Final Brief

No. 07-2447-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

HOMER D. BRONSON COMPANY

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on the application of National Labor Relations Board ("the Board") to enforce its Order against the Homer D. Bronson Company ("the Company") in *Homer D. Bronson Co.*, 349 NLRB No. 50, 2007 WL 844698 (Mar. 16, 2007). (SA 1-41.)[1] The Order is final with respect to all parties. The Board had subject matter jurisdiction over the unfair labor practice proceeding

under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices were committed in Winsted, Connecticut. The Board's application, which was filed on June 7, 2007, is timely because the Act imposes no time restrictions on when an enforcement action must be filed.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that the Company violated Section 8(a)(1) and (3) of the Act.

2. Whether substantial evidence supports the Board's finding that the Company, in speeches and posters presented at its mandatory employee meetings, violated Section 8(a)(1) of the Act by threatening employees with plant closure and job loss if they elected the Union.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by denying employee Roberta Tyree overtime work, and denying employee Tony Pimentel light-duty work and discharging him, based on their union activities.

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[1] "SA" refers to the special appendix, and "A" refers to the joint appendix, which consists of two volumes. References preceding a semicolon are to the Board's findings; those following a semicolon are to the supporting evidence.

4. Whether the Board acted within its broad remedial discretion in determining that the Company's unfair labor practices were sufficiently serious and widespread to warrant ordering that the Board's remedial notice be read to employees.

STATEMENT OF THE CASE

The Board found that the Company committed numerous unfair labor practices against its employees in a strenuous effort to coerce them into rejecting the United Automobile, Aerospace & Agricultural Implement Workers of America, Region 9A, AFL-CIO ("the Union"). The Company no longer contests the majority of those findings. The issues that remain for review pertain to the Board's findings (SA 1-3, 14-17, 26-28) that the Company unlawfully threatened employees with plant closure and job loss in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), and the Board's findings (SA 1, 11-14, 20-21, 33-37) that the Company discriminatorily denied overtime work to employee Roberta Tyree, and denied light-duty work to employee Tony Pimentel, and later discharged him, in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). The Company also challenges the Board's determination (SA 1, 4, 40) that the totality of the Company's unlawful conduct warranted the special remedy of having the remedial notice read aloud at a meeting of all employees.

The facts supporting the Board's unfair labor practice findings are set out below, followed by a summary of the Board's conclusions and order. Other relevant facts are discussed in the Argument.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Management, and Its Policies on Solicitation, Wage Increases, Overtime, and Light-Duty Work

The Company manufactures automotive hinges at its plant in Winsted, Connecticut, where it employs about 78 production and maintenance employees. Many of those employees speak primarily Spanish or Polish and understand little or no English. In September 2000, Joseph Blancato became the Company's president of manufacturing, and David Abraham was its plant manager. At that time, the Company was operating two shifts. The first shift ran from 7:00 a.m. to 3:30 p.m. and was supervised by Derek Ewing and Jozef Odorczuk. John Kisiel supervised the second shift, which required employees to work from 3:00 p.m. to 11:00 p.m. and afforded them a 10-percent pay differential. Charlie Spencer was president of the automotive group for Company's parent corporation. (SA 6-7, 40; A 602, 683-84, 693, 697, 717.)

By September 2000, many employees had not received a wage increase in years. (SA 31; A 453-54, 507-08, 542, 651-71.) The Company had ended its prior policy of providing annual reviews and raises. (SA 31; A 158-62, 433-34, 453-54, 477-78, 506-08, 549-50, 619, 690-91.) For example, in April 2000, Supervisor Odorczuk asked President Blancato to authorize a raise for an employee whose wages had not increased for 3 years and was earning less than new hires. Blancato refused, saying that, "if she didn't like it, she could leave." (SA 9-10; A 628-30.)

Overtime work at the plant was voluntary, and some employees regularly worked overtime to supplement their pay. Since about April 2000, for example, employee Roberta Tyree had worked 1 1/2 or 2 hours of overtime on the hinge line each weekday before her 7:00 a.m. shift. Tyree also worked overtime on the hinge line some Saturdays, but stopped doing so regularly in late July 2000, after she decided she no longer wanted Saturday overtime work. (SA 12; A 130-47, 201, 500-03, 525-26, 709-13.)

The Company has no history of restricting its employees' discussions and solicitation activities at work. Governed only by the commonsense guideline that their activities not interfere with production, the employees were free to sell things at work, like Avon or fundraising items, talk on any topic, and freely interact. (SA 10, 23; A 370-71, 424-25, 439-40, 492-93, 540-42, 738-39.)

The Company also had generously made every effort to accommodate injured employees who were restricted to light-duty work. (SA 35; A 300-15, 707, 720, 724.) When employee Tony Pimentel, for example, injured his back in March 2000, the Company gave him light-duty work assembling hinges, which permitted him to sit, stand, or stretch, as needed. (SA 13, 35; A 96-98, 316-21, 360-62, 365-66, 385-99, 520-22, 571-73, 635-36, 655-56, 703-04, 716-20.)

B. The Union Begins an Organizing Campaign; the Company Opens a Third Shift, Learns of the Union Drive, and Makes Two Antiunion Speeches to Employees, Pledging To Correct Its Mistakes and To Provide Annual Reviews and Raises

In early September, the Union began a drive to organize the employees at the Winsted plant soon after employee Dale Schaffer contacted the Union and met with an organizer. (SA 6-7; A 638-40, 672-73.) On September 18, the Company opened a third shift from 11:00 p.m. to 7:00 a.m., but paid employees the same 10-percent pay differential received for second-shift work. The third-shift employees were unhappy about not getting a greater differential, and said both among themselves and to Supervisor Kisiel that it was unfair. (SA 17-18, 30; A 416, 433-34, 438, 456, 751-52.)

Later in September, President Blancato learned of the union campaign and met with company counsel. Afterwards, Blancato asked Supervisors Odorczuk and Ewing if they knew which employees were behind the union drive, and told them that, if he later found out they knew and did not tell him, he would fire them.

Within days, the Company convened the first of about 10 mandatory employee meetings to convey its views against the Union. (SA 8, 15; A 417-19, 605-06, 611-12, 649-50, 698, 760-63.)

At the meeting, President Spencer read verbatim a speech scripted by his attorneys that admitted mistakes and promised to correct them. He warned that a union could cause a lose of competitiveness, and asked the employees to "think about the Route 8 corridor—ask yourself what happened to Scovill, Chase Brass, Anaconda, Seymour Specialty Wire, Century Brass, Plume and Attwood and Torin. All great companies that are gone—every one of them a union shop." (SA 8-9, 15; A 209-15, 495, 557, 612-13, 686-89, 744.)

Within days, President Spencer called a second employee meeting, and again read verbatim from a prepared text. He acknowledged that the employees were concerned about not receiving performance reviews or raises. He told them that it was "wrong and I apologize." Spencer and President Blancato then promised that the employees would receive reviews and possibly get raises. (SA 9; A 216-19, 495-96, 536-37, 557-58, 564, 621, 650-51.)

By early October, the Company decided to subcontract the assembly of its EN-114 hinge to another company, Summit Manufacturing, and move the EN-114 machine to Summit's plant. That decision was made for cost reasons. (SA 12-13, 28; A 732-37, 778-81.)

C. The Union Meets with Interested Employees, 23 of Whom Sign a Petition Authorizing the Union To Represent Them; the Organizing Committee Is Formed To Circulate the Petition; the Company Denies Employee Tyree Her Regular Overtime

On October 5, the Union held an off-site meeting attended by about 30 interested employees. An organizer from the Union described the benefits of union representation, and the petition and election processes. The employees primarily complained about not getting raises, and 23 employees signed the union petition. A few employees--including Dale Schaffer, Roberta Tyree, Tony Pimentel, and Hank Archambault--volunteered to be members of the organizing committee and to circulate the petition at work. (SA 7-8; A 81-94, 338-39, 419-21, 441-47, 483-87, 514-16, 530-32, 551-56, 575-78, 584, 640-45, 673-77.) Pimentel often acted as a translator for Spanish-speaking employees, and was broadly considered the leader of the Hispanic employees. After the union meeting, Pimentel got 14 employees to sign the petition, including 12 Hispanic employees. (SA 8, 35, 40; A 352, 412.)

Within days of the union meeting, Plant Manager Abraham instructed Supervisor Ewing that "Roberta Tyree and Hank Archambault are not working one more hour of overtime." (SA 12; A 604, 622-23.) Later, Ewing approached Tyree at her workstation and told her to stop coming in early to work overtime on the hinge line. After October 8, Tyree did not work overtime for the remainder of the

year. (SA 12; A 129, 503-04, 528-29.) Other employees continued to work overtime on the hinge line. (SA 12; A 201, 504-05, 527.)

D. Supervisor Kisiel Tells Employee Winegar that the Union Will Only Hurt Things; President Blancato Tells Employee Pimentel that He Knows Pimentel Is Talking About the Union; Blancato Tells Other Employees that He Is Working on Getting Them Raises, and Promises that Things Will Be Different; the Company Imposes New Rules Forbidding All Talk of the Union

A few days after the October 5 union meeting, Supervisor Kisiel approached employee Winegar at her workstation and said, "I'm sure you heard that the Union is trying to get in and that some people think it will help, but it's just going to hurt." (SA 18, 30; A 422-23, 447-48, 457-60.) Later, President Blancato called employee Pimentel into his office and told him, "I know you['re] talking with . . . people . . . about the Union. We really don't want a union over here." (SA 25; A 348-51.) Blancato also told employee Schaffer that he knew the employees wanted raises, and that he was working on it. (SA 26; A 647-48.)

Also in early October, President Blancato instructed Supervisors Ewing and Odorczuk that employees were not to talk in the shop anymore and that, if they saw groups of employees talking, to break them up. (SA 10; A 608, 610, 637.) Later, Ewing complained to Blancato that employees Schaffer, Tyree, and Archambault kept "congregating," and talking about the Union. Ewing dispersed employees when he saw them talking. (SA 10; A 698-99, 714-15, 739-40.)

About this time, Supervisor Kisiel approached several employees who were outside on break, and told them that he "did not want anyone on his shift . . . to discuss the Union in the shop or on the premises." (SA 10, 24; A 423-25, 448-50.) Similarly, President Blancato approached employee Schaffer while he was working, and told him not to promote the Union on company time. (SA 10; A 647-49.) Blancato also approached employee Tyree and said, "do [me] a favor and [not] have people sign union cards on company time." When Tyree denied that she was doing that, Blancato replied, then "tell whoever is doing that, please not do it on company time." Blancato acknowledged that the Company had never before stopped employees from doing other things, like selling Avon, but told her that "with the [u]nion cards, it was something different." (SA 9-10 & n.15; A 488-94.) Later, that day in his office, Blancato told Tyree that he was "the new guy in charge and that things would be different." (SA 26; A 489-91.)

E. The Company Begins Its Review of Employees and Promises that Raises Are on the Way; the Union Attains the Support of a Majority of Employees and Files for a Board Election; the Company Increases the Third-Shift Pay Differential

On October 20, President Blancato wrote a memo to his supervisors listing 29 employees who were "due or overdue for an annual performance review." (SA 9; A 151.) On October 31, Supervisor Ewing reviewed employee Claude Thibodeau's performance, and told him to expect a raise. (SA 9, 29; A 148-49, 469-71.) In early November, Supervisor Kisiel informed his third-shift employees

that they would be reviewed and would receive raises by the end of December. (SA 9, 18; A 434-36.)

On November 3, a group of employees that included Schaffer, Tyree, and Pimentel attempted to present the Company with a letter stating that a majority of employees had authorized the Union to represent them, and requesting voluntary recognition. The letter was refused. (SA 12; A 95, 356-57, 368-69, 404-11, 512-14, 600-01, 645-47, 699-701.) Later that day, the Union filed an election petition with the Board, and attached the union petition that was signed by 48 employees. (SA 7, 12; A 78, 84-94, 585-88.)

Also in early November, Supervisor Kisiel told his third-shift employees that he would ask for a 5-percent increase in their differential pay. On November 13, the Company increased the third-shift differential from 10 to 15 percent. (SA 17-18, 30; A 332, 437-38, 455-56, 694-96, 751-52.)

F. Plant Manager Abraham and Supervisor Ewing Tell Employees that the Company Is Removing the EN-114 Machine Because of the Union; an Election Is Scheduled; the Company Freezes All Wages; the Company Denies Employee Pimentel Light-Duty Work, and Orders Him To Go Home and Not To Return Until He Is Released for Full-Duty Work; Pimentel Reaches Maximum Medical Improvement

In early November, the Company prepared the EN-114 assembly machine for shipping to Summit Manufacturing, and left it packed on a pallet on the shop floor for several days. During that time, Supervisor Ewing said to Pimentel, and

employees Jose Gonzalez and Andre de la Cruz, who worked the EN-114 machine, "You see that machine going, the EN-114 . . . . You're going too. . . . That one is because we don't want the Union over here." Another time, Plant Manager Abraham pointed his finger at De la Cruz, and yelled, "this [EN-114] job is going out and you're next." (SA 12-13, 28; A 357-59, 625-26.) When employee Michael Dixon saw the packed-up machine, he asked Abraham about it. Abraham replied, "It's going out. These things happen," and then referred to the Union. (SA 12-13, 28; A 564-70, 581-83, 723.) The EN-114 machine was shipped out on Saturday, November 11. (SA 12-13, 28; A 755-56, 778-79.)

On November 14, the Board set the election for December 14. (SA 7, 18; A 79-80.) The next day, Pimentel delivered a periodic doctor's note for his light-duty work. The note also stated that he was to "avoid prolonged postures." Plant Manager Abraham told Pimentel that he did not have a 40-hour light-duty job for him that did not involve prolonged postures. Pimentel replied that he was already avoiding "prolonged postures" in his current light-duty work assembling hinges because he could sit or stand, as needed. Without responding, and without calling the doctor to clarify the meaning of "prolonged postures," Abraham instructed Pimentel to go home, collect workers' compensation, and not return until his doctor cleared him for full-duty work. (SA 13, 35; A 324, 363-65, 401-02, 726.) Pimentel followed Abraham's instructions. To receive his temporary disability

benefits, the Company's workers' compensation carrier required that Pimentel look for light-duty work with other employers, and he did so. (SA 21, 36; A 99-109, 117-28, 377, 402-03.)

On November 16, Supervisor Odorczuk completed annual reviews for the five employees in his department. (SA 9; A 165-200, 627-28.) About this time, however, Supervisor Kisiel announced to employee Winegar that the Company was postponing all raises until after the election. (SA 9, 18; A 436-37, 454-55.) Around Thanksgiving, employee Thibodeau asked Supervisor Ewing why he had not received his raise yet. Ewing replied that the Company had "frozen" all wage increases because of the Union, and that the Company had to wait "until the Labor Board was done." (SA 29; A 473-74.)

Employee Schaffer asked President Blancato why the employees had not gotten their raises yet. Blancato replied that the raises, and anything else from "a positive standpoint couldn't happen while the union negotiations were going on." (SA 11; A 654.) Before the Company froze all wage increases, 12 employees received raises. After the freeze, at least nine employees who were due raises did not get them. (SA 20, 31; A 158-200.)

On November 24, physicians with the Company's workers' compensation carrier found that employee Pimentel had reached maximum medical improvement

of his back injury, which left him with a permanent light-duty restriction. That opinion was later confirmed by a second doctor. (SA 21, 36; A 110-15.)

G. In Speeches at More Mandatory Meetings, Presidents Spencer and Blancato Warn the Employees that the Company Could Close if They Elect the Union; the Company Displays Posters that Depict Closed Unionized Plants

On November 22, Presidents Spencer and Blancato held another mandatory meeting in the cafeteria to talk about the Company's negative history with unions. Spencer began by declaring, "those who cannot read history are bound to repeat it." Reading from a prepared text, Spencer said the Company once had plants in both Chicago and Beacon Falls, Connecticut, but that--after repeated strikes by the Steelworkers Union--both plants closed, and the Beacon Falls plant was relocated to Winsted. Spencer concluded that the "history of [the Company] and unions has not been a good one," and that the Company was "fed up and tired of strikes." He asked the employees to ask themselves, "will this Union help us to be responsive, flexible and competitive as required by our customers? Or will this Union do to this new Homer Bronson what it did to the old Homer Bronson?" (SA 1-2, 14-16; A 220-33, 425-27, 431-33, 450-52, 509-10, 745-46, 759-60.)

At the meeting, the Company displayed large posters, 30 by 40 inches in size, highlighting 5 of the 13 closed unionized companies that Spencer referenced in his speech, and used an overhead projector to show the complete list, and other materials. The posters stated: "These are just a *few* examples of plants where the

[Union] *used to* represent employees." (Emphasis in original.) Under that statement, were five photographs of shuttered, dilapidated buildings and overgrown parking lots. Under each photograph was the plant name, its location, and the date it closed, and across each photo was written, in large red block letters, the word, "CLOSED." Below the photographs was the statement: "Is this what the [Union] calls job security? . . . VOTE NO!" The Company displayed the posters in the cafeteria and next to the time clock throughout the campaign. (SA 2, 15; A 129, 150, 427-28, 451, 496-97, 509-10, 544-48, 559, 613-18, 651-52, 748-49.)

On November 28, President Blancato held another employee meeting to talk about how much the employees would have to pay in union dues and fines if they elected the Union, the false promises that the Union would likely make to get their votes, and how the employees could end up with less security and fewer benefits if they elected the Union. (SA 17; A 234-49, 746.) On December 1, the Union filed an unfair labor practice charge. (SA 18; A 73-74.)

On December 5, Spencer and Blancato held another mandatory employee meeting on the subject of unionized plants that had closed. Blancato presented a slideshow about strikes and plant closures, summarized the Union's recent "strike history" at other companies, and stated that some employees lost their jobs because of the Union's actions, either through subcontracting or plant closure. Blancato told the employees that, although "strikes are not inevitable," "where there are

unions . . . there are strikes." He also stated that the Union that was seeking to represent them was "strike happy." (SA 2, 17-18; A 129, 150, 252-67, 509-11, 537-39, 560-62, 613-18, 651-52, 746-47, 757, 759.) When Blancato finished speaking, employee Schaffer asked him if he was "saying that [the Company] will move or close if the Union comes in." Blancato replied, "no, I'm saying we could move or we could close if the Union comes in." (SA 2, 17; A 537-40, 561-62, 652-53.)

President Spencer then presented another slideshow on unionized plant closures, which included a chart stating that "over the last 15 years, 13 companies have closed, putting 4,141 employees who used to be represented by the [Union] out of work." Spencer told the employees that those plant closings proved that "not only can the [Union] not guarantee job security but, in fact, the opposite may be true." (SA 2, 17; A 150, 497-500, 757-58.)

H. The Election Is Postponed While the Board Investigates Unfair Labor Practice Allegations; Employee Thibodeau Circulates an Antiunion Petition During Work Time

On December 12, the Union asked the Board's Regional Director to postpone the election while he investigated the Union's unfair labor practice allegations. (SA 18; A 589-90.) In response, President Blancato immediately called a mandatory employee meeting, and read verbatim from a speech prepared by his attorneys. Blancato told the employees that the Union had blocked the

election by filing "a trumped up unfair labor practice charge," and did not want an election "because they are losing." (SA 18-19; A 273-74, 750-51.)

On December 13, employee Thibodeau circulated an antiunion petition and discussed it with other employees during work time and on the shop floor. Blancato and Supervisor Odorczuk knew that he was circulating the petition in the shop during work time, and did nothing to stop him. The petition was signed by 54 employees, including 23 who had previously signed the petition authorizing the Union to represent them. (SA 19, 24; A 475-76, 573-74, 624, 654-55, 753-43.)

On December 14, the Board postponed the election. Blancato immediately called another mandatory employee meeting, and read verbatim from a speech written by his attorneys. He told the employees that the Union had decided "to litigate this case," which "could take up to [3] or more years." He stated that the Union's decision was unfortunate because the employees would have "to live with this potentially [for] a very long period of time." (SA 18-19; A 268-72, 750-51.)

I. The Company Gives Wage Increases to Employees Whose Raises Had Been Frozen During the Union Campaign; Employee Pimentel Finds Light-Duty Work at Another Factory and Informs the Company's Insurance Carrier; the Company Discharges Him

In February, 2001, Pimentel had found light-duty work at a nearby factory, and informed the Company's workers' compensation carrier. (SA 20-21, 36; A 375-79, 400.) Starting in May, the Company began giving raises to 24 employees, including the 9 employees who had received good performance reviews during the

union campaign in the fall of 2000, but whose raises were frozen by the Company. For those employees, the Company did not conduct new reviews. (SA 20, 31; A 152-200, 466-67, 506, 630-34.)

On June 5, the Company sent Pimentel a letter stating that his insurance coverage had been cancelled based on his abandonment of his job. A few days later, Pimentel went to the plant and told President Blancato that he had not abandoned his job. He reminded Blancato that Plant Manager Abraham had ordered him not to return to work until the doctor cleared him for full-duty work, and he followed Abraham's instructions. When Pimentel asked Blancato directly if he still had a job with the Company, Blancato said, "No." (SA 20-21, 36; A 116, 372-75.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On March 16, 2007, the Board (Chairman Battista and Members Liebman and Walsh) issued its Decision and Order, finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by threatening employees with plant closure and job loss if they elected the Union (Chairman Battista, dissenting (SA 3 n.13)); by making implied promises to improve the employees' benefits if they rejected the Union; by increasing the pay differential for employees working on the third shift; by creating the impression that it was surveilling the employees' union activities; by using the removal of EN-

114 machine to threaten the employees with job loss; by threatening to withhold and withholding wage increases; and by threatening the employees with unspecified reprisals. (SA 1 & n.3, 1-3, 24-30.)

The Board also found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by promulgating overly broad and discriminatory work rules that prohibited employees from discussing the Union or soliciting union support on company time; by denying overtime work to employee Tyree; by denying employee Pimentel light-duty work and later discharging him; and by delaying the wage increases due to those employees who received good performance reviews in the fall of 2000 until after all union activities subsided in the spring of 2001. (SA 1 & n.3, 23-24, 30-37.) Finally, the Board (Chairman Battista, dissenting (SA 4 n.17)) found that the totality of the Company's unlawful conduct was sufficiently serious and widespread to warrant ordering the special remedy of having the remedial notice read aloud to the employees. (SA 1, 4, 40.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Company to rescind the unlawful rules promulgated during the union campaign; to

make employee Tyree whole for any loss of earnings she suffered as a result of the Company's discriminatory denial of overtime; to offer employee Pimentel full reinstatement to his former light-duty job and make him whole for all losses he suffered; and to make whole the employees who were denied wage increases during the union campaign. The Order also requires the Company to remove from its files any reference to Pimentel's unlawful discharge. In addition to posting the remedial notice, the Order requires that President Blancato, or a Board agent in Blancato's presence, read the remedial notice aloud to the employees at a meeting scheduled to ensure the widest possible attendance, with translation for the Spanish- and Polish-speaking employees. (SA 5, 40.)

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of the numerous findings that the Company has declined to challenge in its opening brief. Specifically, it does not contest the Board's findings that it violated Section 8(a)(1) of the Act by making implied promises to improve the employees' benefits if they rejected the Union, increasing the pay differential for employees working on the third shift, creating the impression that it was surveilling the employees' union activities, using the removal of EN-114 machine from the plant to threaten the employees with job loss, threatening to withhold and withholding wage increases, and threatening the employees with unspecified reprisals. The Company also does not

contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by imposing overly broad and discriminatory work rules that prohibited the employees from discussing the Union or soliciting union support on company time, and by delaying the wage increases due to those employees who received good performance reviews in the fall of 2000 until after all union activities had subsided in the spring of 2001.

The Board's finding that the Company, in speeches and posters presented at its mandatory employee meetings, violated Section 8(a)(1) of the Act by threatening employees with plant closure and job loss if they elected the Union, is supported by substantial evidence and fully consistent with settled law. Specifically, the Board found that the Company's speeches and posters, taken as a whole, contravened the principles of *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969). The Company wrongly contends that the Board's decision is contrary to Board precedent, and that its speeches and posters were lawful because they did not contain an explicit threat. But, as the Supreme Court held in *Gissel*, implied threats of plant closure and job loss are just as unlawful.

Substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by denying employee Tyree overtime work, and denying employee Pimentel light-duty work and later discharging him. The Company's principal contention with regard to each of those findings is that it

would have taken these adverse actions even in the absence of its anitunion animus. With regard to its denial of Tyree's overtime work, it mistakenly relies on the discredited testimony of Supervisor Ewing, while failing to provide the Court with any basis to disturb the Board's crediting of Tyree's contrary testimony. That testimony--as corroborated by the Company's own records--shows that the event that the Company claims precipitated its denial of overtime happened several months before the Company denied her overtime. With regard to the its denial of light-duty work and subsequent discharge of Pimentel, the Board reasonably found that the Company's asserted reasons for those adverse actions were false and unbelievable, and designed to mask its unlawful motive of removing this key union organizer from the workplace, first temporarily and then permanently.

Finally, the Board acted well within its broad remedial discretion in determining that, because the Company's unfair labor practices were sufficiently serious and widespread, the special remedy of ordering the Company to read the Board's remedial notice aloud to employees was warranted to dissipate any lingering effects of the unlawful conduct. Among its numerous unlawful acts, particularly pervasive were the Company's repeated threats of plant closure and job loss made to the entire unit of employees, which are a form of exceptional misconduct having serious and long-lasting adverse effects on employees. In its

defense, the Company merely cites cases that do not demonstrate any abuse of discretion by the Board here in ordering the notice-reading remedy.

STANDARD OF REVIEW

Overall, judicial "review of Board orders is quite limited." *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 763 (2d Cir. 1996). As the Court has stated, it "must respect the Board's role as an agency 'equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess.'" *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). *See Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 818 (2d Cir. 1980) (it is the Board's, and not the Court's, "role to find the facts").

The Board's findings of fact are therefore "conclusive" "if supported by substantial evidence on the record considered as a whole." Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera*, 340 U.S. at 488. As the Court has recognized, it "may not 'displace the Board's choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before [it] de novo.'" *Newspaper Guild of New York, Local No. 3 v. NLRB*, 261 F.3d 291, 301 (2d Cir. 2001) (quoting *G&T Terminal Packaging Co.*, 246 F.3d at 114) (internal quotation marks omitted). Therefore, "the findings of

the Board 'cannot lightly be overturned,' especially when these findings are based upon the Board's assessment of witness credibility." *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973)).

ARGUMENT

Upon learning that its employees were seeking union representation, the Company swiftly initiated an extensive antiunion campaign and took numerous unlawfully coercive actions against its employees in an effort to discourage union support and defeat the union. The Company initiated a series of mandatory employee meetings to impart its antiunion views, singled out employees on the organizing committee for coercive treatment and discriminatorily denied one of them overtime work, and imposed unlawful work rules forbidding employees from even talking about the union campaign. When it became clear that the employees' chief complaint was their lack of wage increases, the Company promised to fix the problem without a union, promised the employees performance reviews and raises, and unlawfully increased the pay for employees on its third shift.

The Company, however, intensified its use of coercive tactics after 48 of its 78 employees signed a petition authorizing the Union to represent them, prompting the Union to file a petition for an election with the Board. Escalating its antiunion campaign, the Company repeatedly threatened in mandatory employee meetings

that it could close the plant if the employees elected the Union, prominently displayed posters depicting closed unionized plants, froze the promised raises, and blamed its wage freeze on the Union. The Company also retaliated against another organizing committee member, who was injured, by denying him light-duty work, sending him home, and later discharging him.

Within the span of 12 weeks, the Company had achieved its goal of defeating the Union when, as a result of its unlawfully coercive antiunion tactics, employee support for the Union had eroded so much that 54 employees signed an antiunion petition. Now, the Board has filed this proceeding to enforce its Order, which provides remedies for the employees who suffered as a result of the Company's severe and extensive unlawful conduct, erases the coercive effects of that misconduct, and restores the employees' rights to freely organize and choose union representation without unlawful interference.

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT

In its opening brief, the Company fails to contest a number of the Board's findings that its coercive and discriminatory conduct violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)). It is well settled that when an employer does not contest the Board's unfair labor practice findings before the Court, "the Board is entitled to summary affirmance of those findings."

Torrington Extend-A-Care v. NLRB, 17 F.3d 580, 590 (2d Cir. 1994). *Accord NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992). The Board is therefore entitled to summary enforcement of the following uncontested findings:

Violations of Section 8(a)(3) and (1) of the Act:

- The Company unlawfully imposed overly broad and discriminatory work rules on the employees that prohibited them from discussing the Union or soliciting union support on company time. *See Vanguard Tours, Inc.*, 981 F.2d at 66-67; *NLRB v. Miller*, 341 F.2d 870, 873-74 (2d Cir. 1965).
- The Company unlawfully delayed the wage increases due employees who had received good performance reviews in the fall of 2000, until the spring of 2001, when all union activities had subsided. *See NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 402 (2d Cir. 1980); *Luxuray of N.Y. v. NLRB*, 447 F.2d 112, 118 (2d Cir. 1971).

Violations of Section 8(a)(1) of the Act:

- The Company unlawfully made implied promises to employees to improve their benefits if they rejected the Union. *See United Aircraft Corp. v. NLRB*, 440 F.2d 85, 93 (2d Cir. 1971); *Edward Fields, Inc. v. NLRB*, 325 F.2d 754, 760 (2d Cir. 1963).

- The Company unlawfully increased the pay differential for employees working on the third shift. *See J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 151 (2d Cir. 1981); *Porta Sys. Corp.*, 625 F.2d at 402.
- The Company unlawfully created the impression that it was surveilling employees' union activities. *See NLRB v. Scoler's Inc.*, 466 F.2d 1289, 1292 (2d Cir. 1972); *NLRB v. United Mineral & Chem. Corp.*, 391 F.2d 829, 832, 835 (2d Cir. 1968).
- The Company unlawfully used the removal of the EN-114 machine from the plant to threaten employees with job loss. *See Donovan v. NLRB*, 520 F.2d 1316, 1319 & n.5 (2d Cir. 1975); *NLRB v. Hendel Mfg. Co.*, 483 F.2d 350, 352-53 (2d Cir. 1973).
- The Company unlawfully threatened to withhold, and withheld, wage increases in the fall of 2000. *See Porta Sys. Corp.*, 625 F.2d at 402; *Hendel Mfg. Co.*, 483 F.2d at 352-53.
- The Company unlawfully threatened employees with unspecified reprisals if they elected the Union. *See Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145-46 (1st Cir. 1981); *Reno Hilton Hotel*, 319 NLRB 1154, 1155 (1995).

These established acts of unlawful coercion and discrimination, however, do not vanish from the case. Rather, the "series of coercive antiunion actions" stays

in the case, and "[i]t is against this background that [the Court will] consider the Board's remaining findings." *NLRB v. Pace Motor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983). *Accord Torrington Extend-A-Care*, 17 F.3d at 590. In other words, the "uncontested violations . . . remain, lending their aroma to the context in which the [contested] issues are considered.'" *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY, IN SPEECHES AND POSTERS PRESENTED AT MANDATORY EMPLOYEE MEETINGS, VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES WITH PLANT CLOSURE AND JOB LOSS IF THEY ELECTED THE UNION

The Board found (SA 1-3), in agreement with the administrative law judge, that the Company, in campaign speeches and posters presented at its mandatory employee meetings, violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively threatening employees with plant closure and job loss if they elected the Union. On appeal, the Company contends (Br 12-26) only that the Board's finding is inconsistent with prior Board precedent.[2] As we now show, the Board's finding is fully consistent with law, and supported by substantial evidence.

[2] Although the Company asserts (Br 12) in its section heading that the Board's finding is not supported by substantial evidence, it makes no such argument.

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining . . . ." In turn, Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights.

An employer's conduct violates Section 8(a)(1) of the Act "if, under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees" in the exercise of their Section 7 rights. *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998). An employer's use of threats of plant closure or job loss to coerce employees into rejecting a union is an unfair labor practice barred by Section 8(a)(1) of the Act. *See HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1329 (2d Cir. 1996); *NLRB v. Milco, Inc.*, 388 F.2d 133, 136-37 (2d Cir. 1968).

The Supreme Court, in *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969), described the parameters of what constitutes an unlawful threat of plant closure. Although an employer is free to make "a prediction as to the precise effects [it] believes unionization will have on [the] company," the prediction "must be carefully phrased on the basis of objective fact," and convey to the employees

that there are "demonstrably probable consequences beyond [the employer's] control." *Id.* at 618. On the other hand, an employer's statement constitutes an unlawful threat of plant closure if it contains "any implication that [the] employer may or may not take action solely on [its] own initiative for reasons unrelated to economic necessities." *Id.* *Accord New York Univ. Med. Ctr.*, 156 F.3d at 411.

The Supreme Court also instructed that an employer's statements and conduct must be viewed "in the context of its labor relations setting." *Gissel*, 395 U.S. at 617. Moreover, "a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Id.* at 620. In making that factual assessment, the Board "take[s] into account the economic dependence of the employees on their employers, and the necessary tendency of the [employees], because of that relationship, to pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear." *Id.* at 617. *Accord New York Univ. Med. Ctr.*, 156 F.3d at 410.

B. The Board Reasonably Found that the Company Unlawfully Threatened Its Employees with Plant Closure and Job Loss

Here, the Board reasonably found (SA 2-3), based on well-settled principles, that the Company's speeches and posters on closed unionized plants, "taken as a whole," were unlawful threats that "contravened *Gissel's* guidelines." Specifically, the Board found (SA 2-3) that the Company used its speeches and

posters to convey to the employees, without the necessary basis of objective fact, the implication that unionization would result in plant closure and job loss, and that the Company could, on its own initiative, choose to close or move its facility.

The Board explained (SA 2, 27) that the speeches and posters, contrary to *Gissel*'s admonition, "contained no objective facts to support the . . . clear implication that the referenced plant closings were caused solely by the fact that the 'strike happy' [Union] represented the employees." As the Board further explained (SA 2, 27), the Company similarly supplied no objective facts supporting its implication that plant closure inevitably follows unionization, when it "told its employees that 'where there are unions, there are strikes,' and that two of its own plants had closed following a series of strikes." *See* pp. 15-16. As such, the Company's statements did not constitute reasonable, fact-based predictions of the consequences of unionization, but constituted threats of plant closure in retaliation for the unionization of its facility.

Credited testimony of employees who attended the Company's mandatory meetings on November 22 and December 5 confirms that the Company presented no objective facts supplying the actual reasons the unionized plants referenced in the speeches and posters had closed. (*See* SA 26.) For example, employee Tyree, who attended the November 22 meeting, testified (A 500) that the Company told the employees that "it was because they were union shops, that they closed."

Employee Lee Sochon testified (A 539) that Spencer and Blancato "were showing plant closings," and "the comment [was] made that they were all unionized shops." Supervisor Odorczuk testified (A 614) that Blancato stated, during his slideshow, that it was "because of the union, all them places [] closed." Indeed, President Blancato himself admitted (A 691-92) that he had "no idea" why the plants had actually closed. *See Gissel*, 395 U.S. at 619 (unlawful threat of plant closure properly found where employer "admitted at hearing that it had no basis for attributing other plant closings in the area to unionism").

The Board therefore reasonably found (SA 2) that the Company's unfounded implication that unionization would inevitably lead to plant closure and job loss, which the Company conveyed to employees without the necessary "basis of objective fact" (*Gissel*, 395 U.S. at 618), constituted an unlawful threat. As the Board explained (SA 2), by that implication, the Company coercively "created the impression in the minds of employees that there was an inevitable linkage between unionization and job loss," and that "a vote for the Union will threaten their future employment." The Board noted (SA 3) that the Company's labeling the Union "strike happy" was merely a way of emphasizing that if the employees elected the Union, the inevitable results would be plant closure and job loss. *See Gissel*, 395 U.S. at 618 (employer assertion that the "strike happy" union would strike and precipitate a plant shutdown was an unlawful threat). The Board also noted (SA 3)

that Spencer "clearly threatened job loss" when he told employees that his references to the closed unionized plants demonstrated that selecting the Union might actually "guarantee" the loss of jobs. *See* p. 16.

Also contrary to the admonition of the Supreme Court in *Gissel* was the Company's implication that it could choose to close the plant if the employees elected the Union. As shown at pp. 14-16, on November 22, President Spencer told the employees that the Company had closed two plants because it was "fed up and tired of strikes," and that employees should ask themselves, "will this Union do to this new Homer Bronson what it did to the old Homer Bronson?" By those statements, Spencer indicated that strikes by "this Union" caused the plants to close. By reminding employees of the adage that "those who cannot read history are bound to repeat it," he left no doubt in employees' minds that, in the event of another series of strikes, history *would* repeat itself, and the Company would, on its own initiative, *choose* to close or move. Similarly, on December 5, when employee Schaffer asked Blancato to clarify whether he was "saying that [the Company] will move or close if the Union comes in," Blancato replied, "no, I'm saying we *could* move or we *could* close if the Union comes in." (Emphasis added.) Such "implication[s] that an employer may or may not take action solely on [its] own initiative for reasons . . . known only to [the employer]," constitute unlawfully coercive threats of plant closure. *Gissel*, 395 U.S. at 618. *See*

HarperCollins San Francisco, 79 F.3d 1324, 1329 (employer statement that it "could just move [its] offices because [it] didn't need the hassle of a union or a strike," was an unlawful threat).

The Board also determined (SA 2-3) that "the totality of the speeches and posters in the instant case [are] qualitatively more coercive" than the speeches and posters found lawful in *Stanadyne Automotive Corporation*, 345 NLRB No. 6, 2005 WL 2342111 (2005), *oral argument scheduled*, No. 05-6026-ag (2d Cir. Nov. 2, 2007), and *Smithfield Foods, Inc.*, 347 NLRB No. 109, 2006 WL 2559835 (2006), *petition for review filed*, No. 06-1318 (D.C. Cir. Sept. 8, 2006). In those cases, the Board emphasized that the employer either "repeatedly made clear" and "said several times" that it was not making predictions (*Stanadyne*, 345 NLRB No. 6, 2005 WL 2342111, at *8, *9), or "expressly disclaimed any certainty about the connection between the previous closures" and the union. *Smithfield*, 347 NLRB No. 109, 2006 WL 2559835, at *3.

Here, in contrast, the Company provided the employees with no such repeated assurances or disclaimers. Rather, as the Board found (SA 3), the Company "left no doubt in employees' minds" that it "would, on its own initiative, choose to close or move," if they elected the Union. The Board further found (SA 3) the *Stanadyne* and *Smithfield* cases distinguishable because they did not involve a clear threat of job loss, such as President Spencer's December 5 remark that

selecting the Union might actually "guarantee" that the employees will lose their jobs. Finally, the Board noted (SA 3) that in neither *Stanadyne* nor *Smithfield* was there an employee-management interchange like the one between employee Schaffer and President Blancato, in which Blancato stated that the Company could close if the Union were elected. As the Board noted (SA 3), Schaffer's question presented Blancato with "an opportunity to disavow any implication of a threat." Rather than do so, Blancato used Schaffer's question as an opportunity to reiterate an unlawful threat. Accordingly, the Board reasonably reconciled this case with its prior precedent.

C. The Company Presents the Court with No Basis To Disturb the Board's Finding, and Its Contentions Must Be Rejected

The Company misunderstands the law in contending (Br 13-17) that its speeches were not coercive because they did not contain an *explicit* threat that the Company *would* close or move the plant if the employees elected the Union. As shown, the Supreme Court in *Gissel* stated that an unlawful threat exists where "there is any *implication* that an employer may or may not take action solely on his own initiative." 395 U.S. at 618 (emphasis added). There, the Supreme Court upheld the Board's finding that an *implied* threat of plant closure was unlawful, explaining that the Board properly found that "the *intended* and *understood import* of the [employer's] message" was to threaten the employees with loss of work."

Id. at 619 (emphasis added).[3] Here, as the administrative law judge explained (SA 27), "[t]he fact that an employer does not directly threaten employees with plant closure or job loss is not the end of the inquiry."

Entirely irrelevant is the Company's argument (Br 21-26) that the Court must reverse the Board's finding that its posters, standing alone, were unlawful. The Board made no such finding. As shown, the Board found (SA 2) that the Company's speeches and posters, "taken as a whole," were unlawful threats, based on the proper inquiry for Section 8(a)(1) of the Act. *See New York Univ. Med. Ctr.*, 156 F.3d at 410 (employer conduct violates Section 8(a)(1) "if, under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees" in the exercise of their rights). Similarly of no consequence is the Company's discussion (Br 22-24) of *Sheraton Hotel Waterbury*, 312 NLRB 304, 339 (1993), *enforced in relevant part*, 31 F.3d 79 (2d Cir. 1994), and *EDP Medical Computer Systems*, 284 NLRB 1232, 1264 (1987),[4] because those are cases that found that certain campaign posters, standing alone, were lawful.

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[3] *See, e.g., Fleming Cos. v. NLRB*, 349 F.3d 968, 974 (7th Cir. 2003) (employer's statement that "the warehouse 'would' or 'could' close was an unlawful threat); *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1190 (7th Cir. 1993) (employer's statement that it "might 'possibly' close" its terminal was an unlawful threat).

[4] In discussing those cases, the Company also apparently fails (Br 22) to recognize that the Board expressly disagreed (SA 2 n.7) with the administrative law judge's assessment that *Sheraton Hotel Waterbury*, 312 NLRB 304, and *EDP Medical Computer Systems*, 284 NLRB 1232, were of limited precedential value.

The Company's arguments also contain misstatements of the record. For example, the Company mistakenly attributes (Br 17, 20) to President Blancato statements contained in the texts of his speeches prepared by his attorneys. However, as the administrative law judge explained (SA 26), "[t]here is no dispute that [Blancato] did not," for his November 22 and December 5 speeches, "read the text or his trigger points verbatim." Indeed, Blancato admitted (A 745-47, 764-65) that, for those speeches, he improvised from the trigger point notes he prepared, and did not use prepared speeches.

Similarly, the Company's claim (Br 20) that President Blancato expressly assured employees that strikes are "not inevitable," is not supported by the record when viewed as a whole. As the Board explained (SA 3 n.10), that statement is contained only in Blancato's "notes, which he admittedly did not read verbatim." In any event, as the Board further explained (SA 3 n.10), even if Blancato "may have said that strikes were 'not inevitable,'" during that same presentation on December 5, "his visual display categorically stated that '[w]here there are unions . . . there are strikes,' and he said nothing else at any time to disclaim that he was predicting what would happen if employees voted for the Union." (*See* A 279.)[5]

[5] Accordingly, the Company's reliance (Br 18-19, 19 n.2) on *Baton Rouge Hospital*, 283 NLRB 192 (1987), is immaterial, because there, the Board found a speech lawful because it "d[id] not stress that a strike is inevitable." *Id.* at 211. Similarly, *Michael's Markets*, 274 NLRB 826 (1985), upon which the Company

The Company also incorrectly asserts (Br 14, 21) that its speeches and posters were "fact-based," rather than campaign opinion statements, and that they truthfully presented "events that actually occurred." At the hearing, however, the Company did not present evidence establishing that the matters it now claims are fact actually occurred. Moreover, the Board's General Counsel introduced the posters and speeches to establish what the Company may have said to employees during the speeches, or shown to them, but not to establish the truth of the matters contained in the speeches and posters. Therefore, the Company's contentions that run in this vein are unsupported by the record, and must be rejected.

Finally, the Company does not further its position by relying (Br 17-18, 19 n.1, 20) on *Elgin Butler Brick Co.*, 147 NLRB 1624 (1965), and *American Greetings Corp.*, 146 NLRB 1440 (1964). Those Board representation cases do not involve allegations of coercion under Section 8(a)(1) of the Act, but rather the very different question of whether an employer's objectionable conduct sufficiently interfered with employee free choice to warrant setting aside an election. Accordingly, the Company has presented the Court with no basis to disturb the Board's finding that the Company unlawfully threatened the employees with plant closure and job loss.

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also relies (Br 20), is definitively distinct because there the Board found that the employer did not "intimat[e] that a strike was inevitable." *Id.* at 827.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DENYING EMPLOYEE TYREE OVERTIME WORK, AND DENYING EMPLOYEE PIMENTEL LIGHT-DUTY WORK AND DISCHARGING HIM, BASED ON THEIR UNION ACTIVITIES

A. An Employer Violates the Act by Taking Adverse Actions Against Its Employees on the Basis of Their Union Activities

Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1)[6] of the Act by taking adverse actions against an employee because of his union activity. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957, 959-60 (2d Cir. 1988).

The critical inquiry in these cases is whether the employer's actions were motivated by antiunion animus. *See S.E. Nichols, Inc.*, 862 F.2d at 957; *Abbey's Transp. Servs. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Once it is shown that the employer's opposition to union activity was a motivating factor in its decision to take adverse action against an employee, the employer will be found to have

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[6] As noted, 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] rights" under the Act. An employer that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the employee's union activity. *See Transportation Mgmt. Corp.*, 462 U.S. at 400-04; *Wright Line*, 251 NLRB 1083, 1084 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). An employer, however, fails to prove that affirmative defense where, as here, the record shows that the employer's stated justifications for the adverse actions are "pretext[s] to mask discrimination." *S.E. Nichols, Inc.*, 862 F.2d at 957 (citing *Abbey's Transp. Servs.*, 837 F.2d at 579).

In making that determination, it is well settled that the Board may infer motive from direct and circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey's Transp. Servs.*, 837 F.2d at 579. The Board often must rely on circumstantial evidence to determine motive, given that employers rarely admit to taking adverse actions against employees because of their protected activities. *See NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 313 (5th Cir. 1988). The employer's knowledge of the employee's union activity also may be established by the same circumstantial evidence that supports a finding of unlawful motive. *See Abbey's Transp. Servs.*, 837 F.2d at 579-80; *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292 (2d Cir. 1972).

Among the factors from which the Board may infer unlawful motive are the employer's hostility to union activity and its other unfair labor practices; the

employer's knowledge of the employee's union activity; the coincidence in timing between the union activity and the adverse action; the employer's deviation from past practice; the employer's disparate treatment of other employees; and the implausibility of the employer's asserted reason for its action. *See Abbey's Transp. Servs.*, 837 F.2d at 579-82; *NLRB v. J. Coty Messenger Serv.*, 763 F.2d 92, 98-99 (2d Cir. 1985); *NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 403 (2d Cir. 1980); *Long Island Airport Limousine Serv. Corp.*, 468 F.2d at 295.

Moreover, it is well settled that the Board need not accept "at face value the reason advanced by the employer" if the "evidence, and the reasonable inferences drawn therefrom," indicate that the employer's action was motivated by union animus. *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962). *See also Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (Board properly rejected employer's "excuse rather than the reason for [its] retaliatory action").

Review of a Board finding of unlawful motive is particularly deferential because "[d]rawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board." *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). As the Court has explained, "in cases where difficult issues regarding motivation are of primary concern, the Act vests primary responsibility in the Board to resolve these critical issues of fact." *S.E. Nichols*, 862 F.2d at 956.

B. The Company Had an Unlawful Motive for Taking Its Adverse Actions Against Employees Tyree and Pimentel

Substantial evidence supports the Board's findings (SA 1, 33-37) that the Company violated Section 8(a)(3) and (1) of the Act by denying overtime to employee Tyree in early October 2000, by denying light duty work to employee Pimentel on November 15, and by discharging Pimentel on June 5, 2001. The Board reasonably found (SA 1, 33-37) that the Company had an unlawful motive in taking those adverse actions against Tyree and Pimentel, and that the Company failed to show that it would have taken those actions even absent their union activities. The Company's challenges (Br 27-45) to those findings lack any merit, and must be rejected.

As a preliminary matter, the Company bases its contentions (Br 27-45) on a misunderstanding of the standard of review. (*See* Br 28-29, 37, 43-44.) Rather than arguing that the Board's findings are not supported by substantial evidence (see *Universal Camera*, 340 U.S. at 488, and cases cited at pp. 23-24), the Company instead "simply disagrees with the Board's findings and asks [the Court] to accept its characterization of the evidence as though [the Court's] function were to determine facts." *S.E. Nichols*, 862 F.2d at 958. *See also Newspaper Guild of New York, Local No. 3*, 261 F.3d at 301 (the Court may not displace the Board's choice between two fairly conflicting views of the facts). At best, the Company's

argument (Br 27-45) warrants rejection on that basis alone. In any event, as we show below, the Board's findings are amply supported by the credited evidence.

Another shared theme running through the Company's contentions (Br 27-45) is its attempt to place significance on its fair treatment of employee Tyree *after* denying her weekday overtime, when it granted her leave requests in the fall of 2000, and promoted her in July 2001,[7] and its reasonable accommodation of employee Pimentel's work restrictions *before* denying him light-duty work. There is simply no authority—and the Company cites none—for the proposition that an employer can be excused from its unfair labor practice liability by previously, or subsequently, treating an employee fairly. The Company's claims are simply irrelevant.

A common factor supporting the Board's findings (SA 33-37) of unlawful discrimination is the Company's hostility towards the Union. That factor is undoubtedly established here, where overwhelming proof of the Company's antipathy to unionization is shown by its numerous and coercive unfair labor practices (see pp. 25-38), the bulk of which are uncontested. Such violations provide convincing evidence to support a finding that an employer had an unlawful motive in taking adverse actions against union supporters. *See J. Coty Messenger*

[7] Inexplicably, at another point in its brief, the Company characterizes (Br 45) its denial of weekday overtime to Tyree as "how it wishes to treat employees who repeatedly act in an insubordinate manner."

Serv., 763 F.2d at 98-99, and cases cited at p. 40. Ample evidence therefore supports a finding of antiunion animus, a factor sustaining each of the Section 8(a)(3) and (1) violations discussed below.

1. The Company unlawfully denied employee Tyree overtime

The Board, in finding that the Company had an unlawful motive in denying employee Tyree her weekday overtime work, reasonably relied (SA 34-35) on the credited evidence. As shown at p. 5, the Company granted employees overtime work on a voluntary basis, and some employees worked overtime regularly. Among them was employee Tyree who, since about April 2000, regularly worked 1 1/2 or 2 hours of overtime on the hinge line each weekday before her 7:00 a.m. shift. She sometimes also worked overtime on Saturdays, until she chose to stop doing so in late July 2000. Tyree's first involvement with the Union was to attend the October 5 union meeting, where she signed the union petition and volunteered for the organizing committee. Within days, Plant Manager Abraham instructed Supervisor Ewing not to give Tyree "one more hour of overtime," and Ewing told Tyree to stop coming in early for overtime work. After October 8, and for the rest of the year, Tyree did not work overtime on the hinge line, while the Company continued to give that work to other employees.

The Company's knowledge of Tyree's union activities is abundantly demonstrated by the credited evidence. As shown at p. 9, Supervisor Ewing knew

that Tyree was involved in the union campaign when, in early October, he identified her to President Blancato as one of the employees who kept congregating and talking about the Union during work time. Blancato's knowledge is further demonstrated by the statements he made to Tyree when he asked her not to solicit for the Union during company time, and then told her to stop whoever else was doing it. *See* p. 10. Moreover, Blancato's statements indicate that he believed Tyree was a key union organizer.

The timing of the Company's denial of employee Tyree's overtime—coming immediately on the heels of the October 5 union meeting—makes the unlawful motive behind it "stunningly obvious." *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982). Further, the Company's unlawful motive is evidenced by its sudden departure from the established policy of permitting employees to work overtime on a voluntary basis. *See ITT Automotive v. NLRB*, 188 F.3d 375, 388 (6th Cir. 1999) (departure from past policy supports an inference of unlawful motive). Indeed, the Company continued to give overtime work on the hinge line to other employees, highlighting the fact that its denial of such work to Tyree was "intentionally discriminatory." *Porta Sys. Corp.*, 625 F.2d at 403 (employer's disparate application of a policy supports a finding of unlawful motive).

The Company does not dispute (Br 43-45) any of these key findings, instead claiming (Br 44-45) that it would have denied Tyree weekday overtime, even

absent her union activities. Specifically, the Company asserts (Br 43-45) that Tyree told Supervisor Ewing in early October that she did not want any more Saturday overtime, and that this refusal prompted the Company to strip her of weekday overtime as well. The Company's defense fails at the threshold because the credited evidence shows that the purported predicate for its denial of weekday overtime--Tyree's request not to work Saturday overtime--happened several months before October. The administrative law judge specifically credited (SA 34-35) Tyree's testimony to that effect, which was corroborated by the Company's own timesheets, and the judge discredited Ewing's testimony that Tyree told him in early October, in part because of his "generally poor recollection of dates." (SA 34.) The Company has not challenged those credibility determinations.[8] Moreover, as the Board noted (SA 34), Tyree never refused weekday overtime work. In short, nothing happened in early October to prompt the Company's termination of Tyree's weekday overtime except her union activity. Accordingly, the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by denying employee Tyree her regular weekday overtime must be affirmed.

[8] *See S.E. Nichols, Inc.*, 862 F.2d at 956 (credibility findings made by the judge and adopted by the Board will not be set aside unless hopelessly incredible or flatly contrary to undisputed documentary evidence).

2. The Company unlawfully denied employee Pimentel light-duty work

In finding that the Company had an unlawful motive in denying employee Pimentel light-duty work on November 15, 2000, and later discharging him on June 5, the Board reasonably relied (SA 35-36) on the credited evidence demonstrating the Company's knowledge of Pimentel's union activities, the timing of the adverse actions, and its sudden departure from its policy of generously accommodating its employees' work restrictions. Moreover, the Board reasonably found (SA 34-35) that the reasons the Company gave for denying Pimentel light-duty work, and for discharging him, were false.

Employee Pimentel, as shown at pp. 8 and 11, actively engaged in union activities. On October 5, he attended the union meeting, signed the union petition, and volunteered for the organizing committee. Later, Pimentel, who acted as the translator and "leader" for the Spanish-speaking employees when dealing with the Company, obtained 12 of 14 petition signatures from Hispanic employees. On November 3, Pimentel was among those union organizers who tried to present the Company with the Union's majority-support letter and request that the Company voluntarily recognize the Union.

The Company's knowledge of Pimentel's union activities is fully supported by the credited evidence. As shown at p. 9, in early October, President Blancato admitted knowledge of Pimentel's union activities when he told Pimentel that he

knew Pimentel was talking to other employees about the Union. On November 3, the Company had notice of Pimentel's status as a key union organizer when he tried to deliver the majority support letter and demand recognition. Indeed, Supervisor Ewing testified (A 699-700) that Pimentel was speaking for the group.

Prior to November 2000, as shown at p. 6, the Company applied its policy of generously accommodating its injured employees to Pimentel, who was allowed to perform light-duty work ever since he injured his back in March 2000. He primarily worked assembling hinges, a job which permitted him to sit, stand, or stretch, as needed. On November 15, Pimentel delivered one of his periodic doctor's notes for light-duty work, which also stated that he was to "avoid prolonged postures." Plant Manager Abraham told Pimentel that he did not have light-duty work that did not involve prolonged postures. Pimentel replied that he was avoiding "prolonged postures" in his current light-duty assignment because he could sit or stand, as needed. Without responding, and without calling the doctor to clarify the meaning of "prolonged postures," Abraham instructed Pimentel to go home, collect workers' compensation, and not return until he was cleared for full-duty work.

The Company's denial of light-duty work to Pimentel came less than 2 weeks after his November 3 union activities, and 1 day after the union election was scheduled. That coincidence in timing, viewed together with the Company's

knowledge of Pimentel's union activities, supports the Board's finding that the Company had an unlawful motive for denying this key union organizer light-duty work in order to retaliate against him, and to remove him from the workplace for the final weeks before the election. The Company's unlawful motive is also evidenced by its departure from its policy of generously accommodating its injured employees' work restrictions. *See ITT Automotive*, 188 F.3d at 388.

The Company does not contest (Br 28-37) these elements of unlawful discrimination. Rather, it only contends (Br 28-37) that the reason it denied Pimentel light-duty work was that it could not accommodate the "prolonged postures" work restriction. The Board reasonably rejected (SA 35-36) that asserted reason, noting that it "might have been credible" if the Company had "taken any steps to clarify the restriction."

For example, the Company could have accepted Pimentel's representation that his current light-duty assignment already allowed him to avoid "prolonged postures"--something the Board noted (SA 35) "was corroborated by other employees who had no reason to lie and by [Supervisor] Ewing himself, who acknowledged that Pimentel was already permitted to stand and stretch as needed." Or the Company could have checked with Pimentel's doctor to determine if this restriction prevented Pimentel from simply continuing his current light-duty assignment. Moreover, the fact that Abraham insisted that Pimentel return to work

only if his doctor cleared him for *full*-duty work--rather than his regular light-duty assignment--is inexplicable, absent the presence of an unlawful motive.

Instead, the Company chose the "knee-jerk reaction" of "seizing upon the fortuitous event" of the new phrase appearing in Pimentel's doctor's note "to remove from the plant a key member of the organizing committee," that is, "the only one who could keep the Spanish-speaking employees in the union fold, at a time when an election was imminent." (SA 36.) The Board reasonably concluded (SA 36) that it is "inescapable that, in the absence of Pimentel's union activity, the [Company] would not have so readily sent him home at the first indication that his physical limitations had changed." Accordingly, the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by denying employee Pimentel light-duty work must be affirmed.

3. The Company unlawfully discharged Pimentel

As shown, the Company unlawfully denied Pimentel light-duty work on November 15, 2000, and sent him home to collect workers' compensation benefits until he could return to full duty. By November 24, Pimentel had reached maximum medical improvement in the opinion of his doctor, which left him with a permanent duty restriction. Because Pimentel had been told by Plant Manager Abraham not to come back until he could work full duty, Pimentel had no choice but to look for work elsewhere. Indeed, as the Board found (SA 36), Pimentel

"was required to do this in order to continue receiving the temporary disability benefits he had been receiving from the [Company's] compensation carrier."

After finding light-duty work at a nearby factory, and informing the Company's insurance carrier, Pimentel received the Company's June 5, 2001 termination letter claiming that he had abandoned his job. Being understandably alarmed, Pimentel went into work and told President Blancato that he had not abandoned his job. Blancato did not accept Pimentel's statement, and when Pimentel asked Blancato directly if he still had a job with the Company, Blancato replied, "No."

Based on that credited evidence, the Board explained (SA 37) that "[t]he fact that Blancato told Pimentel that he did not have a job even after Pimentel had denied abandoning his job shows that the true motivation was the [Company]'s desire to finally rid itself of a union activist." The Board further explained (SA 36) that, "[i]f the [Company] truly suspected that Pimentel had abandoned his job, it only had to ask him." Moreover, given that Abraham was still the plant manager, as the Board noted (SA 36-37), "any confusion or misunderstanding could have been quickly resolved." Instead, by insisting that Pimentel no longer had a job with the Company, Blancato demonstrated that discharging Pimentel was the result

the Company wanted, whether or not Pimentel had abandoned his job.[9] Accordingly, the Board reasonably found (SA 36-37) that the Company's asserted reason for discharging Pimentel was false, and that the true reason was its unlawful motive to rid itself of a key union activist.

The Company, in arguing (Br 37-43) that it would have discharged Pimentel even absent his union activities, oddly contends (Br 38 n.9) that there is no record support for the Board's finding the Company's workers' compensation carrier knew that Pimentel was working. To the contrary, Cindy Murphy, the Company's human resources manager, testified (A 769-70) that she called the Company's workers' compensation carrier for "an update" on Pimentel, and that the carrier *knew* that he had been working. Further, this testimony demonstrates that, if the Company had wanted to know if Pimentel was working, all it had to do was simply call its workers' compensation carrier.

Also unsupported is the Company's post-hoc claim (Br 39-41) that it discharged Pimentel because he received health benefits while out on workers' compensation. Human Resources Manager Murphy testified (A 770-71) that, after

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[9] The Company incorrectly attempts (Br 38) to attach significance to the fact that Pimentel, in his post-discharge conversation with President Blancato, denied that he had found other work. As the Board explained (SA 37), "[a]lthough such conduct is not to be condoned," the Company "had already made the decision to terminate Pimentel before [his] act of dishonesty"; the Company "cannot escape liability for its own unlawful conduct by shifting the focus to some misconduct by Pimentel."

she spoke with the Company's workers' compensation carrier and confirmed that Pimentel was working, she and President Blancato together spoke with their attorneys, and she drafted Pimentel's termination letter for *only* one reason: "because we assumed that [Pimentel] had abandoned his job." As shown at p. 18, that was also the single reason provided to Pimentel. Therefore, the belated nature of the Company's newly-asserted reason itself indicates it was not, in fact, a reason for Pimentel's discharge. *See Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468, 1480 (3d Cir.) (rejecting as pretextual the employer's "belated explanation" for discharge), *reheard on other grounds*, 907 F.2d 400 (3d Cir. 1990) (en banc). *See also Property Resources Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (rejecting employer's *Wright Line* defense where employer asserted reasons not raised at the time of the adverse action).

The Board also reasonably rejected (SA 37) the Company's claim (Br 41-42) that its discharge of Pimentel was too remote in time from his union activity to support a finding of an unlawful motive. As the Board explained (SA 37), given that the unfair labor practice charges were pending in June 2001, the Company was "certainly aware . . . of the possibility of a revived campaign if the Union's charges were found meritorious," and therefore "had reason to want Pimentel gone for good," so he could not actively support the Union in a subsequent campaign.

Accordingly, the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Pimentel must be affirmed.

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN DETERMINING THAT THE COMPANY'S UNFAIR LABOR PRACTICES WERE SUFFICIENTLY SERIOUS AND WIDESPREAD TO WARRANT ORDERING THAT THE BOARD'S REMEDIAL NOTICE BE READ TO EMPLOYEES

The Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is directed to order remedies for unfair labor practices. The Supreme Court "has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord NLRB v. Fugazy Continental Corp.*, 817 F.2d 979, 982 (2d Cir. 1987). Therefore, the Board's determination of a remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord NLRB v. Local 3, Intern. Broth. of Elec. Workers, AFL-CIO*, 730 F.2d 870, 879 (2d Cir. 1984).

In addition to its traditional remedies, the Board will order special remedies, where, on the facts of the case, the Board finds they are needed "to dissipate fully

the coercive effects of the unfair labor practices." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) (quotation marks omitted), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). *Accord NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2d Cir. 1988). One such remedy is the requirement that the Board's remedial notice be read aloud to the employees. *See id.*; *Textile Workers Union v. NLRB*, 388 F.2d 896, 903-05 (2d Cir. 1967).

The Board's notice-reading remedy helps erase the lingering effects of the unfair labor practices by providing employees the opportunity to "fully perceive that the [employer] and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB at 258. As this Court has explained, notice reading "guarantees effective communication of the Board's order," and "insures that the full counteracting force of the remedial order will be felt by the employees," *S.E. Nichols, Inc.*, 862 F.2d at 962.

Here, the Board determined (SA 4) that, because the Company's unfair labor practices were sufficiently serious and widespread, the notice-reading remedy was warranted to dissipate any lingering effects of the unlawful conduct. As shown at pp. 25-54, during the course of its antiunion campaign, the Company committed numerous unlawfully coercive and discriminatory actions against its employees in its effort to defeat the Union. Particularly pervasive were the Company's repeated threats of plant closure and job loss made to the entire unit of employees. As the

Court has recognized, a threat of plant closure constitutes a form of "exceptional misconduct," often referred to as "hallmark" violation, because of its "serious and long-lasting untoward effects on employees." *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 272 (2d Cir. 1981). The Company's unlawful withholding of wage increases is also the type of unfair labor practice that has "a long-term coercive impact on the unit." *Federated Logistics & Operations*, 340 NLRB at 258. *See Dynatron/Bondo Corp.*, 333 NLRB 750, 752 n.8 (2001).

The Board also directed (SA 4) that the notice be read by President Blancato because he was "directly and personally involved in many of the violations."[10] The Board has held, with court approval, that its notice-reading remedy is particularly appropriate where "many of the[] [Act's] violations were committed by high-level management officials." *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929–30 (D.C. Cir. 2005).[11] As the Board has explained, "[t]he participation of a high-level manager in unlawful conduct

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[10] The Board's Order, however, provides (SA 5) that, at the Company's option, the notice may be read by a Board agent in President Blancato's presence.

[11] *See Conair v. NLRB*, 721 F.2d 1355, 1385-87 (D.C. Cir. 1983) (notice reading by president was needed "to dispel the atmosphere of intimidation created in large part by the president's own statements and actions"); *McAllister Towing & Transport. Co.*, 341 NLRB 394, 400 (2004), *enforced*, 156 Fed.Appx. 386 (2d Cir. 2005) (notice reading by Board agent, in presence of responsible management official, directed where general manager was personally involved in the unlawful conduct).

exacerbates the natural fear of employees that they would lose employment if they persisted in their union activities," and is "likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies." *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), *enforced*, 47 F.3d 1161 (3d Cir. 1995). *See Excel Case Ready*, 334 NLRB 4, 5 (2001) (same). Accordingly, the Board's ordering of notice reading was squarely within its broad remedial discretion.

The Company weakly attempts to challenge the notice-reading remedy by suggesting (Br 46-47) that the Board should only resort to ordering that special remedy when an employer's unfair labor practices are more egregious than its own unlawful conduct or the employer is a recidivist.[12] As support, the Company relies (Br 46-47) on two cases where notice reading was one of the remedies imposed for such heightened misconduct. But the Company fails to mention that, in both cases, the Board ordered many additional special remedies not imposed here.[13]

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[12] The Company does not contest that portion of its notice-reading remedy that requires (SA 4 n.17) it to provide Spanish and Polish interpreters at the notice reading to translate for the non-English-speaking employees. *See Federated Logistics & Operations*, 340 NLRB at 258 (ordering interpreters).

[13] In *United States Service Industries, Inc.*, 319 NLRB 231 (1995), *enforced mem.*, 107 F.3d 923 (D.C. Cir. 1997), the Board ordered special remedies that included a broad cease-and-desist order, union access to the workplace for 2 years, union access to workplace bulletin boards, notice mailing, notice reading, and a certified statement of compliance with the order. Similarly, in *J.P. Stevens & Co. v. NLRB*, 380 F.2d 292 (2d Cir. 1967), where unfair labor practices were found at 20 of the employer's 45 plants in North and South Carolina, the Board broadly ordered notice posting, mailing, and reading to all employees at all 45 plants.

Therefore, the Company's two cases stand for the unremarkable proposition that when misconduct is worse than in this case, the Board will order even more extensive remedies. The Company can point to nothing in either case that suggests there is a threshold level of misconduct necessary to trigger a notice-reading remedy that was not met in this case. Accordingly, the Board's ordering of the notice-reading remedy in this case was within its broad remedial discretion.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

November 2007

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner	)	No. 07-2447-ag
	)	
v.	)	Board Case No.
	)	34-CA-09499
HOMER D. BRONSON COMPANY,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,775 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 20th day of November 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	:	
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	:	Board Case No.
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COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Pursuant to Local Rule 32, the Board certifies that the PDF copy of its proof brief submitted to the Court as an e-mail attachment to <briefs@ca2.uscourts.gov> was scanned for viruses using Symantec Antivirus Corporate Edition, program version 8.00.9374 (1/10/2007 rev. 32), and according to that program, is free of viruses.

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	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's proof brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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