

Nos. 08-1009, 08-1039, 08-1081

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**CARPENTERS' DISTRICT COUNCIL OF KANSAS CITY
AND VICINITY, LOCALS 311 AND 978 affiliated with
UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent**

and

**EXCEPTIONAL PROFESSIONAL, INC.
d/b/a EPI CONSTRUCTION
Intervenor**

**EXCEPTIONAL PROFESSIONAL, INC.
d/b/a EPI CONSTRUCTION COMPANY
Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner**

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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GLOSSARY

1. “A.” the Appendix
2. “Br.” EPI’s brief
3. “EPI” Exceptional Professional, Inc. d/b/a EPI Construction
4. “GC” the Board’s General Counsel
5. “salts” individuals who apply for jobs at the Union’s request with the intent to organize EPI
6. “the Act” The National Labor Relations Act
7. “the Board” The National Labor Relations Board
8. “the Union” Carpenters’ District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America
9. “UBr.” the Union’s brief

epifinal-glossary

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These cases are before the Court upon the Union's and EPI's petitions for review and the Board's cross-application for enforcement of two Board Decisions and Orders issued against EPI. The first Board Decision and Order issued on September 28, 2001, and is reported at 336 NLRB 234 (A.16-39);¹ the Board's Supplemental Decision and Order issued on August 28, 2007, and is reported at 350 NLRB No. 81. (A.40-43.)

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§151, 160(a))("the Act"). The Board's Orders are final under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)). This Court has jurisdiction over this proceeding under Section 10(e) and (f).

The Union's and EPI's petitions for review, and the Board's cross-application for enforcement, were timely filed; the Act places no time limitations on such actions. The Court has referred to the merits panel the Board's motion to dismiss the Union's petition for lack of standing.

¹ "A." references are to the Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that EPI violated Section 8(a)(1) of the Act by promulgating a discriminatory no-talking rule and making coercive remarks.
2. Whether substantial evidence supports the Board's finding that EPI violated Section 8(a)(3) and (1) of the Act by retaliating against employees and job applicants because of their union activity.
3. Whether the Board acted within its broad remedial discretion in framing its remedy.

APPLICABLE STATUTES

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

Based upon the Union's charges, the Board's General Counsel issued complaints alleging that EPI violated the Act in numerous ways.

(A.26;61,62,63,65,66,116-23,125,126-33,134-42.) After a hearing, an administrative law judge found that EPI violated the Act largely as alleged.

(A.26-39.)

After EPI filed exceptions, the Board issued its decision, affirming many of the judge's findings, but remanding the case to the judge to make additional findings regarding EPI's alleged discrimination against 10 union

job applicants who applied for jobs at the Union's request with the intent to organize EPI ("salts"). (A.16.) Subsequently, the judge issued another decision, to which the parties excepted. (A.40,44-53.) The Board then issued its supplemental decision, finding that EPI unlawfully refused to hire two union salts and refused to consider eight salts for hire. (A.40-42,44,47.) The Union and EPI filed motions for reconsideration that the Board denied. (A.54-58.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; in April 1997, EPI States that the Union Will Never Infiltrate It; on June 30, EPI Tells Union Applicants that It Does Not Need Help, but Then Hires 13 New Employees Between June 30 and July 27

EPI is a nonunion drywall and sheetrock subcontractor. (A.26;127-28(¶2),134(¶2),2116-17,2685-89,2779,3219-20.) In early to mid-April 1997,² the general contractor at a James River jobsite told EPI Foreman Steve Ceruzzi to watch his back because the Union, which was then picketing the site, was out to get the contractors. (A.17n.10,28,29;2275-81, 2869-70,2915.) Ceruzzi replied, in the presence of employee Charles Allison, "We don't have to worry about that; Fred [Stewart, EPI's president]

² All dates are in 1997.

is a lot smarter than that, and the Union will never infiltrate EPI.”

(A.17n.10,28-29;128(¶4(a)),135(¶4),2281,2682.)

In late April at an Overland Park jobsite, Ceruzzi told employees that EPI knew there was a union man in the company, but that “there was no way in hell the Union was going to infiltrate this company.” (A.17n.10,28,29; 2054-55,2064,2099,2300-01.)

On June 22 or 23, Union Organizer James Carsel met with Jerry Hill, a supervisor for Dalton Killinger Construction (“Dalton”), the general contractor at a Carthage, Missouri jobsite. Carsel asked who was performing the sheet metal stud work. (A.31;2115,2515-18.) Hill stated that EPI was performing that work, but was behind and needed help. Hill then introduced Carsel to EPI Foreman Tom Cron. (A.31;1681-82,2518.)

Carsel asked Cron if EPI needed help. When Cron said he did, Carsel offered to send him good workers, whereupon Cron stated that anyone interested in work should apply with President Stewart at EPI’s office. (A.31;2518-19.)

About June 25, Dalton became concerned with EPI’s progress at the jobsite. (A.31,45;2115-22.) Dalton Supervisor Hill told EPI Foreman Cron

that he had good men that EPI could use to meet its schedule. (A.31;2122-23.) Between June 26 and July 30, EPI utilized the services of four Dalton employees to fulfill its obligations at the jobsite, which cost EPI \$22.75 per hour per Dalton employee. (A.31,32,45;2123-27,2567.)

On June 30, Carsel and nine other union carpenters traveled to EPI's office wearing union paraphernalia. (A.35&n.11,45;2382,2384,2436-37,2519-23,2525,2642,2644-47.) Carsel introduced himself as a union organizer to EPI's president, said that he had a lot of qualified carpenters, and asked for applications. Carsel added that if EPI hired the applicants, they would try to organize EPI. (A.31;2383,2439,2524.)

President Stewart said that he did not need any help. (A.31;2524-25,2729.) Carsel replied that Foreman Cron had said that EPI was behind at the Carthage jobsite. (A.31;2525.) The salts then completed job applications. Stewart said it would be about two weeks before he would be able to look at their applications. (A.31;2385,2525,2729.) Stewart did not ask the salts about their qualifications. (A.32;2527-28,2529,2628,2729.)

Between June 30 and July 27, EPI hired 13 employees to perform carpentry work, and paid them at or near the journeyman carpentry rate of

\$17.51 per hour. One of the 13 employees EPI hired, Steve Rucker, had no drywall/sheetrock experience. (A.32-33,45,47,49;250-309,316-17,350,357, 2723-24,2727,2739,2753,2759-60,2763,2764,2765,2780-81.)

B. On July 3, EPI Instructs an Applicant To Backdate His Job Application Because Union Representatives Had Visited EPI; EPI Interrogates Employees, Promulgates a No-Talking-About-the-Union Rule, and Lays Off Union Supporters

On July 3, Jonathan Hackenberg applied for a job with EPI. EPI's receptionist, Sandy Garlette, told Hackenberg to backdate his application because union representatives had been in the office earlier. Shortly thereafter, EPI hired Hackenberg. (A.18,33,49n.2;350,1999-2003,2005-06,2036.)

On July 18, employee Jerry Brown told Foreman Randy Rucker that he was a union member and asked if Rucker wanted to join the Union. (A.18,20;2203-04.) On July 23, Allison told Foreman Ceruzzi at a Springfield jobsite that he was a union carpenter and was there to educate and organize the workers. (A.18,29;2310,2312,2315.) Ceruzzi asked whether anyone else on the jobsite was union. (A.18,29;2312-13,2885.) When Allison indicated there were other union members on the jobsite, Ceruzzi asked who they were. (A.18,29;2313.) Allison replied that Tom Piazza and Dan Joiner were also union members, which Ceruzzi reported to President Stewart. (A.18,29-30;2312-13,2885,2910-11.) Ceruzzi told

Allison that he did not care if he talked to other employees on break or during lunch or dinner, but added that while they were working, he would rather they did not talk with other employees “about it.” (A.29-30; 2313,2314.) Prior to this, employees were allowed to talk about anything they wanted as long as they kept working. (A.30;2062-63,2224,2313-14.)

On July 25, Brown asked Foreman Rucker at the Carthage jobsite if he had contacted the Union. Rucker replied that he could not talk about the Union on the job or President Stewart would lay him off. (A.18,31;2207-08.)

On July 27, the Union notified EPI that it had begun an organizing drive at EPI, and that several of EPI’s employees were working as salts to organize EPI’s employees. (A.18;240,2538-39,3167-68.) On July 28, EPI laid off Allison and Piazza in the middle of the workday. (A.18,19,34; 2077-78,2316-17.) On July 28, EPI also laid off Tim Phanelson from another jobsite in the middle of the workday, and on July 29 laid off Phanelson’s coworker, Jerry Brown, who had been absent on the 28th. (A.19&n.19,21,35;2146,2155,2156,2208-09,2243,2247-49,3018.)

On July 30 or 31, EPI distributed a letter to employees explaining why EPI opposed the Union and warning that the Union might try to engage in sabotage. At the Carthage jobsite, President Stewart said he did not care whether employees were union or nonunion, and everyone could do what they wanted to do. He also said that he was not going to have the Company join the Union, and it was probably going to cost him some money, but he was not going to have the Company join the Union and that is where he stood. President Stewart added that he had never been union and would not be union, and if the wheel's not broken, he was not going to fix it. (A.18, 20,29;362-64,1748-49,1900,1964,2491-94,3173-74.)

C. On August 4, EPI Questions Don Stewart and Glen Easterly About Their Union Activity and Suspends Them on August 7; on August 8, EPI Announces a Drug and Alcohol Testing Policy; in September, Company Counsel Questions Stewart About the Union

On August 4, Foreman Mike Vernon told employees Glen Easterly and Don Stewart ("Stewart"), who is not related to President Stewart, that as a supervisor, he could not say anything for or against the Union, but the Union had never done anything good for him. (A.18;1718,1771.) Vernon then grabbed Easterly's shirt pocket, asked Easterly if there was a tape recorder in it, and then twirled him around and patted him down, prompting Easterly to say "that's enough." (A.18;1771-72,1869,1911,1986,1988.)

Vernon asked why they were trying to steal jobs. (A.18,30;1910.) Easterly said they were union salts and were not there to steal jobs, but to educate the employees about the Union. (A.18,30;1910.)

On August 7, EPI issued Stewart and Easterly notices of suspension and possible termination, citing horseplay, lack of productivity, and unsatisfactory work quality on August 4. (A.36;149,188.)

On August 8, EPI announced a drug and alcohol testing policy, whereby EPI may “select any employee at any time” for random drug or alcohol testing. (A.38;367,369.)

On September 24, EPI Counsel Don Jones and President Stewart met with employees Easterly and Stewart and Union Representatives Carsel and Danny Hyde about the employees’ suspensions. (A.23,36-37;159,1788-91,2640-41,2645.) Jones told Stewart and Easterly that they would not be considered for employment if they did not complete new job applications. (A.26,37;159-61,1789.) Jones, who was loud and rude during the meeting, asked the employees questions about their August 4 conduct. When Hyde counseled against engaging in supposition, Jones threatened to throw the union representatives out of the room “the next time” they interrupted. (A.172,173,187,1795.)

In addition to asking employee Stewart about his August 4 conduct, EPI Counsel Jones asked: “And you had not been involved in any Union salting activity had you?” (A.37;180.) When Stewart said no, Jones asked: “You weren’t involved in any union activity at all, were you?” (A.37;180.) At this point, Stewart conferred with Hyde, and Jones asked: “OK, so you’re not changing what you told me, are you?” (A.37;180.)

Stewart responded that he had signed a union card, whereupon Jones asked when he had done that. Jones then stated, “you don’t have to answer the question if you don’t want to.” (A.37;180-81.) Stewart said that the only union activity that he was involved in was signing a card. (A.37;181.) Jones continued to question Stewart about the circumstances of his card signing. On two occasions, Hyde interjected: “Is that pertinent?” and “Let’s stop that line of questioning, please.” (A.37;181,2651.)

On various dates in October, EPI sent letters to certain alleged discriminatees offering them “employment.” The letters stated: “You and the others who are being called in ... will be paid for attending a safety training program for about two hours Then, we will select from those who attend that training, a few who will be sent out to perform some

sheetrock hanging work Those who are not selected for that work will be left on a hiring recall list” (A.34-35;155,194,206,210,214.) Piazza replied that, because EPI’s letter did not guarantee him employment even if he attended the training session, he could not leave the new job he had obtained after his unlawful layoff. (A.207,2082-84.)

In early October, employees Stewart and Easterly attended the 2-hour safety training session, but were not offered work at the conclusion of the program. (A.37;1804-06,1931-32,3092-94.) On October 8, EPI informed Stewart and Easterly that they were no longer suspended, and that they should call EPI on October 13 about returning to work on October 14. (A.37;156-57,197-98,199.) Stewart called EPI on October 13 as directed, but EPI did not give him any work on the 14th. Stewart then advised Easterly that EPI would not put them back to work on the 14th. (A.37; 1806-07,1933.)

II. THE BOARD’S CONCLUSIONS AND ORDERS

The Board found that EPI violated Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) by informing its employees that it would be futile to select the Union as their bargaining representative, creating the impression that the employees’ union activities were under surveillance, promulgating a rule that discriminatorily prohibits employees from talking about the Union

while working, and interrogating and threatening employees. (A.38.) The Board also found that EPI violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by promulgating a drug and alcohol testing policy, requiring an employee to predate his employment application to avoid hiring union applicants, and laying off Allison, Piazza, Brown, and Phanelson, and suspending Easterly and Stewart because of their union activity. (A.16&n.5,19,22n.24,23,38.) In its Supplemental Decision and Order, the Board found that EPI violated Section 8(a)(3) and (1) of the Act by refusing to hire two union salts, and refusing to consider for hire eight other salts. (A.40,41,47.)

The Board's Orders require EPI 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 Section 7 rights. (A.24,48.) Affirmatively, the Board's Orders contain the usual provisions requiring rescission of the unlawful rules and policies, reinstatement and make-whole relief for the unlawfully laid off or suspended employees, and notice-posting remedies. (A.24,25-26.)

As affirmative relief for EPI's discriminatory conduct toward union applicants, the Board's Supplemental Order requires EPI, among other things, to offer reinstatement to two union salts, whose identity is to be

determined in future compliance proceedings, to the positions to which they applied; to make them whole for any losses suffered as a result of the discrimination against them; and to consider on a nondiscriminatory basis the remaining salts for future job openings. (A.48.)

The Board's Supplemental Order further provides that the reinstatement and make-whole remedy for EPI's discrimination against the applicants be implemented in accordance with the Board's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118, 2007 WL 1610437 (2007) ("*Oil Capitol*"). (A.40n.5.)

SUMMARY OF ARGUMENT

The Board found that EPI made coercive remarks and unlawfully retaliated against employees and job applicants because of their union activity. The Board's findings are supported by substantial evidence and are consistent with well-settled principles. EPI's arguments are contrary to the facts or the law.

The Union challenges the portion of the Board's Supplemental Order requiring that the remedy for EPI's refusal to hire be implemented in accordance with the Board's recent decision in *Oil Capitol*, which is the subject of a pending petition for review--*Sheet Metal Workers Local 270 v. NLRB* (D.C.Cir. No. 07-1479) ("*Local 270*")--that this Court has ordered to

be heard on the same day as this case. The Board respectfully submits that the Court's decision in that case will largely determine the outcome of the Union's challenge in this case. The Union has not shown that it would be manifestly unjust to retroactively apply *Oil Capitol* here.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EPI VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A DISCRIMINATORY NO-TALKING RULE AND MAKING COERCIVE REMARKS

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. §157) grants employees the "right to ... form, join, or assist labor organizations" Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) implements that right by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of those rights.

The test for whether the employer's conduct violates the Act is whether it has a reasonable tendency to coerce; actual coercion is not necessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C.Cir. 1991). In evaluating the coercive tendency of an employer's statement, the Board and a reviewing court must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter

that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969)(“*Gissel*”). Furthermore, the scope of the inquiry must encompass the employer’s entire course of conduct. Remarks “that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances.” *NLRB v. Kaiser Agricultural Chemicals*, 473 F.2d 374, 381 (5th Cir. 1973).

An employer violates Section 8(a)(1) by promulgating a discriminatory rule that prohibits employees from talking about a union during work time. *Frazier Industrial Co., Inc. v. NLRB*, 213 F.3d 750, 755, 759 (D.C.Cir. 2000)(“*Frazier*”); *Atlas Metal Parts Co., Inc. v. NLRB*, 660 F.2d 304, 307, 311 (7th Cir. 1981). An employer also violates Section 8(a)(1) by creating the impression that its employees’ union activities are under surveillance;³ threatening its employees with adverse consequences if they engage in union activity;⁴ informing its employees that it will be futile

³ *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 613 (3d Cir. 1984).

⁴ *Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C.Cir. 1987) (“*Southwire*”).

to support a union;⁵ and coercively interrogating employees about union activity.⁶

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.” *Gissel*, 395 U.S. at 620. Accordingly, “the question of whether an employer has used coercive language is a question essentially for the expertise of the Board.” *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985).

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

B. EPI Promulgated a Discriminatory No-Talking Rule

The Board reasonably found that EPI promulgated a discriminatory no-talking-about-the-Union rule. Prior to the union drive, EPI had permitted

⁵ *Hedstrom Co. v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980) (“*Hedstrom*”)(en banc).

⁶ *Southwire*, 820 F.2d at 456.

employees to talk about anything they wanted while they worked, as long as they continued working. (A.30;2062-63,2224,2313-14.) However, as soon as Allison told Foreman Ceruzzi that he was a union carpenter and was there to organize the workers, Ceruzzi directed him not to talk to other employees about the Union while they were working. (A.29-30;2312-13). EPI offers no justification for its sudden change in policy, and the prohibition against talking while working plainly applied only to union talk, and was therefore discriminatory. *See Frazier*, 213 F.3d at 755, 759, *enforcing*, 328 NLRB 717, 717, 725-26 (1999); *Capitol EMI Music, Inc.*, 311 NLRB 997, 1006 (1993)(no-talking rule unlawful given timing of its promulgation during union campaign, and employer's failure to show that past practice of permitting talking had become problematic), *enforced mem.*, 23 F.3d 399 (4th Cir. 1994).

EPI does not advance its case by pointing out (Br.38) that the Union had advised its members to solicit union cards only during breaks or other nonwork time. The Union's admonition hardly entitled EPI to discriminatorily bar union talk in response to the union campaign. (A.2615-16.)

C. EPI Made a Variety of Unlawful Remarks

Substantial evidence supports the Board's finding that EPI unlawfully created the impression that its employees' union activity was under surveillance. Months before any EPI employee openly engaged in union activity, Foreman Ceruzzi stated that EPI knew that there was a guy from the Union in the company, but there was "no way in hell" the Union was going to infiltrate it. (A.17&n.10,28-29;2064.) *See NLRB v. Marion Rohr Corp., Inc.*, 714 F.2d 228, 230 (2d Cir. 1983)(employer stated that he knew of five employees who were involved with union), *enforcing*, 261 NLRB 971 (1982).

EPI also unlawfully threatened Brown with layoff when, just days after Ceruzzi unlawfully promulgated a discriminatory no-talking rule, Foreman Rucker told Brown that he (Rucker) could not talk about the Union on the job, or President Stewart would lay him off. In the circumstances, Brown could reasonably infer that he too would be laid off if he talked union on the job. (A.16n.6,18,31;2207,2208.) *See Winett, Inc.*, 135 NLRB 1305, 1308, 1311 (1962)(supervisor's statement--that he would be fired if union won election--violated the Act because employees could reasonably conclude that they would meet with similar fate if they voted for union);

Winter-Weiss, 61 NLRB 361, 368-69 (1945)(same), *enforced*, 154 F.2d 719 (10th Cir. 1946).⁷

The Board also reasonably found that EPI unlawfully informed employees that it would be futile for them to pursue unionization. Thus, as the Board noted (A.17&n.10,18-19n.17,28-29), Foreman Ceruzzi indicated in early to mid-April that “the [U]nion will never infiltrate EPI” because of President Stewart’s smarts (A.2281); Ceruzzi later that same month stated that “there was no way in hell the Union was going to infiltrate this company” (A.2064,2099,2300-01); and President Stewart told employees in July--just days after unlawfully laying off several union supporters--that it was probably going to cost him some money, but he was not going to go Union, and that if the wheel’s not broken, he was not going to fix it. (A.1749,1900,2494,3173-74.) *See NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265-66 (7th Cir. 1987)(“we’re not union, we never have

⁷ EPI argues (Br.42,49) that Rucker’s statement could not be coercive if he is a supervisor because supervisors fall outside the Act’s protection. But Rucker failed to clarify to Brown that he feared being discharged only because he was a supervisor.

been, and never will be”); *Hoerber v. KNZ Construction, Inc.*, 879 F.Supp. 451, 456-57 (E.D.Pa. 1995)(company “would not ‘go union’”).⁸

The totality of the circumstances also demonstrates that Foremen Ceruzzi and Vernon and EPI Counsel Jones unlawfully interrogated employees. The test for evaluating the legality of an interrogation is whether, assessing the totality of the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with the employees’ exercise of statutorily protected rights. *See Southwire*, 820 F.2d at 456-57.

As the Board found, after Allison told Ceruzzi that he was a union carpenter and was there to organize EPI’s employees, Ceruzzi asked whether anyone else on the jobsite was union. When Allison replied there were other union members on the jobsite but did not name them, Ceruzzi bluntly asked who they were, and unlawfully promulgated a discriminatory no-talking rule

⁸ EPI’s reliance (Br.36) on *Park ‘N Fly*, 349 NLRB No.16, slip op.3 & n.10 (Jan. 31, 2007), does not help it. Wording and context are crucial. Given that Ceruzzi indicated in early April that *the Union* would “never infiltrate” EPI because of President Stewart’s smarts, and subsequently unlawfully created the impression of surveillance in the same conversation as he stated that there was “no way in hell” the Union would infiltrate EPI, Ceruzzi was not simply conveying a lawful message that EPI preferred to be nonunion, but rather was implying that “unionization efforts [would be] futile” on account of EPI’s actions. *Id.* Similarly, given EPI’s unlawful layoffs of union supporters, President Stewart’s statement--that it was probably going to cost him some money, but he was not going to go Union--likewise threatened futility by suggesting that he would not recognize the Union even if it cost him money. (A.19n.17.)

during the same conversation. (A.18,20,29,30,31;2312-13,2885.) *See NLRB v. Garon*, 738 F.2d 140, 143 (6th Cir. 1984)(“*Garon*”) (interrogation accompanied by other unfair labor practices). And, Ceruzzi provided no explanation for why he wanted to know the identity of the other union members, information particularly useful for targeting union supporters. *See Midwest Regional Joint Board v. NLRB*, 564 F.2d 434, 443 (D.C.Cir. 1977)(“*Midwest*”)(employer did not explain interrogation’s purpose); *Satra Belarus, Inc. v. NLRB*, 568 F.2d 545, 548 (7th Cir. 1978)(interrogation coercive because of nature of information sought).

Similarly, Vernon unlawfully questioned Stewart and Easterly on August 4 about why they were trying to steal employees’ jobs. The questioning came on the heels of EPI’s numerous unfair labor practices, including its unlawful layoffs of union supporters; Vernon failed to provide assurances against reprisals or an explanation for his questioning; and Vernon assaulted Easterly during the interrogation. (A.18-19,30-31;1771-72,1869,1910-11,1986,1988.). *See Midwest*, 564 F.2d at 443 (employer failed to provide explanation or assurances); *Southwire*, 820 F.2d at 457 (interrogation coercive in context of employer’s reprisals against union

supporters); *Boydston Electric, Inc.*, 331 NLRB 1450, 1450 (2000)(asking employee why he was doing this coercive in context).⁹

EPI's counsel also unlawfully interrogated Stewart by repeatedly asking him about his union activity during the formal meeting held in EPI's office to discuss whether EPI would lift Stewart's suspension and permit him to return to work. (A.23,37;159-61,172-73,180-81,187,1789,1795.) President Stewart's presence during the questioning, counsel's angry tone, and the fact that Stewart's job hung in the balance served only to heighten the coercive nature of the questioning. *See Timsko, Inc. v. NLRB*, 819 F.2d 1173, 1179 (D.C.Cir. 1982)(*"Timsko"*)(president's involvement in questioning "by itself has a coercive air"); *Southwire*, 820 F.2d at 457 (angry tone). Moreover, before questioning Stewart, Jones did not provide assurances against reprisals, and Stewart initially answered the questions untruthfully, evidencing his discomfort. *See Garon*, 738 F.2d at 143 (employees' untruthful replies and employer's failure to provide assurances against reprisals evidence interrogation's coercive nature). And, Jones' union questions were not pertinent to the matter at issue, because, according

⁹ EPI's claim (Br.40-41)--that the questioning occurred in a friendly atmosphere--ignores Easterly's testimony (A.1911,1986) that he was upset about Vernon's assaulting him and told Vernon "that's enough."

to EPI's suspension letter, union activity was not the cause of Stewart's suspension. (A.149.)

D. EPI's Credibility and 8(c) Arguments Lack Merit

EPI argues (Br.18,35-36,41) that the Board erred in finding these violations because it never made the remarks in question. The short answer is that the Board credited the General Counsel's witnesses, who testified that EPI did indeed utter them. EPI's argument is thus nothing but a frontal assault on the Board's credibility determinations.

As this Court has recognized, however, the Board's credibility determinations may not be disturbed "unless they are 'hopelessly incredible' or 'self-contradictory.'" *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C.Cir. 1988)("Teamsters 171")(citation omitted). *Accord Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C.Cir. 1998)("Cadbury"). In its brief, EPI fails to show that the Board's credibility determinations are hopelessly incredible or self-contradictory, and they are therefore entitled to affirmance.

Indeed, EPI ignores that the testimony of the General Counsel's witnesses stands un rebutted in many cases. Thus, although EPI complains (Br.36) that "Allison was untruthful when he falsified his application," Allison freely acknowledged (A.2271-72,2345,2347-48) doing so at the

hearing, and Foreman Ceruzzi *admitted* (A.2884-85) that he asked Allison whether there were other union employees on the job. Moreover, Rucker and President Stewart did not specifically deny the remarks attributed to them. (A.31;3008-12,3173-75.)¹⁰

EPI fares no better in claiming (Br.2,34-45) that the statements fell within the protection of Section 8(c) (29 U.S.C. §158(c)) because they merely constituted expressions of personal opinion. EPI does not cite any evidence showing that Rucker or Stewart prefaced their remarks by stating that they were merely voicing their personal opinions. In any event, an employer “cannot obtain the protection of [S]ection 8(c) simply by labeling his statements ‘opinions,’” where, as here, the remarks have a reasonable tendency to coerce employees. *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984). *See Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924-25 (D.C.Cir. 2005)(rejecting employer’s 8(c) defense to threat-of-futility allegation because a reasonable factfinder could conclude under the circumstances that employer’s statements implied that it might

¹⁰ For example, although EPI called Rucker as its witness, EPI’s counsel did not even ask Rucker if he had said that he could not talk about the Union on the job or President Stewart would lay him off. (A.31;3008-12.)

take action on its own initiative to render unionization futile for reasons unrelated to economic necessity).¹¹

E. EPI's Attempts To Avoid Responsibility for the Actions of Its Foremen and Receptionist Lack Merit

Alternatively, EPI argues (Br.29-34) that it cannot be held responsible for the actions of its foremen because they were not its supervisors or agents. The Board reasonably found, however, that they were supervisors within the meaning of Section 2(11) of the Act (29 U.S.C. §151), noting that EPI's working foremen authorize time-off and effectively recommend whether employees should be retained and rewarded with pay increases, as President Stewart is absent from EPI's numerous jobsites most of the time.¹² (A.17n.8,28;2278,2293-94,2296-97,2331,2716-17,2721-22, 2898,3135.) *See Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000)(management's heavy reliance on recommendations of alleged supervisors warrants a finding of supervisory status); *NLRB v.*

¹¹ Although, as EPI mentions (Br.40), Vernon did say on a personal note that the Union had not helped him, the Board did not find that statement unlawful.

¹² Thus, President Stewart admitted (A.2716-17,2721-22) that because the foremen are more familiar with the performance of EPI's employees than he is, he gives weight to the foremen's views in deciding whether to retain new employees, grant employees pay raises, and recall employees from layoffs.

American Medical Services, Inc., 705 F.2d 1472, 1474 (7th Cir.

1983)(completion of evaluations that can lead to termination of probationary

employees evidences supervisory status); *Extencicare Health Facilities,*

Inc., 330 NLRB 1377, 1377-78 (2000)(individuals who effectively

recommend pay raises are supervisors). Moreover, the individuals in

question put their names on EPI personnel forms in the spaces provided for

“supervisors,” just like Foreman Cron, whom EPI admits is a supervisor.

(A.242,243,246,247,248,1681,1682,2709-11,2713,2714-15.)¹³

In any event, an employer may be held liable for unfair labor practices committed by persons acting as its agents even if they are not supervisors.

Helena Laboratories Corp v. NLRB, 557 F.2d 1183, 1187 (5th Cir. 1977).

And, the Board reasonably found (A.17n.8,28,33) that Foremen Ceruzzi,

Rucker, and Vernon and receptionist Garlette were also EPI's agents,

because EPI placed them in positions where employees could reasonably

believe they spoke for management. *See Metco Products, Inc. v. NLRB*, 884

F.2d 156, 159 (4th Cir. 1989)(individual is imbued with apparent authority

to bind the principal “if a third person could reasonably interpret acts or

¹³ EPI’s claim (Br.17-18,29-31)--that the foremen are not supervisors because they do not hire or fire or use independent judgment in directing employees--is irrelevant because the Board did not find them to be supervisors on those grounds. (A.17n.8.)

omissions of the principal as indicating that the agent has authority to act on behalf of the principal.”).

Thus, EPI’s president told employees to report to the working foremen, informed its employees that the working foremen ran EPI’s jobs, and instructed employees to bring their problems to the foremen. EPI’s president also admittedly relayed work-related information to employees through the foremen, used its foremen to inform employees that they were laid off, and had its receptionist pass out job applications to applicants. (A.28;2002-03,2026,2077,2105-06,2156,2224,2275-76,2316,2717-18, 2789-91,3142-43,3146.) *See Poly-America, Inc. v. NLRB*, 260 F.3d 465, 481 (5th Cir. 2001)(agency status found where employer used leadmen to relay information to employees and instructed employees to inform leadmen if they had concerns); *Zimmerman Plumbing & Heating Co., Inc.*, 325 NLRB 106, 106 (1997)(same), *enforced in pertinent part*, 188 F.3d 508 (6th Cir. 1999).

F. EPI’s Due Process and Section 10(b) Arguments Lack Merit

EPI complains (Br.39-40) that the Board violated its due process rights by finding that Ceruzzi unlawfully interrogated Allison on July 23, because the complaint did not allege such conduct to be violative. However, “the Board may find and remedy a violation even in the absence of a

specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.” *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C.Cir. 2003)(“*Casino*”)(citation omitted).

The Board did not violate EPI’s due process rights. First, Ceruzzi’s July interrogation was closely connected to the complaint’s subject matter. As in *Casino*, the complaint alleged that other supervisors and agents interrogated employees, and so EPI “knew that it was being charged with a §8(a)(1) violation for the same kind” of misconduct. *Id.* at 1200. (A.129-30(¶¶5(d),8).) As in *Casino*, the complaint alleged that the individual who committed the unalleged violation was an EPI supervisor and agent, and so “put [EPI] on notice that it could be held accountable for [his] actions.” *Id.* (A.128(¶4(a).) And, as in *Casino*, the unalleged interrogation of Allison, which led Allison to reveal that Piazza was also a union member, was “obviously relevant” to the complaint allegation that EPI “discriminated against” Allison and Piazza, because the interrogation “demonstrate[s] animus” and shows that EPI knew that Allison and Piazza were union members before it laid them off. *Id.* (A.131(¶¶6(d),9).)

The issue was also fully litigated. The two individuals involved in the interrogation--Allison and Ceruzzi--testified. EPI had the opportunity to

cross-examine Allison. (A.2312-13,2341-70.) And when EPI called Ceruzzi as its own witness some 4 months after Allison testified, Ceruzzi *admitted* asking Allison whether there were other union employees on the job. (A.2182,2807,2866,2885.) *See NLRB v. Tricor Products, Inc.*, 636 F.2d 266, 271 (10th Cir. 1980)(issue fully litigated where only two witnesses testified, and employer’s witness did not challenge accuracy of employee’s testimony).

EPI further contends (Br.10,26-29) that, because the Union’s unfair labor practice charges indicated that EPI’s conduct had occurred “[s]ince July,” the Board lacked authority under Section 10(b) of the Act (29 U.S.C. §160(b)) to find that EPI violated the Act in April. (A.63.) However, a charge filed with the Board “is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry” by the Board, which is charged with framing the complaint. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959).

Thus, the Board may prosecute an alleged violation that was not contained in the charge if the violations in question occurred within six months of the charge and are closely related to the allegations of the timely charge (*Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 672 (D.C.Cir. 2001); *FPC*

Holdings, Inc. v. NLRB, 64 F.3d 935, 940-41 (4th Cir. 1995)), “which question turns on ... whether the two allegations (1) involve the same legal theory; (2) arise from the same factual circumstances...; and (3) would elicit similar defenses.” *Brockton Hospital v. NLRB*, 294 F.3d 100, 107 (D.C. Cir. 2002).

The Board reasonably concluded (A.17-18) that Section 10(b) did not preclude it from finding the April violations. First, EPI’s April misconduct plainly *did* occur within six months of a timely filed charge, because it occurred within six months of the Union’s September 29, 1997 second amended charge. (A.18;63.)

Moreover, EPI’s April misconduct *was* closely related to the allegations in that charge. The Board found that EPI violated the Act in April by indicating that it would be futile for employees to select the Union and by creating the impression of surveillance. The Union’s September 29 charge alleged that EPI had told employees “that it will be futile for them to select” the Union and that EPI “creat[ed] the impression of surveillance.” (A.63.) Thus, EPI engaged in precisely the same conduct in April-- indicating to employees it would be futile to select the Union and creating the impression of surveillance--that the Union alleged was unlawful in its second amended charge. Moreover, the Board found that EPI’s April

conduct violated the same section of the Act that was alleged to be violated by the Union's charge. Thus, the violations in question "involve the same legal theories and arise from the same factual circumstances" as those set forth in the charge. (A.17.)

And, because the April conduct was precisely the same type of conduct alleged to be unlawful in the Union's charge, EPI could be expected to raise similar defenses to the violative conduct and to the charge allegations--namely that its supervisors and agents did not utter remarks indicating that unionization would be futile and that union activity was under surveillance. As the Board also noted, the second amended complaint put EPI on notice that the alleged conduct at issue occurred in April. (A.18; 129(¶¶5(a)(i)(ii),5(b).) In the circumstances, the mere fact that the charge assigned the conduct to a post-June 30 period, whereas Ceruzzi did those things in April, did not preclude the Board from finding unfair labor practices. *See Douds v. ILA*, 241 F.2d 278, 284 (2d Cir. 1957) ("specific events in the complaint may precede ... those stated in the 'charge.'")

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT EPI VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY RETALIATING AGAINST EMPLOYEES AND JOB APPLICANTS BECAUSE OF THEIR UNION ACTIVITY

A. Applicable Principles and Standard of Review

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 ... to ... discourage membership in any labor organization[.]” Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by taking adverse action against employees because of their union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-98, 401 (1983)(“*Transportation Management*”). *See Power, Inc. v. NLRB*, 40 F.3d 409, 417 (D.C. Cir. 1994)(“*Power, Inc.*”)(layoff is unlawful “if either the decision to lay off employees or the selection of those to be laid off is based on anti-union animus”); *Southwire*, 820 F.2d at 459 (suspension).

The critical inquiry is whether the employer’s conduct was motivated by antiunion animus. *Teamsters 171*, 863 F.2d at 955. Once it is shown that opposition to union activity was a motivating factor in the employer’s decision to take the adverse action, the employer will be found to have violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken that action even absent the employee’s union activity or status. *See Transportation Management*, 462 U.S. at 400-

04; *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 104 (D.C.Cir. 2003)(“Ark”).

As this Court has recognized, “circumstantial evidence alone may establish unlawful motivation.” *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C.Cir. 1988)(citation omitted). Factors supporting a finding of unlawful motivation include the employee’s union activity; employer knowledge of same; coincidence in timing between the adverse action and the employee’s union activity; and the employer’s hostility to union activity. *See Ark*, 334 F.3d at 104-05; *Teamsters 171*, 863 F.2d at 955.

Judicial review with respect to the Board’s determination of motive is especially “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)(“Laro”).

B. EPI Unlawfully Suspended and Laid Off Employees

The Board reasonably found that EPI unlawfully suspended Stewart and Easterly on August 7 and unlawfully laid off Allison, Piazza, and Phanelson on July 28 and Brown on July 29. EPI certainly knew that Stewart, Easterly, Allison, Piazza, and Brown supported the Union prior to suspending or laying them off. Thus, Foreman Cron admitted (A.19n.18;

2981-84) knowing that Stewart and Easterly had engaged in union activity in late July. Moreover, Easterly told Foreman Vernon on August 4, in response to Vernon's interrogation, that he and Stewart were union salts and were there to educate employees about the Union. (A.18,19n.18;1910.)

EPI likewise knew by July 23 that Allison and Piazza were union supporters because, as Foreman Ceruzzi admitted, Allison had told him that, and he promptly related that information to President Stewart. (A.18,20,29-30,34;2312-13,2885,2910-11.) Similarly, Brown told Foreman Rucker on July 18 that he was a union member, which was before EPI claims (Br.47) it decided to lay Brown off. (A.18,20; 2203-04.)

The suspicious timing of the suspensions and layoffs buttresses the Board's finding of unlawful motivation. (A.20.) EPI suspended and laid off the five employees just days after learning that they were engaged in union activity. This timing makes EPI's unlawful motivation for the suspensions and layoffs "stunningly obvious." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 959 (2d Cir. 1988)(citation omitted). Indeed, this Court has noted that "the proximity between union activity and the employer's action by itself is substantial circumstantial evidence" of unlawful motivation. *Matson Terminals, Inc. v. NLRB*, 114 F.3d 300, 303 (1997)("Matson").

EPI's manifest hostility to the idea of unionization--as evidenced by its numerous unfair labor practices--strengthens the Board's finding of unlawful motivation. *See NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265 & n.2, 1266-68 (7th Cir. 1987)(unlawful motive evidenced by employer's threats that it would not go union); *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 252-53 (4th Cir. 1997)(employer's threats and impression of surveillance support 8(a)(3) finding). Indeed, the conclusion is inescapable that when EPI suspended and laid off these union activists, it was taking steps to counteract the Union's infiltration of its workforce so that, as President Stewart pledged, EPI would not go union.

The Board also reasonably found (A.21) that EPI unlawfully laid off Phanelson on July 28, notwithstanding the absence of evidence about whether he supported the Union. It is settled that an employer violates the Act by laying off an employee with no known or suspected union sentiments if the surrounding circumstances warrant the inference that the employer laid off that employee to conceal its unlawful motive for its simultaneous layoff of a known union supporter. *NLRB v. Jack August Enterprises, Inc.*, 583 F.2d 575, 578-79 (1st Cir. 1978); *NLRB v. Williams*, 195 F.2d 669, 672 (4th Cir. 1952).

EPI's layoff of Phanelson fits comfortably within that precedent. As will be shown below, EPI attempts to justify the layoff of open union supporter Brown on the sole basis that he had less seniority than other employees who were out of work. Accordingly, EPI could hardly hope to prevail if it did not also lay off new hire Phanelson, who was working alongside Brown at the same job site. (A.21;2155,2156,3018.) *See L.J. Williams Lumber Co.*, 93 NLRB 1672, 1674-75 (1951) (although there is no evidence that employer knew of employee's union activity, employer violated the Act by discharging him, because it did so in order to make its lack-of-work excuse for discharging that employee's teammate, a known union supporter, appear valid), *enforced*, 195 F.2d 669, 672 (4th Cir. 1952); *Wonder State Mfg. Co. v. NLRB*, 331 F.2d 737, 738 (6th Cir. 1964)(same).

C. EPI's Suspension and Layoff Defenses Lack Merit

EPI claims (Br.20,23,25,47-51) that there is no evidence of animus, and that the Board therefore never should have required it to show that it would have suspended or laid off these employees even absent their union activity. EPI's claim must be rejected because it is based on EPI's mistaken premise that it is not responsible for the unlawful actions of its foremen, receptionist, and President Stewart.

Alternatively, EPI posits (Br.12-13,47) legitimate reasons for the suspensions and layoffs of most of those employees. However, it is settled that “[t]he proffering of legitimate business reasons for the [challenged] action does not end the inquiry, for it must be determined whether these reasons are bona fide or pretextual.” *Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 252 (5th Cir. 1983). Thus, as shown, once the evidence supports a finding of unlawful motivation, the employer’s burden is to demonstrate that it “*would*” have taken the challenged action because of legitimate reasons, “not that it *could* have done so.” *Cadbury*, 160 F.3d at 31. This, EPI did not do.

1. EPI failed to show that it would have suspended Stewart and Easterly absent their union activity

EPI asserts (Br.12-13) that Easterly and Stewart were suspended for “horseplay” (throwing a frisbee and playing piano), lack of productivity and unsatisfactory work quality on August 4. (A.149,188,1771,1906,2847-48.)¹⁴

The Board reasonably found (A.37) that EPI failed to show that it would have suspended them for their alleged misconduct even absent their union activity. EPI failed to document the existence of any company policy

¹⁴ Contrary to EPI’s claim (Br.13), Stewart did not “understand” that he was suspended for horseplay; instead, he told EPI that he believed EPI had suspended him for his union activity. (A.158.)

of indefinitely suspending employees for such reasons. To the contrary, EPI employees and foremen commonly engaged in horseplay, such as throwing drywall nails at one another, without suffering any repercussions, and EPI, which did not have work quotas, did not indefinitely suspend employees who damaged equipment or worked unproductively. (A.33-34,37; 1729,1734-35,1780-81,1888,1904,1917-18,2200-01,2306-09,2836-37,2852-53,3173.)¹⁵ *See Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 100 (D.C.Cir. 2000)(employer's disparate treatment undermines employer's defense).

EPI's more lenient treatment of more serious misconduct further undermines EPI's defense. *See Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir.1998)(employer's toleration of significant misconduct undermines employer's defense). Thus, EPI's indefinite suspension of Stewart, whom EPI thought highly enough of to name a foreman on occasion, and Easterly, whose work EPI had praised, stands in stark contrast to EPI's mere one-day suspension of an employee who

¹⁵ For example, Foreman Vernon admitted that EPI did not discipline an employee who just one day earlier had damaged school equipment at the same site by driving a lift into it; instead, Vernon jokingly asked the employee if he needed a license to drive that way. (A.2836-38). Similarly, several weeks before unlawfully suspending Easterly and Stewart, EPI had transferred--rather than suspended--an employee whom a general contractor reported was working too slowly. (A.33-34;2306-09.)

admittedly smoked marijuana one work day. (A.37;1737,1937-38,2815,3000-01.)

2. EPI failed to show that it would have laid off Brown, Phanelson, Allison, and Piazza in late July absent the union drive

The Board reasonably rejected EPI's claim (Br.47,50,A.2976,2986, 2992,3011) that it laid off Brown and Phanelson because work was slowing down, and EPI wanted to transfer more senior employees to their jobsite. Put simply, EPI failed to show that it had any practice of laying off less senior employees when longer term employees were out of work. (A.21,35.) *See NLRB v. Talsol Corp.*, 155 F.3d 785, 792, 798 (6th Cir. 1998)(rejecting employer's claim that it had a firm discharge policy in light of its inability to document any such policy).

EPI's inconsistent staffing decisions further undermine EPI's defense. Although EPI claimed that it laid off Brown and Phanelson so that more senior employees could transfer to that site and thereby avoid being laid off, EPI does not dispute the Board's finding (A21,34;250-309,350,2293,2295-96,2700,2701) that it also laid off union activist Allison at the same time from another jobsite even though he had more seniority than other employees who continued working. *See Waterbury Hotel Mngmt., LLC v. NLRB*, 314 F.3d 645, 653 (D.C.Cir. 2003)(inconsistent employment

decisions undermine employer's defense). EPI's claim is also undermined by the fact that one of the longer term employees who transferred to their project worked there only one day. (A.21,35;2987-89,3014,3019.)

Before this Court, EPI fails to offer *any* explanation for laying off Allison and Piazza. The Board reasonably rejected the claim that EPI made below: namely, that it would have laid them off anyway because the woodwork contractor on their project was behind schedule. Thus, Foreman Ceruzzi had assured employees--just one week before their layoffs--that he had spoken to President Stewart and the employees should not worry about layoffs because they could weld and perform exterior sheetrock work until the contractor caught up. (A.21,34;2076-77,2317,2318,2365-66.) *See NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998)(“*McClain*”)(rejecting lack of work defense where employer had previously assured employees there would be no layoffs despite decline in work). The abrupt nature of the layoffs--which occurred in the middle of a work day--further undermines EPI's defense.

EPI argues (Br.20,47) that the Board cannot find these four layoffs to be unlawful, because the Board did not find its other layoffs to be unlawful. EPI's argument is specious. The Board had no occasion to pass on the legality of the other layoffs, because the General Counsel did not allege

them to be unlawful. In any event, that the layoffs of some employees may be lawful hardly precludes a finding that other layoffs are unlawful.

D. EPI Refused To Consider and Hire Union Salts

Because discrimination against union hiring “is a dam to self organization at the source of supply [that] inevitably operates against the whole idea of the legitimacy of organization” (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941)(“*Phelps Dodge*”), an employer violates the Act by refusing to hire, or consider for hire, union salts. *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 546 (D.C.Cir. 2006)(“*Progressive*”); *The 3E Company, Inc.*, 322 NLRB 1058, 1061-62 (1997)(“*3E*”), *enforced mem.*, 132 F.3d 1482 (D.C.Cir. 1997).

To establish that an employer unlawfully refused to hire union applicants, the General Counsel has the burden of showing that (1) the employer was hiring, or had concrete plans to hire, at the time the union applicants applied; (2) the union applicants were qualified for the available jobs; and (3) antiunion animus contributed to the decision not to hire the applicants. *Progressive*, 453 F.3d at 547; *NLRB v. FES, (A Division of Thermo Power)*, 301 F.3d 83, 87 (3d Cir. 2002)(“*FES*”). To prove that an employer unlawfully refused to consider union applicants, the General Counsel need only prove that the employer excluded union applicants from

the hiring process and that antiunion animus contributed to that decision. *See Progressive*, 453 F.3d at 547. Once that is established, the burden shifts to the employer to show it would not have considered or hired the applicants even absent their union status. *Ibid.*

The Board reasonably found that EPI unlawfully refused to hire two union salts and refused to consider the eight other salts who applied on June 30. EPI was hiring or had concrete plans to hire when the salts applied: Foreman Cron stated the week before they applied that EPI needed employees (A.31-33;2377,2379-80,2432-33,2518-19); EPI hired 13 employees to perform carpentry work between June 30 and July 27 (A.32-33,45,49;250-309,350,357,2723-24,2727,2739,2753,2759-60,2763,2764,2765,2780-82); and EPI continued utilizing the services of four Dalton employees after June 30 because Dalton had expressed concern that EPI was behind schedule on its job. (A.31,32,45;2123-27).

Moreover, the 10 salts, who had years of carpentry experience, were clearly qualified to work for EPI; after all, EPI hired Steve Rucker to perform carpentry work even though he had *no* carpentry experience (A.45-46,50;2739-40,2781), and EPI insists (Br.16,A.3194) that it eventually made job offers to 9 of the 10 salts.

Contrary to EPI's claim (Br.55), the record contains abundant evidence of EPI's unlawful motivation for its refusals to consider and hire the salts. EPI obviously knew that the 10 applicants were union salts, because Carsel had told President Stewart that they would try to organize EPI's employees if Stewart hired them. (A.31,45;2383,2384,2439,2519-24.)

The timing of EPI's refusals and EPI's false statements buttress the Board's finding of unlawful motivation. Despite desperately needing employees when the salts applied, EPI refused to consider or hire any of them. Indeed, EPI not only did not hire them, it actually tried to dissuade them from completing job applications by falsely telling them that EPI did not need any help. (A.31;2524-25,2729.) When the salts persisted and completed applications, President Stewart did not even bother to question any of them about their skills. (A.32;2527-28,2729.) Instead, he told them that he would not even look at their applications for a couple of weeks, during which time EPI proceeded to hire other employees. (A.31,32,47; 250-309,350,357,2385,2729.) *See Clock Electric, Inc. NLRB*, 162 F.3d 907, 913, 917 (6th Cir. 1998)(“*Clock*”) (unlawful motivation evidenced by employer's falsely telling union applicants it was not hiring); *FES*, 301 F.3d at 88 (employer's rejection of union applicants at a time when it desperately needed employees supports Board's motive determination).

EPI's manifest hostility towards unionization and its July 3 instruction to new hire Hackenberg--to backdate his application because union representatives had visited EPI earlier--provide additional support for the Board's finding that EPI refused to consider and hire the salts because it did not want the Union to infiltrate it. (A.18,33,49&n.2;350,2003,2005-06,2036.) *See NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1036-37 (10th Cir. 2003)(unlawful motivation evidenced by employer's hostility towards union, employer's false claim that it was not hiring when union applicants applied, and employer's continuing to hire new employees after its rejection of union applicants).

E. EPI's Hiring Defenses Lack Merit

Citing *Toering Electric Co.*, 351 NLRB No.18, 2007 WL 2899733 (Sept. 29, 2007)("Toering"), EPI complains (Br.3,21,26,55) that the Board erred in failing to require the General Counsel to prove that the salts had a genuine interest in employment with EPI. However, as the Board noted, *Toering* does not govern this case because *Toering*, by its terms, is applicable only to future cases and cases that were "pending" at the time it issued, and this case was decided before *Toering*. (A.56, citing *Toering*, 2007 WL 2899733 *13 n.56.) Accordingly, the General Counsel did not have the burden of showing that the salts who applied were genuinely

interested in employment; rather, EPI had the burden of showing that they were not genuinely interested in employment.

In any event, the General Counsel would not have had the burden of showing that the union applicants were genuinely interested in employment with EPI even if *Toering* applied here. Thus, *Toering* only imposes such a burden on the General Counsel *after* the employer has offered “evidence that creates a reasonable question as to the applicant’s actual interest in going to work for the employer,” such as his engaging in disruptive behavior during the application process. *Id.* at *12. EPI offers no such evidence here. To the contrary, the record shows that the salts were polite. (A.2385,2443-44,2526-27.) The mere fact that the 10 salts applied together hardly shows that they were not genuinely interested in employment. *See id.* at *12 n.51.

Moreover, EPI ignores overwhelming evidence that the salts *did* have a genuine interest in employment with EPI when they applied. As shown, union salts such as Allison, who initially concealed their union status, *accepted* job offers and worked for EPI until EPI unlawfully suspended or laid them off. And, when EPI contacted some of the open union salts *after* the Union filed its charge, the salts told EPI that they were ready and willing to come to work for EPI immediately, only to have EPI inform them that it had no positions available. (A.451,452,453,454,455-57,458.)

There is no merit to EPI's claim (Br.16,21) that the salts were not genuinely interested in employment because they declined to accept the "job offers" EPI made to them in October, some four months *after* they had applied. Thus, as the text of EPI's alleged "job offers" makes clear (pp.10-11), EPI did not actually offer them employment; instead, it merely offered them two hours pay if they attended a safety training program, and the possibility of assignment or placement on a recall list. (A.33,34-35;155, 194,206,207,210,214,385-86,388-89,394-95,397,404,405,406,407,410, 423,428,431,432,434,435,436 2082-84.) Indeed, an EPI official admitted (A.3093-94) that "there were not" jobs available on the days of the safety training. *Cf. NLRB v. W.C. McQuaide, Inc.*, 617 F.2d 349, 352 n.4 (3d Cir. 1980)(letter that recognized an obligation to offer reinstatement when jobs became available did not constitute a valid offer of reinstatement).

EPI argues (Br.56-58) that it was entitled to require the salts to attend safety training, even though it required no such training of its employees before the open union salts applied on June 30. (A.1728,1888,2052,2196, 2272,2486.) However, the Court need not even address that issue, because EPI did *not* offer the salts jobs if they attended the safety training; instead, as shown, EPI merely offered them the *possibility* of assignment if they attended the training. In short, the alleged fact that the salts did not respond

to EPI's letters offering safety training hardly proves that the salts would have declined actual offers of employment. To the contrary, as shown, the evidence points the other way.

Moreover, even assuming for purposes of argument that EPI did actually offer the salts employment months after the Union filed its unfair labor practice charge, that would still not defeat the Board's unfair labor practice finding. *See Clock*, 162 F.3d at 913-14 (the timing of the recall after the unfair labor practice charge “does nothing to offset the General Counsel's evidence of animus”)(citation omitted).

EPI's remaining contentions fare no better. EPI indignantly claims (Br.54) that the Board has required it to give hiring preference to union applicants, but the Board's decisions require no such thing. EPI fails to cite any evidence in support of its suggestion (Br.55) that its post June 30 job openings had “already been promised” to the individuals EPI eventually hired. EPI's claim (Br.9,17,20)--that Steve Rucker worked as a laborer rather than a carpenter--is belied by President Stewart's acknowledgement that EPI paid him at the carpenter wage rate. (A.49;2781.) And, EPI's apparent suggestion (Br.56) that it actually hired only 3 employees after the union salts applied on June 30--rather than 13 as the Board found--is belied

by EPI's own payroll records, which indicate that none of them had worked before the salts applied. (A.49;250-309.)¹⁶

F. EPI Required Hackenberg To Backdate His Application and Promulgated a Drug and Alcohol Testing Policy for Discriminatory Purposes

The Board reasonably found that EPI required Hackenberg to backdate his job application for discriminatory purposes. As shown, on June 30, the salts told President Stewart they would try to organize EPI if he hired them. Although EPI needed employees, Stewart falsely told them he did not need any help and then, when confronted with his lie, said it would be two weeks before he could review the salts' applications. Just days later, on July 3, nonunion applicant Hackenberg arrived at EPI's office, whereupon receptionist Garlette told him that he needed to backdate his job application because union representatives had visited EPI's office earlier. (A.49n.2,18,

¹⁶ For example, the Board discredited EPI's claim that Steve Rucker applied and was hired before June 30. The Board explained that, although his application is dated June 3, that same application states that he quit his prior employer in *July* 1997, and he first appears in EPI's payroll records as having worked during the payroll period July 7 to July 13. (A.49;250-65,316-17.)

33; 1999-2003,2005-06,2036.) Garlette's explanation "by itself" demonstrates that EPI required Hackenberg to backdate his application to avoid hiring union salts. *Matson*, 114 F.3d at 303.

EPI's claim (Br.45-46)--that this finding violates its due process rights--ignores that the complaint alleged that this conduct violated the Act. Certainly, the General Counsel never stated that Garlette did not violate the Act; his reference to the interview process referred to EPI Counsel's interview of Hackenberg. (A.19;129-30(¶¶4(b),6(b)),2008-09.)

The totality of the circumstances also strongly supports the Board's finding that EPI implemented a drug and alcohol testing policy because of the Union drive. As shown, on July 27, the Union notified EPI that several of its employees were union salts who were trying to organize its employees. Just 2 to 3 days later, President Stewart told employees that he would not go union. (A.38;1748-49,2493-94.) Then, on August 8, EPI suddenly announced a drug and alcohol testing policy. (A.38;367-70,2767.) The timing of the policy's implementation, EPI's manifest hostility towards the idea of unionization, and EPI's failure to explain the policy's timing strongly support the Board's finding. *See McClain*, 138 F.3d at 1426-27; *Wayne Mfg. Corp.*, 317 NLRB 1243, 1244 (1995).

EPI plainly failed to show that it would have implemented the testing policy absent the union drive. Although EPI claims (Br.19,52) that it implemented the policy because it wanted to be able to bid on federal jobs, President Stewart admitted (A.38;2767-68,3235-36) that he *had* been able to bid on federal jobs even though EPI had not had a written drug and alcohol policy. EPI's claim is further undermined by the fact that EPI waited until after the Union started its salting campaign to promulgate the policy even though it admittedly had been bidding on federal projects for nearly a year. (A.38;2767-68,3235-36.) EPI's additional claim (Br.19,53)--that it implemented the policy because another company's employee had died on a jobsite where EPI also worked--is unpersuasive because that death had occurred in January, yet EPI did nothing until after the union salts applied 5 months later. (A.3114-15.) Even EPI's allegation (Br.52) that its counsel had been recommending such a policy for *years* undercuts EPI's argument that it would have adopted the policy absent the union drive. Moreover, EPI never even tested an employee who had admittedly used drugs. (A.2796,2802,2803,2805.)

The single out-of-circuit case cited by EPI (Br.53)--*Eldeco, Inc. v. NLRB*, 132 F.3d 1007 (4th Cir. 1997)--hardly compels the Court to reverse the Board's finding, particularly given EPI's failure to offer any valid reason

for why it adopted the policy when it did. As Judge Hall noted in his dissent, the majority's view simply begs the question of why the employer adopted the new drug testing policy. *Id.* at 1015-16. *See McClain*, 138 F.3d at 1427 (Eleventh Circuit declines to follow *Eldeco* because *Eldeco* failed to address Board's motive determination).

There is no merit to EPI's suggestion (Br.18-19,51-52) that it cannot be found to have violated the Act because it notified the Union that it planned to implement the policy, but the Union did not object. The Union filed an unfair labor practice charge over the EPI's action, and therefore plainly did not agree that the policy was lawful. (A.66.) In any event, the Union's failure to request bargaining over the drug policy is irrelevant because the complaint alleged a violation of Section 8(a)(3), not a breach of the duty to bargain under Section 8(a)(5).

III. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN FRAMING ITS REMEDY

A. EPI's Remedial Objections Lack Merit

Because EPI never made the argument to the Board, the Court lacks jurisdiction under Section 10(e) (29 U.S.C. §160(e) to consider EPI's argument (Br.59) that the remedial notice should be revised to inform employees that management has free speech rights under Section 8(c). *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979).

The Court also can swiftly reject EPI's argument (Br.56-59) that backpay should be tolled and reinstatement deemed waived for all discriminatees who did not respond to its October offers of paid safety training. As shown (pp.10-11,46-47), the October letters did not constitute clear, firm, and unconditional offers of employment, and therefore did not toll the accrual of backpay liability or satisfy EPI's (re)instatement obligations. *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1053, 1055-57 (D.C.Cir. 1989).

Finally, the Board did not abuse its discretion in declining to reopen the record to consider EPI's claim (Br.4) that it subsequently made additional job offers to the discriminatees after the judge issued her decision. The Board reasonably deferred this issue to compliance, noting that if the letters are determined to constitute valid offers, EPI will not be required to make a second offer of reinstatement. (A.40n.3,16n.2.) *See Ark*, 334 F.3d at 106 (deferring to compliance employer's claim that it made victim whole).

B. The Union Lacks Standing To Challenge the Board's Remedy

To remedy EPI's discriminatory refusal to hire, the Board ordered that the reinstatement and make-whole remedy be implemented in accordance with the Board's decision in *Oil Capitol*. (A.40n.5.) In that case, the Board held that where the discriminatee is a union salt, it would no longer apply its

traditional rebuttable presumption that the backpay period extends indefinitely from the date of the refusal to hire to the date the employer offers the salt instatement. *Oil Capitol*, 2007 WL 1610437 **1-2, 8-9. Instead, the Board held that in such cases the General Counsel must present affirmative evidence in a subsequent compliance proceeding that the salt would have worked throughout the claimed backpay period, and that, absent such evidence, the employer need not offer the salt instatement. *Id.* at *2.

The Union challenges the *Oil Capitol* provision in the Board's Supplemental Order. However, the Union lacks standing at this time to challenge that portion of the Board's Order. Section 10(f) of the Act (29 U.S.C. §160(f)) provides that "[a]ny person aggrieved by a final order of the Board ... denying in whole or in part the relief sought may obtain review of such an order" in this Court. Contrary to the Union's suggestion (UBr.37), however, it is not the law that any party to an administrative proceeding may gain judicial review under an "aggrievement" provision merely because he is displeased with the proceeding's outcome, "for the party still must meet judicial standing requirements." *U.S. v. Federal Maritime Commission*, 694 F.2d 793, 800 n.25 (D.C.Cir. 1982).

Standing to obtain review of a Board order as a "person aggrieved" arises only if, among other things, "there is an adverse effect in fact" on the

petitioner. *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C.Cir. 1981)(citation omitted). That injury “must be concrete in both a qualitative and temporal sense,” and thus the alleged injury “must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Accordingly, “[a]llegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be ‘certainly impending’ to constitute [an] injury in fact.” *Id.* at 158 (citation omitted).

The Union fails to show that it has suffered an adverse effect at this time. After all, it currently is only a matter of conjecture whether EPI's instatement and backpay obligations will be any different under the Board's *Oil Capitol* rule than they would have been under the Board's former rule. Thus, the Union does not deny that if the Board's General Counsel shows in the future compliance proceeding that the salts would still be working for EPI if EPI had not discriminatorily denied them employment, EPI *will* have to offer them instatement and pay them backpay until the date of instatement. And, that is precisely the remedy that the Union claims is appropriate.

In short, the Union's claim of injury rests entirely on speculation about the outcome of future compliance litigation, which is not sufficient to

confer standing and which distinguishes this case from the cases cited by the Union. (Br.38.) *See Platte River Whooping Crane Critical Habitat*

Maintenance Trust v. F.E.R.C., 962 F.2d 27, 35 (D.C.Cir.

1992)(“Allegations of injury based on predictions regarding future legal proceedings are ... ‘too speculative’” to confer standing); *Federal Express*

Corp. v. Mineta, 373 F.3d 112, 118-19 (D.C.Cir. 2004)(“*Mineta*”)(Court

declines to hear case because it is uncertain whether the challenged

rebuttable presumptions will ever have the effect of depriving party of

compensation).¹⁷

The Union complains (UBr.39) that the instatement remedy may be “illusory” because it is subject to defeasance if the General Counsel fails to meet his burden of proof. But, the Union ignores that the extent of an employer’s remedial obligations has always been dependent on the facts

¹⁷ The Union’s reliance (UBr.38&n.11,43-44) on *Oil, Chemical & Atomic Workers Local Union 6-418 v. NLRB*, 694 F.2d 1289 (D.C.Cir. 1982), is misplaced. To be sure, the Court held there that a union had standing to challenge the Board’s failure to order an employer to immediately disclose safety information to the union, even though it was possible that the union would ultimately receive the information as a result of Board-ordered bargaining. *Id.* at 1292-95. But, as the Court explained, the delay that could ensue until the union received the information as a result of Board-ordered bargaining could *presently aggrieve* the union because the withheld information allegedly concerned health and safety hazards which “could presently be threatening the health of company employees.” *Id.* at 1295-96. No such wrong that would presently aggrieve the Union is shown here.

adduced at the compliance hearing. Even under the former rule favored by the Union, backpay and reinstatement could be limited if EPI adduced evidence sufficient to rebut the presumption of continued employment. *See Tualatin Electric, Inc. v. NLRB*, 253 F.3d 714, 718 (D.C.Cir. 2001) (“*Tualatin*”)(“The employer ... retains ... the ... right to seek out and to present evidence that a salt would not have been transferred at the conclusion of the project on which he last worked [or should have worked], whether by reason of the union’s policies or of its own.”).

The Union also claims (UBr.39-41) that the Board’s Order adversely affects it by “requiring [it] to disclose its organizing strategies” to EPI. But, nothing in the Board’s Order requires the Union to do any such thing. The fact (UBr.40-41) that, pursuant to case handling instructions for investigating *Oil Capitol* issues, the Board’s Regional Office may ask the Union to supply *it* with organizing information does not demonstrate that the Board’s Regional Office will require the Union to furnish EPI with copies of that information or that the Board’s Regional Office will disclose the Union’s information to EPI. Moreover, in the compliance proceeding, the Board can address whether and how to protect any information required to be disclosed, through the use of protective orders, *in camera* review, filing exhibits under seal, or otherwise. *See, e.g., Teamsters Local 917*, 345 NLRB

1010, 1011 n.7 (2005). Until the Board has addressed the issue in that context, any purported harm is speculative and insufficient to confer standing here.

The Union incorrectly suggests (UBr.42-43) that it will be precluded from raising its arguments in a petition to review the Board's subsequent compliance order if its current petition is dismissed now. "There is a difference between entitlement to relief and the amount of relief to which one is entitled." *Starcon Int'l, Inc. v. NLRB*, 450 F.3d 276, 279 (7th Cir. 2006)("Starcon"). The latter remains an "open issue" until it is decided in a compliance proceeding. *Id.* And, this Court held in *Tualatin* that an employer *could* raise, in its appeal from the Board's compliance determination, challenges that are virtually the mirror image of those raised by the Union here. *Tualatin*, 253 F.3d at 717-18 (allowing employer to challenge the Board's application of a presumption of continued employment to union salts in a compliance proceeding).

Nor does *Scepter, Inc. v. NLRB*, 448 F.3d 388 (D.C.Cir. 2006), support the Union's suggestion that it can only raise its challenge to *Oil Capitol* now. Unlike here, 1) the petitioner there did not notify the Board or the Court about any objection to the relevant portion of the Board's order in the earlier unfair-labor-practice proceeding, and 2) the disputed provision of

the make-whole order was not subject to a more precise calculation in a subsequent compliance proceeding. *Id.* at 389-90. There is no danger that this Court or the Board will find in a subsequent compliance proceeding that the Union sat on its hands where, as here, it has explicitly raised its challenge to the propriety of *Oil Capitol*, and the Board has represented to the Court that the Union's challenge is premature at this stage, but may be raised anew in a petition for review challenging a compliance determination.¹⁸

The Union mistakenly claims (UBr.43) that “no conceivable interest of judicial efficiency [is] served” by requiring it to wait and see whether it will be aggrieved by the subsequent compliance order. To the contrary, there will be no need for this Court to decide the propriety of the Board's decision to apply *Oil Capitol* here if, during the compliance proceeding, the Board determines that EPI must pay backpay until it offers the salts instatement. Moreover, if the Union is aggrieved after the compliance proceeding, judicial review of the Board's decision to apply *Oil Capitol* here “is likely to stand on a much surer footing in the context of a specific application” of this rule than would be the case if this Court reviewed the

¹⁸ *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984), is distinguishable for precisely the same reasons. (UBr.42.)

Union's "generalized challenge" now. *Mineta*, 373 F.3d at 119 (citation omitted).¹⁹

The Union is equally wrong in claiming (UBr.46) that the Board's Order adversely affects it by foreclosing it from litigating at compliance that the discriminatees did not apply for jobs for reasons "other than an actual desire to organize." The Board's Order does not foreclose the Union from defending against a company claim that the discriminatees are entitled to no backpay because of their "motives."

C. The Board's *Oil Capitol* Policy Is Consistent with the Act

Even assuming that the Union has standing to raise its remedial challenge now, its challenge must be rejected. As explained more fully in the Board's brief in *Local 270* (D.C. Cir. No. 07-1479), the Union's argument fails because the Board's *Oil Capitol* rule--requiring the General Counsel to present affirmative evidence that the salt would have worked throughout the claimed backpay period (*Oil Capitol*, 2007 WL 1610437 *2)--advances the Act's remedial objectives. See *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)(Board's order may not be disturbed

¹⁹ Although the *Mineta* court found jurisdiction wanting on ripeness grounds, this Court has recognized that the ripeness inquiry "overlaps with the 'injury in fact' facet of standing doctrine." *Navegar, Inc. v. U.S.*, 103 F.3d 994, 998 (D.C.Cir. 1997).

“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.”).

As the Board noted in *Oil Capitol*, 2007 WL 1610437 *4, the primary purposes of the Board’s make-whole remedies are to compensate employees for “losses suffered on account of an unfair labor practice” (*Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)), and to restore “the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.” *Phelps Dodge*, 313 U.S. at 194. In short, “[t]he Act is essentially remedial.” *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).

The *Oil Capitol* remedy, by its terms, is aimed at restoring the status quo that would have obtained but for the unfair labor practices. It clearly “vindicate[s] the public policy” of the Act to compensate the salts for their actual losses “suffered on account of [the] unfair labor practice[s].” *Nathanson v. NLRB*, 344 U.S. at 27. At the same time, the *Oil Capitol* rule helps to ensure that the remedy does not penalize the employer by putting the salts in a better position than they would have been absent the unfair labor practices. *Starcon*, 450 F.3d at 278. Thus, “salts often do not seek employment for an indefinite duration; rather, ... many ... intend to remain

with the targeted employer only until the union's defined objectives are achieved or abandoned." *Oil Capitol*, 2007 WL 1610437 *2.

Oil Capitol's placing the burden on the Board's General Counsel to show, for example, how long the union would have permitted the salt to work for the employer is also equitable because the General Counsel (and Union) have superior access to that evidence. *See McCormick on Evidence* §337 p. 564 (6th ed. 2006)("A doctrine often repeated by the courts is that where the facts with respect to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

At bottom, the Union's attack on *Oil Capitol* amounts to a claim that the Board is *required* to presume, for reinstatement and backpay purposes, that *every* union salt would have worked from the date the employer discriminatorily refused to employ him to the date the employer ultimately offers him reinstatement. However, there is nothing in the Act that expressly dictates what presumptions, if any, should be applied in determining the extent of make-whole relief for salts. And, the Board's refusal to adhere to the remedial presumption sought by the Union is rational and consistent with the Act, and therefore entitled to deference. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 796 (1990)("Curtin Matheson") (upholding, as rational and consistent with the Act, the Board's refusal to

adopt, as rational and consistent with the Act, a presumption that strike replacements oppose incumbent union).

The Board's refusal to presume that *all* union salts will indefinitely work for the employer they are assigned to organize is clearly rational as an empirical matter. Put simply, not every salt who applies for a job with a nonunion employer intends to work for that employer indefinitely.

Moreover, the Union's members are subject to fines if they work for nonunion employers absent union permission, which the Union grants only for organizing purposes. (A.2658-59.) Accordingly, it may well be that absent EPI's unfair labor practices, the salts would not have continued working for EPI past the duration of the organizing campaign, regardless of its outcome. For, if the campaign were successful, the Union might have reassigned the salt to a different nonunion employer it decided to target. If the campaign proved unsuccessful, the Union would be barred from obtaining an election for another year under 29 U.S.C. §159(c)(3), and so the Union might have withdrawn authorization for the salt to continue working for nonunion EPI.

To be sure, that might not be the case here. But, that is precisely the point--not all salts or salting campaigns are identical. Accordingly, it certainly is not irrational for the Board to decline to presume that these union

salts would still be working for EPI during the 11-plus years since the Union targeted EPI, and instead to hold that the salts' reinstatement rights and backpay period must be proven by evidence. *See Curtin Matheson*, 494 U.S. at 789-91, 793 (although strike replacements often may not favor incumbent union, the Board was not required to presume that strike replacements oppose the incumbent union because the circumstances of each strike vary). And, as shown, the Board's *Oil Capitol* rule is also consistent with the Act's remedial purposes.

The Union strongly complains (UBr.28-36) that *Oil Capitol* is invalid because it improperly requires the Board to engage in speculation about what would have happened if EPI had not violated the Act. The Union's argument proves too much. By definition, there is *always* some uncertainty as to how long a discriminatee would have remained in the wrongdoer's employ absent the unfair labor practice. Nevertheless, the Board *is* charged with the task of trying to restore the situation that would have obtained but for those unfair labor practices. *See Phelps Dodge*, 313 U.S. at 194. Indeed, this Court has recognized that the Board *should* reduce the backpay period if the evidence shows that the salt eventually would have ceased working for the employer at some point because of the union's policies. *Tualatin*, 253 F.3d at 718.

The Union mistakenly relies (UBr.34-35) on *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), for the proposition that the Board cannot try to reconstruct what probably would have happened absent the unfair labor practices. But *Sure-Tan* only forbids the establishment of a backpay award “in the total absence of any record evidence,” and that bears no relation to the employees’ actual losses. *Id.* at 899-900 n.9, 904. Because the Board’s new policy specifically requires supporting evidence for a remedial award in salting cases, it fully comports with *Sure-Tan*’s holding. Certainly, the Board is not engaging in sheer conjecture based on “non-existent Board ‘expertise’” (Br.28) when it fashions a remedy that is grounded on *evidence* about the actual contemporaneous plans of the salt and/or his union.²⁰

The Union claims (UBr.22-28) that the Board has run afoul of the Act by establishing a different rule for union salts than it has for other employee discriminatees. To the contrary, the Supreme Court has recognized that treating union salts as “employees” under the Act does not mean that the law must treat salts the same as other employees “in every labor law context.”

²⁰ *H.K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970), relied on by the Union (Br.32), does not preclude the Board from adopting a policy that requires a salt’s backpay award to be supported by evidence about how long he would have worked for the employer absent the employer’s discrimination. By its own terms, *H.K. Porter* merely prevents the Board from compelling an employer “to agree to any substantive contractual provision.” *Id.* at 102.

NLRB v. Town & Country Electric, Inc., 516 U.S. 85, 97 (1995). Thus, for example, the Board has excluded salts from a bargaining unit because their employment was solely for the purpose of union organizing and was therefore temporary in nature. *299 Lincoln Street*, 292 NLRB 172, 180 (1988). Similarly, this Court has approvingly cited the Board's rule that an employer may lawfully refuse to hire a union salt during a strike. *See Casino*, 321 F.3d at 1198. Significantly, when this Court approved the Board's prior decision to apply the traditional presumption of continued employment to union salts, it did so not on the ground that the Board's then-existing policy was *required* by the Act, but merely because the policy was not "arbitrary or contrary to law." *Tualatin*, 253 F.3d at 717-18.

**D. Retroactive Application of *Oil Capitol*
Is Not Manifestly Unjust**

Finally, the Union argues (UBr.46-51) that the Board's *Oil Capitol* rule should not be applied retroactively here. However, a decision that changes existing law is generally given retroactive effect unless retroactive application would cause manifest injustice. *NLRB v. Bufco Corp.*, 899 F.2d 608, 611 (7th Cir. 1990). By definition, retroactive application is not manifestly unjust if the complaining party fails to show that it relied on the prior rule and that the new rule severely penalizes it. *See id.* at 611-12;

Local 900, Int'l Union of Electrical, etc. v. NLRB, 727 F.2d 1184, 1194-95 (D.C.Cir. 1984)(“*Local 900*”).

The Union fails to show that retroactive application of the *Oil Capitol* rule is manifestly unjust. Significantly, the Union does not claim that it relied on the pre-*Oil Capitol* rule in taking the actions which led to this litigation. See *Local 900*, 727 F.2d at 1195 (rejecting union’s retroactivity challenge where union failed to show that it relied on prior law in fashioning challenged clause). Nor can the Union claim that the Board’s Order imposes a penalty on it, because the Union is not required to pay any damages under the Board’s Order. See *SNE Enterprises, Inc.*, 344 NLRB 673, 673-74 (2005)(retroactive application not manifestly unjust because Board’s order does not require complaining party to pay any damages). Cf. *Local 900*, 727 F.2d at 1195 (retroactive application would not cause great hardship because of limited backpay liability under Board’s order).

Rather, the Union argues (UBr.51) that retroactive application of the Board’s new *Oil Capitol* rule--which requires the General Counsel to present affirmative evidence that the salt would have worked for the employer throughout the claimed backpay period--is manifestly unjust because it imposes on the Union the burdensome task of reconstructing its EPI salting plans. However, at this stage of the case, it is unclear whether the General

Counsel will seek to satisfy his *Oil Capitol* burden by reliance on the Union's EPI salting plans. Moreover, the Union has cited no evidence that its EPI salting plans are unavailable, and simply suggests that such evidence *may* be unavailable. In any event, at least since this Court's 2001 *Tualatin* decision, the Union has been on notice that such records could be relevant at the compliance stage.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petitions for review and enforcing the Board's Orders in full.

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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KANSAS CITY AND VICINIT, LOCALS 311)
AND 978 affiliated with UNITED)
BROTHERHOOD OF CARPENTERS AND)
JOINERS OF AMERICA)
)
Petitioner) Nos. 08-1009, 08-1039,
) 08-1081
)
v.) Board Case No.
) 17-CA-19272
NATIONAL LABOR RELATIONS BOARD)
)
Respondent)
)
and)
)
EXCEPTIONAL PROFESSIONAL, INC.)
d/b/a EPI CONSTRUCTION)
)
Intervenor)
)

EXCEPTIONAL PROFESSIONAL, INC.)
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)
Petitioner/Cross-Respondent)
)
v.)
)
NATIONAL LABOR RELATIONS BOARD)
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Respondent/Cross-Petitioner)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 13,981 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 21st day of January 2009

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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

final 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[es] listed below:

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