitations to wear antiunion paraphernalia force employees “to make an observable choice that demonstrates their support for or rejection of the union”); *Lott’s Elec.*, 293 NLRB at 304 (explaining that, “by agreeing or refusing to wear [antiunion paraphernalia], the employee is forced into an open declaration either for or against the Union”) (quoting *Kurz-Kasch*, 239 NLRB at 1044).

campaigning to present their . . . views or preferences,” and this right can be advanced through the distribution of antiunion paraphernalia “so long as there is an ‘absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position.’” *Holsum Bakers of Puerto Rico, Inc.*, 320 NLRB 834, 839 (1996) (quoting *Schwartz Mfg. Co.*, 289 NLRB 874, 879 (1988)). *Accord Black Dot, Inc.*, 239 NLRB 929, 929 (1978); *McDonald’s*, 214 NLRB 879, 881 (1974); *Farah Mfg. Co.*, 204 NLRB 173, 175-76 (1973).

In the instant case, after thoroughly surveying its antiunion-paraphernalia jurisprudence (A 204-05 & nn.34-44), the Board reasonably concluded that a similar approach was warranted in the context of antiunion videotaping. Accordingly, the Board held that employers may not directly solicit individual employees to appear in antiunion videos because employees who are confronted with such solicitations “reasonably would feel pressured to make an observable choice that demonstrates their support for or rejection of the union.” (A 205.) However, the Board held that an employer “may lawfully include in a campaign videotape employees who volunteer in response to a general announcement.” (A 206-07.) As the Board explained, when employers use noncoercive, general announcements to solicit participation in antiunion videos, “employees are

afforded the opportunity to decide for themselves whether to participate, free of any supervisory pressure or involvement.” (A 206.)

In addition to protecting employees from undue coercion, the Board’s distinction between impermissible direct solicitations and permissible general solicitations adequately accommodates employers’ free speech rights under Section 8(c) of the Act (29 U.S.C. § 158(c)).⁶ Responding to the D.C. Circuit’s concern that Board caselaw had left unanswered the “fundamental question of whether employers can ever legally include visual images of employees in campaign materials” (A 165), the Board’s supplemental decision makes clear that employers *can* include such images if they are obtained pursuant to noncoercive, general solicitations. The Board’s decision thus alleviates the potential tension identified by the D.C. Circuit between the Board’s polling doctrine and its decision in *Sony Corp. of America*, 313 NLRB 420 (1993), which held that an employer violated the Act when it included employees in an antiunion video without their consent. *Id.* at 428-29.⁷

⁶ Section 8(c) provides that the “expressing of views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c).

⁷ *See generally Fieldcrest Cannon*, 318 NLRB 470, 496 (1995) (finding that an employer violated the Act when it required an employee to wear antiunion paraphernalia), *enforced in relevant part*, 97 F.3d 65, 72, 74 (4th Cir. 1996);

Although *Sony* prohibits employers from using employees in antiunion videos without their consent, and although the Board’s polling doctrine prohibits employers from obtaining employee consent through direct solicitations, the Board’s supplemental decision recognizes that employers have a viable third option if they want to use employees in an antiunion video: they can use noncoercive, general solicitations and film any employee who comes forward as a volunteer.

In remanding this case to the Board, the D.C. Circuit called upon the Board to use its “expertise and experience” to resolve the “potentially conflicting mandates of § 8(a)(1) and § 8(c)” in the “recurrent situation of employer videotaping of employees.” (A 170-71.) Although the Board’s resolution is not the one favored by the Union—which would prohibit both general and direct solicitations—or the Company—which would permit both general and direct solicitations—it is a resolution that reasonably balances the right of employees to be free from coercive polling with the right of employers to express opposition to unionization. *See Chevron, U.S.A., Inc. v. Nat’l Res. Def. Counsel*, 467 U.S. 837,

Florida Steel Corp., 224 NLRB 587, 588-89, 594 (1976) (finding that an employer violated the Act by requiring employees to pose for photographs while holding antiunion signs). As the Board explained in its supplemental decision, *Sony*, *Fieldcrest Cannon*, and *Florida Steel* all stand for the proposition that an employer violates the Act when it “compel[s] employees to express opposition to union representation.” (A 208.)

865 (1984) (explaining that an agency’s “reasonable accommodation of manifestly competing interests . . . is entitled to deference”); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 148 (3d Cir. 1994) (deferring to the Board’s balancing of competing employer and employee interests); *NLRB v. New Jersey Bell Tel. Co.*, 936 F.2d 144, 152-53 (3d Cir. 1991) (same); *Iron Workers Local 3 v. NLRB*, 843 F.2d 779-80 (3d Cir. 1988) (same).

There is no merit to the Company’s argument (Br 20-34) that the Board’s balancing of interests was unnecessary because, as “a threshold matter,” no polling concerns were implicated when the Company directly solicited employees to appear in an antiunion video. If that were true, the D.C. Circuit would have had no reason to remand this case for a balancing of the employee interest in avoiding polling with the employer interest in free speech. Moreover, the Company’s argument rests on the fundamentally flawed premise that employer solicitations cannot constitute unlawful polling unless the employer has an unlawful “purpose” or “intent.” *See* Br 20, 25, 27, 33. As the D.C. Circuit observed in its remand, the lawfulness of an employer’s solicitation

does not turn on the malevolence or innocence of the employer’s *intent* in seeking the employees’ consent; rather, the relevant question is whether the solicitations would tend to create among the employees a reasonable *impression* that the employer was attempting to discern their union sentiments.

(A 169) (emphasis in original). *See Medeco Sec. Locks, Inc.*, 142 F.3d 733 (4th Cir. 1998) (“The Board has long held that interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive, and the federal courts have reflected this position.”) (citation omitted).

The Company’s failure to acknowledge this basic principle taints its entire discussion of the Board’s decisions concerning the distribution of antiunion paraphernalia. (Br 22-25.) Contrary to the Company’s contention (Br 22-23), those cases do not stand for the proposition that an employer violates the Act only when it is “clearly attempting” to force employees to disclose their union sympathies. Rather, as the D.C. Circuit noted in its remand, they stand for the proposition that an employer’s conduct will constitute an unlawful poll so long as it has the “practical effect” of pressuring employees to disclose their views on unionization. (A 168.) As discussed above, direct solicitations to participate in an employer’s antiunion campaign, whether by wearing paraphernalia or appearing in a video, have precisely such an effect.⁸ *See ITT Auto.*, 324 NLRB 609, 623 (1997) (explaining that direct solicitations “effectively put the employee in the position of having either to accept or reject the company’s proffer . . . , thereby pressuring the

⁸ Nowhere in its discussion of the antiunion-paraphernalia cases does the Company acknowledge the fundamental distinction made in those cases between direct solicitations and general availability, a distinction that the D.C. Circuit highlighted when remanding this case to the Board. (A 168) (comparing *Holsum Bakers of Puerto Rico* with *Laidlaw Transit*).

employee to make an observable choice or open acknowledgment of the employee's union sentiments"), *enforced*, 188 F.3d 375, 382 (6th Cir. 1999).⁹

On a related note, the Company's contention (Br 30-31) that certain employees in this case may not have felt coerced is of no moment. It is well settled that there "need be no proof of any actual interference with employees' rights" to establish a Section 8(a)(1) violation. *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 938 (1980). Rather, "there need only be a finding that the statements or acts of the employer would tend to coerce a reasonable employee." *Id. See also Engineers Local 542 v. NLRB*, 328 F.2d 850, 852 (3d Cir. 1964) ("That no one was in fact coerced or intimidated is of no relevance."). In the instant case, the Board reasonably concluded that when an employer directly solicits employees to appear in an antiunion campaign video, its conduct tends to coerce employees into openly disclosing their union sentiments.¹⁰

⁹ In its remand, the D.C. Circuit suggested in dictum that an employer would not be guilty of unlawful polling if it sought to include in an antiunion video "only those employees who have on their own initiative clearly expressed opposition to union representation." (A 171.) In its supplemental decision, the Board disagreed, and explained that such solicitations interfere with "an employee's right to choose the *degree* to which he or she" opposes unionization. (A 205.) Although the Company's brief mentions the Board's disagreement with the D.C. Circuit (Br 42 & n.11), the Company does not actually challenge the Board's reasoning. In any event, the issue is not presented here because the Company did not limit its direct solicitations to open union opponents.

¹⁰ The Company notes that there is evidence in this case that several employees may have declined to participate in the antiunion video for reasons unrelated to

Furthermore, and contrary to the Company's contention (Br 23-25), there is no conflict between the Board's approach in this case and its decisions in *Holsum Bakers of Puerto Rico, Inc.*, 320 NLRB 834 (1996), *Oklahoma Installation Co.*, 309 NLRB 776 (1992), *enforcement denied*, 27 F.3d 567 (6th Cir. 1994), and *Daniel Constr. Co.*, 266 NLRB 1090 (1983). In *Holsum Bakers*, the Board found that an employer did not violate the Act when it simply made "Vote No" stickers generally available to employees who requested them. 320 NLRB at 839.

However, the Board made clear that the result would have been different had there been "supervisory involvement in the process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position." *Id.* Thus, *Holsum Bakers* is fully consistent with the Board's holding in the instant case that an employer violates the Act when supervisors pressure employees into disclosing their union sentiments by directly soliciting them to appear in an antiunion video.

In *Oklahoma Installation*, the Board concluded that an employer's distribution of company apparel did not violate the Act where the apparel did not indicate "an explicit proemployer or antiunion preference in the upcoming

their union sentiments. (Br 25, 32) (discussing an employee who said she was having a "bad hair day"). However, as stated in the text, the relevant inquiry concerns the impact that the employer's conduct can reasonably be expected to have on employees in general, not the subjective and idiosyncratic responses of individual employees.

election.” 309 NLRB at 776. Likewise, in *Daniel Constr. Co.*, the Board declined to find a violation where the employer sold company jackets that “were of a standard nature, had been sold to employees for a period long before [the campaign],” and had “no campaign or antiunion message on them.” 266 NLRB at 1099. Because the Board’s decision here concerns campaign videotapes that *do* contain explicit antiunion messages, *Oklahoma Installation* and *Daniel Constr. Co.* are simply not on point.

B. The Board Established Clear and Reasonable Guidelines For Employers To Follow When Soliciting Employees To Appear in Antiunion Videos

In addition to recognizing the key distinction between direct and general solicitations, the Board also articulated clear guidelines for employers to follow when engaging in general solicitations. Specifically, the Board held that an employer may lawfully solicit employees to appear in a campaign video if each of the following requirements is satisfied:

1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee’s picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
2. Employees are not pressured into making the decision in the presence of a supervisor.
3. There is no other coercive conduct connected with the employer’s announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video.

4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.
5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

(A 207.)

Those requirements are similar to safeguards that have been adopted in other polling cases, including the Board's landmark decision in *Struksnes Constr. Co.*, 165 NLRB 1062, 1063 (1967). When applied in the videotaping context, the requirements serve the legitimate purpose of ensuring that, when employees make decisions that "may have lasting consequences," they are truly acting voluntarily (A 207.) As the Board explained, a campaign videotape, unlike an antiunion button or T-shirt that an employee can simply cease wearing, may "serve[] as a permanent record of the participating employees' opposition to the union."

(A 207.)

Contrary to the Company's contention (Br 44), the Board's requirements are not unduly burdensome. Rules 3 through 5 merely require employers to obey the law by refraining from conduct that independently violates the Act. The second requirement simply implements the well-settled principle, discussed above, that employees should not be forced to make observable choices in front of supervisors that would disclose their union sympathies. This leaves only the Board's first

requirement, which can easily be satisfied by including in any general announcement a statement of the requisite assurances.

Although the Board's decision leaves open a clear path for employers who wish to use employees in antiunion videos, the Company's brief repeatedly returns to the theme that the Board has somehow shortchanged employers with respect to their free speech rights under Section 8(c) of the Act. (Br 34-40, 42, 44-48.) As we now show, the Company's argument cannot be reconciled with the principal cases upon which it relies—*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), *Teamsters Local 633 v. NLRB*, 509 F.2d 490, 493 (D.C. Cir. 1974), and *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983).

In *Gissel Packing*, a unanimous Supreme Court explained that an employer's free speech rights "cannot outweigh the equal rights of [its] employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1)." 395 U.S. at 617. Accordingly, to be lawful, an employer's speech must "not contain a 'threat of reprisal.'" *Id.* at 618 (quoting 8(c)). As discussed above, it is well established that employer polling is precisely the type of activity that has a "tendency to cause fear of reprisal in the mind of the employee." *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir. 1989) (citation omitted). Thus, by requiring employers to avoid polling concerns by limiting the manner in which they solicit employees, the Board acted in complete harmony with *Gissel*. *See* 395 U.S. at 617 (explaining

that “any balancing” of § 7 and § 8(c) rights “must take into account the economic dependence of the employees on their employers”).

Similarly unhelpful to the Company is the D.C. Circuit’s discussion of Section 8(c) in *Teamsters Local 633*. The relevant passage quoted by the Company stands for the unremarkable proposition that a “persuasive argument” against unionization does not, without more, constitute coercion. 509 F.2d at 495-96. Here, the Board has not regulated the *substance* of the Company’s antiunion arguments in any way; it has only limited the *manner* in which the Company can go about soliciting employees to appear in antiunion videos. Thus, any Section 8(c) interest that the Company may have in this case is not akin to the core free speech interest an employer has in making “persuasive arguments” against unionization.

With respect to *Graham Architectural*, that decision holds that Section 8(c) protects employer opinions that are expressed during “casual” conversations between supervisors and employees about unionization. 697 F.2d at 540-41. In that case, this Court emphasized that it was “important to bear in mind that there was no history of Company hostility to the Union.” 697 F.2d at 539. More specifically, the Court relied on the fact that the inquiries it found to be lawful were “not part of a full scale antiunion campaign orchestrated by the highest levels of . . . management.” 697 F.2d at 541. Thus, on its face, *Graham* provides no

protection to employers (like the Company) that directly and systematically solicit employees to participate in an antiunion video. *See Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 811-12 (3d Cir. 1986) (distinguishing *Graham Architectural* and finding an interrogation to be unlawful because it was not “casual”).

Equally unavailing is the Company’s argument (Br 40-42, 47-48) that the Board’s “mandate to maintain neutrality” prevents it from applying different solicitation rules to employers and unions. As an initial matter, the Company waived this argument by failing to raise it before the Board either in its original exceptions or in its statement of position on remand. *See* 29 U.S.C. § 160(e) (providing that “no objection that has not been urged before the Board . . . shall be considered by the court” absent “extraordinary circumstances”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Konig*, 79 F.3d 354, 359, 361 (3d Cir. 1996). Moreover, because the instant case did not involve a charge filed against a union, and because the Board did not address the issue of union solicitations in its supplemental decision, it is not yet clear what rule the Board will adopt in that context. In any event, even assuming that the Board adopts different rules to govern employer and union solicitations, the courts have recognized in prior polling cases that such an approach is permissible. *See, e.g.,*

Maremount Corp. v. NLRB, 177 F.3d 573, 578 (6th Cir. 1999); *Louis-Allis Co. v. NLRB*, 463 F.2d 512, 517 (7th Cir. 1972).¹¹

Contrary to the Company's contention, a different approach is not mandated by the Supreme Court's decision in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). Although the *Savair* Court observed that a union seeking to win a representation election may be able to exercise some coercive influence over employees based on the *possibility* that it will be elected (*id.* at 280-81), the Court nowhere advanced the novel proposition that the union's coercive power rivals that of an employer that *already and exclusively* controls its employees' economic fate. Indeed, in the nearly 30 years since *Savair* was decided, no court has ever read that decision as requiring the Board to ignore the obvious differences between employers and unions in their relationships with employees.

In sum, the Board has adopted a reasonable standard for employer solicitations that (1) makes a fundamental distinction between direct solicitations

¹¹ The Sixth Circuit has offered the following explanation, which is characteristic of the reasoning found in the various decisions:

By no stretch of the imagination are employers of unorganized workers and unions seeking to organize those workers equally matched with respect to their powers of or opportunities for the exercise of coercion. . . . 'An employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union.'

and general solicitations, and (2) provides clear guidelines for employers who wish to use general solicitations lawfully. Although the Company claims that the Board's approach has made it "virtually impossible for an employer to videotape its employees," this contention cannot be reconciled with the fact that a law-abiding employer is free under the Board's standard to film any and all employees who volunteer in response to a noncoercive, general announcement.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY'S METHOD OF SOLICITATION IN THE INSTANT CASE UNLAWFULLY COERCED EMPLOYEES

It is undisputed in this case that the Company's manager of communications services, Mark Ziemianski, directly approached individual employees with a film crew and asked them to participate in the Company's campaign video. (A 199; 70, 74.) It is also undisputed that the Company provided several employees with a notice instructing them to contact one of two company officials if they wished not to be included in the video. (A 199; 122.) Other employees received a notice stating that requests not to participate should be presented to the video crew, which Ziemianski was supervising. (A 199; 123.) Many employees complained to the Union about the filming process, and the Union asked the Company to cease its conduct on the ground that it was engaging in unlawful polling. (A 200; 28, 30.)

Kusan Mfg. Co. v. NLRB, 749 F.2d 362, 364-65 (6th Cir. 1984) (quoting *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)).

Nevertheless, Ziemianski continued to solicit employees to appear in the antiunion video. (A 200.)

Based on these facts, the Board properly concluded that the Company violated the Act by engaging in direct solicitations that “forced employees to make an observable choice that demonstrate[d] their support for or rejection of the union.” (A 209.) Contrary to the Company’s contention (Br 52), it did not comply with the Board’s “general announcement” requirement by providing some employees with written notices before they were personally solicited by Ziemianski. The Company’s argument ignores the fact that those notices only compounded the problem by requiring employees to proactively identify themselves to management if they wished to refrain from participating in the Company’s antiunion campaign.¹²

The Board also properly found that the Company failed to comply with the requirement that it assure employees that participation was voluntary and would not result in benefits, and that nonparticipation would not result in reprisals.

(A 209.) The Company does not dispute the fact that its notices to employees fail

¹² In its brief (Br 21-23, 53), the Company appears to argue that its use of managers in the solicitation process was not coercive because those managers were not “direct supervisors.” Not surprisingly, the Company fails to provide any authority for the dubious proposition that employees would feel less pressure when confronted by a company manager during a formal solicitation process than when confronted by a direct supervisor with whom they likely interact daily.

to contain such explicit assurances, but it argues that it satisfied the Board's requirement by stating in the notices that it would "be happy to accommodate" requests not to participate. (Br 55.) However, this language merely informed employees that they had the option of declining to participate, and did not provide them with any assurances as to the consequences of exercising that option.

Finally, substantial evidence supports the Board's conclusion that Company's solicitations violated the Act because they took place in a coercive atmosphere created by the Company's other unfair labor practices, which are no longer in dispute. The Company's coercive practices began several weeks before the videotaping when a company supervisor interrogated employee James Borgan, an active member of the Union's organizing committee. (A 129-30.) The supervisor demeaned Borgan for his support of the Union and then threatened that the Company would impose more onerous working conditions if the employees elected the Union. (A 124, 129-30, 156.) Borgan discussed this incident with four employees who had observed him talking to the supervisor, and reported on the incident at the next union meeting. (A 130.)

In addition to its coercive conduct before the videotaping, the Company quickly followed its filming with further unlawful conduct, including threats made by the Company's CEO during meetings with employees, and threats that appeared in an antiunion newsletter that the Company sent to its employees' homes. (A 133-

39, 156.) Then, after the election, the Company capped its antiunion campaign by discriminatorily discharging employee Borgan for having actively supported the Union. (A 139-55, 156.)

Given these circumstances, there is no merit to the Company's claim that its unlawful conduct consisted of only "isolated incidents" that did not create a coercive atmosphere. (Br 54.) By the time the Company began filming, employees were already discussing the Company's coercive conduct as a result of the Borgan interrogation. Then, after the Company compiled a written list of approximately 30 employees who did wish to be in the antiunion video (A 199-200; 111-21), employees were exposed to repeated antiunion threats. Such threats were more than sufficient to cause employees whose names were on the list to reasonably fear that they would face retaliation of the sort that the Company eventually visited upon Borgan.¹³

In sum, substantial evidence supports the Board's conclusion that the Company violated three separate requirements of the rules governing employer solicitations in the videotaping. First, the Company used impermissible direct solicitation instead of permissible general solicitation. Second, the Company did

¹³ *Cf. House of Raeford Farms, Inc.*, 308 NLRB 568, 570-71 & n.12 (1992) (holding that an employer's maintenance of a list of employees who accept antiunion paraphernalia, even if innocently motivated, violates the Act), *enforced mem.*, 7 F.3d 223 (4th Cir. 1993).

not provide adequate assurances to employees as to the consequences of participation or nonparticipation in filming. Finally, the Company committed a series of other unfair labor practices that created a coercive atmosphere. (A 210.)

III. THE COMPANY’S BELATED RETROACTIVITY ARGUMENT IS BARRED BY SECTION 10(e) OF THE ACT AND, IN ANY EVENT, CONTRARY TO THIS COURT’S TEACHING THAT A NEW LEGAL STANDARD SHOULD APPLY TO THE DECISION IN WHICH IT IS ANNOUNCED

Section 10(e) of the Act (29 U.S.C. 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” That statutory prohibition raises a jurisdictional bar against judicial review of issues not raised before the Board. *See Woelke and Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Konig*, 79 F.3d 354, 359, 361 (3d Cir. 1996) .

In the instant case, after the D.C. Circuit remanded to the Board “with instructions to develop a standard” that would govern solicitations in the context of employer videotaping (A 164), the Company failed to argue that the resulting standard should not apply to its conduct. Instead, in its statement of position on remand, the Company itself proposed new standards and explained how its conduct should be “[j]udged by these proposed standards.” (A 196.) Then, after the Board issued its supplemental decision and held that its new solicitation standard would

apply to this as well as all pending cases (A 211 n.3), the Company failed to file a motion for reconsideration. Accordingly, the Company's attempt to raise the retroactivity issue before this Court is barred by Section 10(e) of the Act. *See Woelke & Romero Framing*, 456 U.S. at 666 (refusing to consider an argument that could have been raised to the Board "in a petition for reconsideration or rehearing"); *Konig*, 79 F.3d at 360 ("The [party's] failure to raise the argument, and certainly its failure to file a petition for reconsideration, deprives this court of jurisdiction.").¹⁴

In any event, the Company has failed to demonstrate that the Board's decision to apply its solicitation standard in this case will result in a "manifest injustice." *Iron Workers Local 3 v. NLRB*, 843 F.2d 770, 780-81 (3d Cir. 1988) (providing the standard of review in cases where the Board has retroactively

¹⁴ When a party's conduct is found lawful by an administrative law judge under an existing standard, but then found unlawful by the Board under a newly adopted standard, some courts have concluded that the party should be deemed to have implicitly raised and preserved the issue of retroactivity so long as it contended before the Board that the judge's decision should be affirmed. *See, e.g., NLRB v. Wayne Transp.*, 776 F.2d 745, 748-50 (7th Cir. 1985); *Electrical Workers Local 900*, 727 F.2d 1184, 1190-94 (D.C. Cir. 1984). Whatever the merits of such an approach, it has no application to cases (such as the instant one) in which a party's conduct is deemed unlawful by an administrative law judge and the Board agrees with that finding, albeit using a different standard. Under such circumstances, the party that initially lost before the judge can stand only to benefit from application of a new standard, and there is no reason to assume that the party has a conceptual objection to the application of a new standard in the absence of an explicit argument to that effect.

applied a new rule), *enforcing John Deklewa & Sons*, 282 NLRB 1375 (1987).

This Court has identified the following five factors that should be examined when determining whether a Board decision should be retroactively applied:

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely occupies a void in an unsettled area of law, (3) the extent to which the party against whom the new holding is applied in fact relied on the former rule, (4) the degree of the burden imposed, and (5) the statutory interest in application of this new rule.

Laborers' Int'l Union v. Foster Wheeler Corp., 26 F.3d 375, 392 (3d Cir. 1994).

In the leading case in which this Court was called upon to balance the five retroactivity factors, it began its task by emphasizing the “truism that in the context of adjudication, retrospectivity is, and has since the birth of this nation been, the norm.” *Foster Wheeler*, 26 F.3d at 394. Against that background, the Court concluded that the new Board rule at issue in *Foster Wheeler* should be retroactively applied even though it represented an “abrupt departure from prior precedent.” *Id.* at 394-95. As we now show, the present case is an easier one than *Foster Wheeler* because not even one of the five factors weighs against retroactivity. Accordingly, the Board’s decision to follow the adjudicatory norm should be affirmed.

In discussing the import of the first factor, this Court has explained that “the prohibition against advisory opinions assures that every case of first impression has a retroactive effect.” *Foster Wheeler*, 26 F.3d at 392 (internal citations, quotation

marks, and brackets omitted). Likewise, the D.C. Circuit has observed that “the command that we resolve issues solely in concrete cases or controversies” favors application of a new rule in “the adjudicatory proceeding in which it is first announced.” *Retail, Wholesale, and Dep’t Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) (quoting *Stovall v. Denno*, 388 U.S. 293, 301 (1967)). Thus, because the Company admits that this case is one of first impression (Br 49), the first factor favors application of the Board’s new rule in this case.

As to the second factor, the Board’s decision does not represent an “abrupt departure” from a prior Board rule and instead merely fills a void in an area where the law was not settled. Accordingly, the second factor weighs in favor of application of the Board’s rule because there is little potential for the disappointment of reasonable reliance interests. *See Foster Wheeler*, 26 F.3d at 392. *See also Food and Commercial Workers Local 150 v. NLRB*, 1 F.3d 24, 34 (D.C. Cir. 1993) (discussing the court’s “consistent willingness to approve the retroactive application of rulings that do not represent an abrupt break with well-settled policy”).

On a related note, the third factor—actual reliance—also weighs in favor of application in the instant case because the Company does not claim that it relied on any prior Board decisions when it decided to directly solicit employees to appear in its antiunion video. Indeed, the only prior Board decision concerning employer

videotaping is *Sony*, and “there is no record evidence that the [Company] somehow relied on the Board’s finding of a violation in that case in structuring its anti-union videotaping.” (A 125, 200.) See *Foster Wheeler*, 26 F.3d at 393 (holding that the “weighty factor of actual reliance” favors retroactivity where “the record convincingly establishes that there was no actual reliance” on a prior decision).

The fourth factor strongly favors application of the new rule in the instant case because the burden imposed on the Company is limited. The Board’s order requires the Company to do no more than post a remedial notice; it does not require the Company to pay any monetary damages or reinstate any employees.

Finally, the fifth factor favors application of the new rule in the instant case because there is a statutory interest in avoiding the types of “administrative and litigational difficulties” that would no doubt result if the Board had to apply its unsettled prior law to this and all other pending cases. *John Deklewa & Sons*, 282 NLRB at 1389.

CONCLUSION

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

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