

Nos. 08-1315, 08-1357

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

M.V.M., INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION 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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TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	3
Applicable statutes and regulations	3
Statement of the case.....	3
Statement of the facts.....	4
I. The Board’s findings of fact.....	4
A. Background: The Company’s Business, its relationship with the unions, and the role of Local 72 President Rodriguez	4
B. Rodriguez and other Union officials repeatedly complain to the Company about unresolved labor disputes, to no avail	5
C. Rodriguez sends a letter to the Marshals Service seeking its support in employment disputes with the Company	10
D. The company issues a directive prohibiting employees from contacting the USMS about personnel matters and suspends Rodriguez for disobeying the directive	11
E. The company interviews and interrogates Rodriguez about the letter	12
F. The company terminates Rodriguez because of his involvement with the letter	14
II. The Board’s conclusions and orders	15
Summary of argument.....	16
Standard of review	19

Headings-Cont'd

Page(s)

Argument.....20

I. Substantial evidence supports the Board’s finding that the company violated Section 8(a)(3) and 8(a)(1) of the Act by suspending and discharging Rodriguez for sending a letter to the USMS alleging labor and contract problems20

 A. An employer violates Section 8(a)(3) and (1) of the Act by discriminating against employees for engaging in protected, concerted union activities20

 B. The company failed to meet its burden of showing that the letter lost the Act’s protection26

 1. The letter to the USMS was related to an ongoing labor dispute with the company26

 2. The company failed to prove that the Rodriguez’ involvement with the letter was disloyal32

 3. The company failed to prove that the letter was maliciously untrue34

 4. After the court report lost Barreto’s testimony, the judge reasonably permitted it to be retaken.....38

 C. The company unlawfully suspended and terminated Rodriguez because of his involvement in sending the letter40

II. Substantial evidence supports the Board’s finding that the company violated Section 8(a)(1) of the Act by interrogating Rodriguez about his involvement in sending the letter43

 A. An employer violates Section 8(a)(1) of the Act by coercively interrogating employees.....43

 B. The company unlawfully interrogated Rodriguez44

Headings-Cont'd

Page(s)

Conclusion47

TABLE OF AUTHORITIES

<i>Allied Aviation Serv. Co.</i> , 248 NLRB 229 (1980), <i>enforced mem.</i> , 636 F.2d 1210 (3d Cir. 1980)	28,33
* <i>American Golf Corp.</i> , 330 NLRB 1238 (2000), <i>affirmed sub nom</i> <i>Jensen v. NLRB</i> , 86 Fed Appx. 305 (9th Cir. 2004).....	17,18,23,25,34
<i>Bethlehem Steel Co.</i> , 120 F.2d 641 (D.C. Cir. 1941).....	39
<i>BI-LO</i> , 303 NLRB 749 (1991).....	39
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998).....	20
<i>Capital Cleaning Contractors, Inc. v NLRB</i> , 147 F.3d 999 (D.C. Cir. 1998).....	20
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1967)	21
<i>Elastic Stop Nut Division of Harvard Indus., Inc. v. NLRB</i> , 921 F.2d 1275 (D.C. Cir. 1990).....	20
<i>Emarco, Inc.</i> , 284 NLRB 832 (1987).....	27
<i>Endicott Interconnect Tech., Inc. v. NLRB</i> , 453 F.3d 532 (D.C. Cir. 2006).....	23,33,34
<i>Endicott Interconnect Tech.</i> , 345 NLRB 448 (2005), <i>rev'd on other grounds</i> , 453 F.3d 532 (D.C. Cir. 2006).....	29,34

* Authorities upon which we chiefly rely are marked with asterisks.

Cases--Cont'd	Page(s)
* <i>Five Star Transport, Inc. v. NLRB</i> , 522 F.3d 46 (1st Cir. 2008).....	22,24,28
* <i>Five Star Transport, Inc.</i> , 349 NLRB 42 (2007), <i>enforced</i> , 522 F.3d 46 (1st Cir. 2008).....	31
<i>Foamex</i> , 315 NLRB 858 (1994).....	45
* <i>Guardsmark LLC v. NLRB</i> , 475 F.3d 369 (D.C. Cir. 2007).....	41
<i>Handicabs, Inc.</i> , 318 NLRB 890 (1995), <i>enforced</i> , 95 F.3d 681 (8th Cir. 1996).....	22
<i>Hertz Corp.</i> , 316 NLRB 672 (1995).....	42
<i>Int'l Union of Electronic, Elec., Salaried, Machine & Furniture Workers v. NLRB</i> , 41 F.3d 1532 (D.C.Cir.1994).....	19
<i>Joliff v. NLRB</i> , 513 F.3d 600 (6th Cir. 2008).....	34
<i>KBO, Inc.</i> , 315 NLRB 570 (1994).....	36
<i>Kentucky River Med. Ctr.</i> , 340 NLRB 536 (2003).....	39
<i>Midwest Reg. Joint Board, Amalgamated Clothing Workers of America v. NLRB</i> , 564 F.2d 434 (D.C. Cir. 1977).....	46

* Authorities upon which we chiefly rely are marked with asterisks.

Cases--Cont'd	Page(s)
<i>Millard Refrigerated Services</i> , 345 NLRB 1143 (2005).....	43
<i>Misericordia Hospital Medical Center v. NLRB</i> , 623 F.2d 808 (2d Cir. 1980)	21
* <i>Mohave Electric Cooperative, Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000).....	24,33
<i>NLRB v. Bryant Manufacturing Co.</i> , 196 F.2d 477 (7th Cir. 1952)	39
<i>NLRB v. Circle Bindery, Inc.</i> , 536 F.2d 447 (1st Cir. 1976).....	24,33
<i>NLRB v. Int'l Brotherhood of Electrical Workers, Local 1229</i> ("Jefferson Standard"), 346 U.S. 464 (1953)	22,23,33
<i>NLRB v. Greyhound Lines Inc.</i> , 660 F.2d 354 (8th Cir. 1981)	29
<i>NLRB v. Lummus Industrial, Inc.</i> , 679 F.2d 229 (11th Cir. 1982)	24
<i>NLRB v. Mount Desert Island Hosp.</i> , 695 F.2d 634 (1st Cir. 1982).....	21
<i>NLRB v. Parr Lance Ambulance Service</i> , 723 F.2d 575 (7th Cir. 1983)	24
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983)	21
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962)	31

* Authorities upon which we chiefly rely are marked with asterisks.

Cases--Cont'd	Page(s)
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	34
<i>Pattern Makers' League of N. America v. NLRB</i> , 473 U.S. 95 (1985)	19
* <i>Perdue Farms Inc. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998).....	43,44,45
* <i>Rossmore House</i> , 269 NLRB 1176 (1984), <i>enforced sub nom</i> <i>Hotel Employees and Restaurant Employees Union, Local 11</i> , 760 F2d 1006 (9th Cir. 1985)	43,44
* <i>Saia Motor Freight Line</i> , 333 NLRB 784 (2000).....	21,41
<i>Schaeff Inc.</i> , 113 F.3d 264 (D.C. Cir 1997).....	21
<i>Shop-Rite Supermarket</i> , 231 NLRB 500 (1977).....	40
<i>Sierra Publ'g Co. v. NLRB</i> , 889 F.2d 210 (9th Cir. 1989)	24
<i>Springfield Library and Museum Association</i> , 238 NLRB 1673 (1979) <i>rev'd in part</i> , 113 F.3d 1259 (D.C. Cir. 1997).....	28,34
<i>St. Amant v. Thompson</i> , 390 U.S. 727 (1960)	37
<i>Traction Wholesale Ctr. Co., Inc. v. NLRB</i> , 216 F.3d 92 (D.C. Cir 2000).....	19

* Authorities upon which we chiefly rely are marked with asterisks.

Cases--Cont'd	Page(s)
* <i>United Services Automobile Association</i> , 340 NLRB 784 (2003), <i>enforced</i> , 387 F.3d 908 (D.C. Cir 2004).....	42,43,45,46
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	19,20
* <i>Valley Hospital Medical Ctr.</i> , 351 NLRB 1250 (2007)	22,36,34,41
<i>Veeder-Root, Co.</i> , 237 NLRB 1175, 1177 (1978).....	31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

Section 2(9) (29 U.S.C. § 152(9)	26
Section 3(b) (29 U.S.C. § 153(b)).....	2
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	3,4,15,16,17,18,20,21,26,43
Section 8(a)(3)(29 U.S.C. § 158(a)(3)).....	3,15,16,17,20,21,26,43
Section 7 (29 U.S.C. § 157)	16,20
Section 10(a)(29 U.S.C. §160(a))	2
Section 10(e)(29 U.S.C. § 160(e))	2,19
Section 10(f)(29 U.S.C. § 160(f))	2

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of M.V.M., Inc. (“the Company”) to review a decision and order of the National Labor Relations Board

(“the Board”) issued August 29, 2008, and reported at 352 NLRB 1165 (2008). (JA 78-90.)¹ The Board has filed a cross-application for enforcement.

The Board had subject matter jurisdiction over the unfair labor practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act (the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).²

The Company filed its petition for review on September 26, 2008, and the Board filed its cross-application for enforcement on November 7, 2008. Both filings were timely, as the Act places no time limitations on either filing.

¹ “JA” references are to the joint appendix. “Br” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See *Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). This issue is currently before this Court in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos 08-1162 and 08-1214, argued December 4, 2008, before Judges Sentelle, Tatel, and Williams.

STATEMENT OF THE ISSUES

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Local 72 President Marcial Rodriguez for sending a letter to the U.S. Marshals Service, the Company's contracting client, alleging labor and contract problems.
2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by interrogating Rodriguez about his involvement with the letter.

APPLICABLE STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

Acting on the unfair labor practice charge filed by Marcial Rodriguez, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) and (3) of the Act. (JA 78.) After a hearing,³ the administrative law judge issued a decision finding that the Company violated Section 8(a)(3) and

³ The case was originally tried on November 8, 2007. The record was reopened when it was discovered that the court reporter had irretrievably lost almost all the trial testimony of Freddie Barreto, a key witness for the General Counsel. On January 22, 2008, over the objection of the Company's counsel, the trial was reconvened, and Barreto was recalled so that his testimony could be made a part of the record.

(1) of the Act by suspending and discharging Rodriguez for sending a letter to the United States Marshals Service (“USMS”) complaining about the Company’s labor and contract violations. In so ruling, the judge rejected the Company’s defense that the letter lost the protection of the Act; he found that the Company had failed to establish that the letter was unrelated to the Union’s ongoing labor disputes, or that it was disloyal or maliciously untrue. The judge further found that the Company had violated Section 8(a)(1) of the Act by coercively interrogating Rodriguez about his protected involvement in sending the letter. On review, the Board substantially affirmed the judge’s rulings, findings, and conclusions as to the violations, and adopted the recommended Order in full. (JA 78.)

STATEMENT OF FACTS

I. THE BOARD’S FINDINGS OF FACT

A. Background: The Company’s Business, Its Relationship with the Unions, and the Role of Local 72 President Rodriguez

The Company is a Virginia corporation that provides security guard services for Federal court facilities in Puerto Rico, by contract with the USMS. (JA 79; 93, 124.) The Company’s court security officers (“CSOs”) operate checkpoints, screen visitors, assist court personnel, transport inmates, and monitor and operate the security equipment and systems. (JA 79; 93, 113, 156.)

Marcial Rodriguez was a CSO for the Company for 10 years. (JA 79; 92, 125.) He served as an officer of Local 72 of the United Government Security

Officers of America (“Local 72”), the CSOs’ collective-bargaining representative, and became President of Local 72 in January 2005. (JA 79; 93-94, 114, 157.)

Local 72 and the Company were parties to a collective-bargaining agreement (“the Agreement”) covering the CSOs that was effective by its terms from June 13, 2003, to September 30, 2006. (JA 79; 98, 156, 200-16.) The Agreement contained a clause providing that it would remain in effect thereafter from year to year, absent timely notice by either party of an intent to terminate it. (JA 79; 216.)

In September 2006, the employees replaced Local 72 with the United States Court Security Officers (“USCSO”). (JA 79; 94, 99, 157.) Thereafter, Rodriguez remained an active union member and served on USCSO’s bargaining committee for a new agreement that it was negotiating with the Company. (JA 79; 157.) He believed that Local 72’s Agreement would remain in effect until a new bargaining agreement was negotiated between the Company and the USCSO. (JA 79; 104.)

B. Rodriguez and Other Union Officials Repeatedly Complain to the Company About Unresolved Labor Disputes, to No Avail

The Company had a long history of labor disputes with its employees’ collective-bargaining representative, and Rodriguez—first in his capacity as President of Local 72, and later as a member of USCSO’s bargaining committee—played an active role in lodging, pressing, and monitoring employees’ complaints. Rodriguez and Local 72 Vice President Eduardo Soto reviewed correspondence sent by and to Local 72. (JA 97, 115.) Rodriguez also worked with Soto, Delegate

Eddie Barreto, and other Local 72 officers to address various disputes. (JA 80, 80 n.3; 114-15, 117-118, 157-60, 164-65.)

The labor disputes at issue included, for example, Rodriguez and Soto's allegations that the Company had failed to comply with provisions in the parties' Agreement controlling the probationary period for new employees, pay differentials, seniority, the use of full-time and shared-time hours, and the grievance process. (JA 80; 103-05, 115.) In particular, controversies over provisions governing pay and leave were a frequent source of employee complaints. CSOs complained to Rodriguez and other union delegates that the Company denied their vacation leave and sick pay requests, made unexplained adjustments in pay rates, and failed to report their leave balances or post them quarterly as required by the Agreement. (JA 79-80; 104-05, 108, 115, 151, 157-59, 164-65.) Rodriguez himself complained that he was denied leave to which he was entitled under the Family and Medical Leave Act. (JA 79; 102, 166.) The Company also made deductions from CSOs' paychecks without prior notice to the CSOs or their collective-bargaining representative at the time, the USCSO. (JA 80; 157, 164, 165.) When the CSOs complained and union officers intervened, the Company claimed that it was "pulling out" the money because the CSOs had been mistakenly overpaid, but it never responded to USCSO's requests for further explanation or documentation. (JA 80; 157-58.)

Rodriguez and Delegate Barreto repeatedly brought employee complaints and requests for leave balances to the attention of the Company through Site Supervisor Luis Comas, pursuant to the first informal step in the contractual grievance process. (JA 79-80; 151, 157-59, 164-65, 204, 223.) Comas referred Rodriguez' requests to higher-ranking company officials, figuring "the problem would be handled," but they remained unresolved. (JA 80; 108, 151.)

Rodriguez and other union officers, including Soto and Barreto, also challenged the Company's harassment of CSOs who were involved in union activities and its discharge of three CSOs. (JA 80; 105-08, 118-19, 162, 166-67.) In 2004 or 2005, Local 72 filed unfair labor practice charges when the Company discharged unit member Juan Salgado for using business cards. (JA 80; 109, 118.) The Company claimed that the cards improperly identified him as a "U.S. Marshal," but Vice-President Soto claimed that they accurately designated him as a "Special Deputy Marshal," and Delegate Barreto claimed that other CSOs used business cards without being disciplined. (JA 80; 122, 161-62, 166-67.) In late 2005, after the Company discharged Union Secretary Marisol Rosario, Local 72 contested the action based on her claim that she had been sexually harassed. (JA 80; 123, 161, 167.) The Company also discharged Delegate Jose Padilla for using a cell phone on the job, but Delegate Barreto claimed that other CSOs did the same without being fired. (JA 80; 122, 161-62, 166.) The unfair labor practice charges

that Local 72 filed over Padilla's termination were still pending at the time of the unfair labor practice hearing in this case. (JA 80; 109, 123, 168.)

In addition to contesting the Company's actions described above, Rodriguez, Soto, and Delegate Padilla sent a letter dated January 31, 2006, to Company President and Chief Executive Officer Dario Marquez. In it, they detailed an extensive list of some 24 ongoing grievances. (JA 81; 114-15, 119-20, 218-20.)

On May 9, 2006, Rodriguez, in his capacity as president of Local 72, sent a written request to Site Supervisor Comas for information on CSOs' pay rates, pay changes, probationary employees' hours worked, and dates of probation completion. (JA 80; 108, 111, 115, 117, 121, 151, 221.) By means of this letter, which mentioned two previous information requests that the Company had ignored, Rodriguez was attempting to investigate ongoing labor problems, and to gather information for negotiations with the Company. *Id.* After the Company again responded with excuses and delays, Vice-President Soto filed an unfair labor practice charge on behalf of Local 72, which Rodriguez amended, alleging that the Company had unlawfully refused to provide the requested information. (JA 80; 96-97, 108, 117-18, 121, 159, 195-96.) The parties tentatively agreed to settle the charge in July 2006, but before it was finalized, Rodriguez complained to the Board that the Company had failed to provide the information or post the required notice. (JA 80; 111, 159-60, 165.) It was not until April 2007 that the Board

closed the case, at which time the charge regarding Padilla's termination was still pending. (JA 80, 80 n.7&8; 123, 160, 197.)

After USCSO replaced Local 72 as the employees' bargaining representative, Rodriguez remained active in union affairs. For example, he challenged the Company's practice of continuing to deduct union dues for Local 72 from employees' paychecks. (JA 81; 99.) In a January 23, 2007 letter to Site Supervisor Comas, Rodriguez memorialized this complaint. (JA 81; 94, 98, 198.)

Based on his involvement with Local 72 and USCSO, Rodriguez also believed that the Company was violating the USMS service contract in ways that affected the CSOs' working conditions. For example, Rodriguez knew that the Company was hiring CSOs who were not fluent in English, including Epifanio Fernandez, who used an interpreter in his interview, in violation of the Company's contract with the USMS. (JA 81; 103-04, 110.) In addition, because the Company's contract with the USMS tracked the Agreement in key respects, some of the Company's disputed actions could have violated both the contract and the Agreement. For example, Article V, Section 2 of the Agreement provided that the Company was obligated under its contract with the USMS to fill positions in order to provide "full staffing level coverage" and to "avoid unnecessary overtime." (JA 81; 203.) Rodriguez, who was aware of this collectively-bargained obligation, claimed that the Company had failed to meet it, causing CSOs to work double and

triple shifts. (JA 81; 103, 105.) Similarly, the USMS contract incorporated the terms of the Agreement governing wages. (JA 81; 142, 207-08.) Therefore, to the extent that the Company's payment of collectively-bargained wages was in dispute, so was its compliance with the USMS contract.

C. Rodriguez Sends a Letter to the Marshals Service Seeking Its Support in Employment Disputes with the Company

In December of 2006 or January 2007, Rodriguez—frustrated with the Company's responses to union officers' complaints—drafted a letter to the USMS (JA 192) complaining about the Company's failure to redress what Rodriguez believed were repeated violations of employees' rights. (JA 81; 93, 107, 158, 192.) The letter alleged that over the years, the Company had “violate[d] not only the contract with the USMS . . . but also the . . . collective bargaining agreement,” and that despite the complaints filed by union officers with the Board, the Company was “violating the labor laws and our rights with impunity.” (JA 81-82; 192.) The letter also claimed that managers had threatened and harassed union officers and any other employee who “dare[d] to complain.” *Id.* The letter appealed to the USMS to “investigate” the Company's “performance in Puerto Rico before allowing them to bid on further contracts,” and accused the Company of staff “wrong doings” and of conducting self-serving investigations. (JA 82; 192.) The letter ended, “The Court Security Officers in Puerto Rico are protecting

the greatest institution in the United States and we are seeking the same protection. ‘Is that to [sic] much to ask??’” *Id.*

Rodriguez and Vice-President Soto signed the letter before giving it to Delegate Barreto, who said that he would “take care of it.” (JA 82; 93, 112, 158, 163.) Barreto initially signed the letter, but instead of mailing it to the USMS, he read it over and held on to it for about a week. (JA 82; 112, 158, 163.) Barreto feared retaliation from the Company, so before mailing the letter, and without telling Rodriguez, he “whited out” both his name and Soto’s. (JA 82; 158, 163-64.) But Barreto thought that “somebody” had to sign the letter, and because Rodriguez was president of Local 72, he left Rodriguez’ name on the letter. (JA 82; 161-64, 167.) Barreto mailed the letter to the USMS in Washington, D.C. and sent a copy to Manuel Varela, the USMS Contracting Officer for Puerto Rico, sometime before February 5, 2007. (JA 82; 158.)

D. The Company Issues a Directive Prohibiting Employees from Contacting the USMS About Personnel Matters, and Suspends Rodriguez for Disobeying the Directive

Sometime in January 2007, USMS Contracting Officer Varela told Site Supervisor Comas that CSOs were “running” to the USMS to discuss “corporate employee matters,” and that he wanted it stopped. (JA 82; 149.) As a result, on January 23, 2007, James Dolan, the Company’s project manager, issued a directive to the CSOs informing them that they were prohibited from engaging the USMS in

company personnel matters on pain of disciplinary action. In his directive, Dolan asserted that employees directly violate company policy by asking the USMS to intervene in such matters. (JA 82; 128, 131, 142-43, 149, 178.) Dolan charged Comas with distributing the directive to the CSOs. (JA 82; 149, 178.)

On February 5, Varela gave Comas a copy of Rodriguez' letter to the USMS, which Comas forwarded to Human Resources Manager Dina Evans in Virginia. (JA 82; 128-130, 137, 148, 169.) After reviewing Dolan's directive and Rodriguez' letter, Evans instructed Comas to suspend Rodriguez. (JA 83; 130-31, 148, 199.) When Rodriguez arrived at work on February 6, Comas told him he was suspended and handed him a memorandum stating that the suspension was indefinite, "pending an investigation and disposition." (JA 83; 94-95, 148-49, 152, 193.) In a February 12 memo from Dolan to Rodriguez, the Company stated that it was suspending him for violating Dolan's directive and the Company's standards of conduct by sending a letter to the USMS. (JA 83; 131-32, 179.)

E. The Company Interviews and Interrogates Rodriguez About the Letter

On February 14, Rodriguez and his attorney met with three company officials, including Human Resources Manager Evans over the phone, to discuss his suspension. (JA 82; 132, 139-40, 149-50.) When Evans refused to permit Rodriguez' attorney to attend, the meeting ended. The parties made plans to reschedule the meeting when a union representative could accompany Rodriguez.

(JA 82; 132, 140, 150.) In a February 22 letter, Evans directed Rodriguez to report for an interview as part of a company investigation into whether he had violated USMS and company directives by writing a letter to the USMS. (JA 83; 132, 181.) Evans warned that if Rodriguez did not report, the Company would “adjudicate the matter” without his “input.” (JA 83; 181.)

On February 27, Rodriguez, accompanied by CSO Yolanda Alvarez, attended the interview with Site Supervisor Comas, Administrative Assistant Dorcas Parilla, and Manager Edwin Burgos. Evans led the meeting by phone from Virginia. (JA 83; 95, 133, 140-41, 183-85.) At Evans’ direction, Comas presented Rodriguez with copies of the letter that he had sent to the USMS and Dolan’s directive. (JA 83; 96, 109-10, 133, 140, 169.) The letter, however, differed from the original that Rodriguez had prepared: the size of the font was different, and Soto and Barreto’s names were missing. (JA 82-82; 101, 128-30, 144, 158, 169, 192.) Evans asked Rodriguez if he had received Dolan’s directive, but he responded that he did not recall. (JA 83; 133, 140, 143, 228, 255-56.) Comas told Evans that he had given Rodriguez a copy of Dolan’s directive on January 25. (JA 83; 143-46.) Evans then asked Rodriguez if he had seen the letter to the USMS. Rodriguez replied that he did not recall, and asked to speak with his attorney. (JA 83; 96, 101, 102.) Evans told Rodriguez that she was “simply . . . trying to make a determination as to whether he had sent” the letter to the USMS. (JA 86; 133.) At

that point, Rodriguez refused to answer her further questions and left the meeting. (JA 83; 133, 140.) At no time did Evans ask Rodriguez about the substance of the letter's allegations. (JA 133-34.)

F. The Company Terminates Rodriguez Because of His Involvement with the Letter

The Company terminated Rodriguez effective February 27, the day of his interview, and informed him of the action by letter on March 1. (JA 83; 93, 96, 194.) Evans made the final decision, relying on notes taken at the meeting (JA 183-85), the letter to the USMS (JA 169), Dolan's directive (JA 178), Rodriguez' personnel file (to compare signatures), and a sworn statement from Manager Borges (JA 186) that Rodriguez had admitted to writing the letter. (JA 84; 133-35.) Evans did not, however, investigate the truth or falsity of the letter's allegations about labor and contract violations. (JA 86; 135-36, 138-39, 144-45.)

In the March 1 termination letter and an internal change of status form, the Company stated that it was discharging Rodriguez for "communicating directly with the USMS," which allegedly violated USMS and company standards of conduct, and for refusing to answer questions about the letter during the internal investigation. (JA 83, 86; 136, 145, 187, 194.) Neither the USMS "Performance Standards" nor the Company's standards of conduct, however, addressed or prohibited employee contact with the USMS about personnel matters. (JA 82, 171, 173-77.)

The Company's change of status form referred to the letter to the USMS as "defamatory," but at the time of Rodriguez' discharge, Evans claimed to have "no information" that would indicate that the letter's allegations were false. (JA 84; 136, 138-39, 187.) Because Evans did not focus her investigation on determining the truth or falsity of the letter's allegations, she did not uncover Local 72's outstanding unfair labor practice charges and the unresolved employee grievances until much later. (JA 83-84, 86; 144-45.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging Rodriguez because of his participation in sending the letter to the USMS. In so finding, the Board agreed with the judge in rejecting the Company's defense that the letter lost the protection of the Act. (JA 78, 89.) The Board also found, again in agreement with the judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating Rodriguez about his participation in sending the letter. (JA 78, 89.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of

the Act (29 U.S.C. § 157). (JA 78, 89.) Affirmatively, the Board's order directs the Company to reinstate Rodriguez fully to his former position or, if that job no longer exists, to a substantially equivalent position; to remove any reference to the unlawful suspension and discharge from his personnel file; to make him whole for any loss of income or benefits that he suffered as a result of the Company's unlawful actions; and to preserve and produce the information necessary to compute backpay on request. (JA 78, 89.) Finally, the Company must post a remedial notice at its Puerto Rico facility. (JA 78, 89.)

SUMMARY OF THE ARGUMENT

This unfair labor practice case concerns a letter drafted by Marcial Rodriguez, a CSO who was also president of Local 72, the CSOs' collective-bargaining representative, to the USMS, the Company's contracting client, asking for its support in several unresolved labor disputes. The Company responded to Rodriguez' protected activity by suspending, coercively interrogating, and discharging him. The Board reasonably found that by taking those actions, the Company violated Section 8(a)(3) and (1) of the Act.

Substantial evidence supports the Board's finding that the Company suspended and discharged Rodriguez because of his statutorily protected involvement with the letter. The Company primarily defends its actions by asserting that the letter was unrelated to any labor disputes, and was disloyal and

maliciously untrue, and therefore lost the Act's protection. However, the Company's own witnesses admitted, and the documentary evidence shows, that when company officials got rid of Rodriguez, they did not rely on the letter's content. Indeed, those company officials never bothered to verify the letter's allegations; if they had, they would have realized that, as Rodriguez alleged in the letter to the USMS, the Company had long been on the receiving end of a litany of unresolved complaints and charges about a host of matters affecting the CSOs' terms and conditions of employment. Instead, those company officials took action against Rodriguez based on an unlawful company directive prohibiting employees from discussing personnel matters outside the chain of command, and on their coercive interrogation of Rodriguez. Because the Company's stated reasons for suspending and discharging Rodriguez were themselves unlawful, the Company violated Section 8(a)(3) and (1) of the Act by taking those actions.

On review, the Company largely eschews the rationales on which it relied when it suspended and discharged Rodriguez. Instead, the Company puts most of its eggs in the *American Golf* basket, challenging the Board's reasonable finding that the Company failed to meet its burden of showing that the letter's contents lost the protection of the Act. First, the Company erroneously contends that the letter was unrelated to any ongoing labor disputes. The testimonial and documentary evidence of the parties' myriad, longstanding labor disputes is uncontroverted and

practically unassailable. Indeed, the letter on its face referred to those disputes, and they involved the very union officers—including Rodriguez—who signed and mailed the letter.

The Board also reasonably found that the Company failed to meet its burden of proving, under the second prong of the *American Golf* test, that the letter was disloyal and maliciously untrue. As the Board noted, the letter directly concerned the CSOs' terms and conditions of employment, and avoided disparaging the Company's services or making the type of harsh public attack on its reputation that could lose the Act's protection. As the Board further emphasized, the Company failed to establish that the letter's allegations were untrue, much less maliciously so. The record includes significant, uncontroverted evidence documenting the parties' many unresolved labor disputes, as well as Rodriguez' personal involvement in pressing many of the CSOs' grievances. On this record, the Board reasonably found that Rodriguez had a good faith basis for alleging in the letter that the Company had failed to meet its contractual and statutory obligations to its employees. Thus, substantial evidence supports the Board's determination that the letter never lost the Act's protection, and the Company's suspension and discharge of Rodriguez were therefore unlawful.

The Board also reasonably found that the Company violated Section 8(a)(1) of the Act by coercively interrogating Rodriguez about the letter. The undisputed,

mutually corroborative testimony of the participating witnesses establishes that high-ranking company officials questioned Rodriguez under circumstances that reasonably tended to be coercive: those officials had just suspended Rodriguez, and, far from giving him assurances against reprisals, they had told him that they would hold his refusal to participate in the “investigation” against him. On this record, the Board reasonably found that the interrogation was unlawful.

STANDARD OF REVIEW

This Court’s review of the Board’s unfair labor practice determinations is “quite narrow.” *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Board’s interpretation of the Act is given great deference because of its “special competence in the field of labor relations.” *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 100 (1985). Thus, the Board’s judgment will be affirmed unless it “acted arbitrarily or otherwise erred in applying established law.” *Int’l Union of Electronic, Elec., Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1536 (D.C. Cir.1994) (internal quotations and citations omitted).

The Board’s fact findings are conclusive so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Review under the substantial evidence standard is limited and “highly deferential.” *Capital Cleaning*

Contractors, Inc. v NLRB, 147 F.3d 999, 1004 (D.C. Cir. 1998). A reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. The Court will not “reverse the Board’s adoption of an ALJ’s credibility determinations unless . . . those determinations are ‘hopelessly incredible,’ ‘self contradictory,’ or ‘patently unsupportable.’” *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d at 1004). *Accord Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1281 (D.C. Cir. 1990).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND 8(a)(1) OF THE ACT BY SUSPENDING AND DISCHARGING RODRIGUEZ FOR SENDING A LETTER TO THE USMS ALLEGING LABOR AND CONTRACT PROBLEMS

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Discriminating Against Employees for Engaging in Protected, Concerted Union Activities

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in protected, concerted activities, not only for the purposes of “self-organization” and “collective bargaining,” but also “for the purpose of . . . other mutual aid or protection.” To make that guarantee effective, Congress enacted

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7,” and Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), which prohibits discrimination “in regard to hire or tenure of employment or any other term or condition of employment to . . . discourage membership in any labor organization.” Accordingly, it is well settled that an employer violates 8(a)(3) and (1) of the Act by suspending and discharging an employee for participating in protected concerted union activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Schaeff Inc.*, 113 F.3d 264, 266-267 (D.C. Cir. 1997); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2000).

As the Supreme Court recognized in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1967), “labor’s cause often is advanced on fronts other than [those] within the immediate employment context.” Consequently, it found “no warrant for [the] view that employees lose their protection . . . when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Id.* Thus, it is settled that employees’ right to engage in concerted activities for “other mutual aid or protection” includes the right to appeal to third parties for support in a dispute with an employer. *See, e.g., NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982); *Misericordia Hosp. Medical Center v. NLRB*, 623 F.2d 808,

813 (2d Cir. 1980) (employees' submission of critical report to accreditation committee was "for mutual aid and protection" because it raised "issues directly related to employee working conditions" (citation omitted)); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007) (employee's appeals for public support in a newspaper article were protected). This principle entitles employees to solicit support, as Rodriguez did here, even from their employer's clients during labor disputes. *See, e.g., Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 53 (1st Cir. 2008) (employees wrote letters raising employment-related concerns to the employer's contracting client); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995) (employer could not prohibit employees from discussing their complaints and unionization problems with clients), *enforced*, 95 F.3d 681 (8th Cir. 1996).

The right to appeal to third parties, however, is not without limits. Employees may engage in otherwise protected concerted activity in such an abusive manner that it loses the protection of the Act. In the seminal case in this area, *NLRB v. Int'l Brotherhood of Elec. Workers, Local 1229* ("*Jefferson Standard*"), 346 U.S. 464, 466-67, 476 (1953), the Court upheld the Board's denial of reinstatement to broadcasting technicians who, during a dispute over their employer's discharge of several employees, distributed handbills to the public disparaging the quality of their employer's programming, but making no mention of the labor dispute. *Id.* The handbills in *Jefferson Standard*, however, were

unlike Rodriguez' letter here because they made no reference to the union or the ongoing labor controversies between the union and the employer. Instead, as the Court found, the handbills in *Jefferson Standard* (unlike the letter here) "attacked public policies of the Company" on matters "which had no discernible relation to [the labor] controversy." *Id.* at 476-77.⁴

Consistent with the principles articulated in *Jefferson Standard*, the Board, with this Court's approval, has established a two-part test, under which a communication to a third party that criticizes an employer remains protected by the Act if it is (1) related to an ongoing labor dispute, and (2) "not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *American Golf Corp.*, 330 NLRB 1238, 1240 (2000), *affirmed sub nom. Jensen v. NLRB*, 86 Fed Appx. 305 (9th Cir. 2004). *Accord Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006) (noting that "the Board's formulation accurately reflects the holding in *Jefferson Standard*").

In applying this test, the Board and the reviewing courts bear in mind that not every action that harms an employer, and which could therefore be characterized as "disloyal" in a broad sense, is unprotected, else the Act's

⁴ The handbills in question attacked the broadcaster's policies with regard to "finance and public relations," complaining that the station only aired dated programs, failed to carry local programming such as sports broadcasts because the employer failed to invest in "proper equipment," and suggesting that management "consider[s] Charlotte a second-class community and only entitled to the pictures now being presented to them." *Id.* at 473.

protections would prove illusory. *See, e.g., Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000) (“[T]he fact that an employee’s actions may cause some harm to the employer does not alone render them disloyal.”); *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976) (“[C]oncerted activity that is otherwise proper does not lose its protected status merely because it is prejudicial to the employer.”). This is so because if employees “are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers’ undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.” *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989).

The determination of whether otherwise protected activity loses its protection is fact-specific, focusing on whether the conduct is reasonable and proportional in light of the particulars of the labor dispute. And, on that score, it is settled that the “primary responsibility for drawing the line between protected and unprotected activity falls on the Board.” *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982). *Accord Five Star Transport., Inc.*, 522 F.3d 46, 54 (1st Cir. 2008); *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983) (“We will not reposition a line drawn by the Board between protected and unprotected behavior unless the Board’s line is ‘illogical or arbitrary.’”).

As the Board found (JA 88 n.18), the Company has never disputed that Local 72 President Rodriguez' involvement in sending a letter to the USMS constituted concerted and union activity. Before this Court, however, the Company primarily adopts the strategy that it attempted without success before the judge and the Board, asserting once again (Br 30-32) that it was entitled to suspend and discharge Rodriguez because the letter was defamatory and therefore lost the Act's protection. The Company recognizes (Br 19) that *American Golf's* two-part test governs its claim. First, the Company—ignoring the letter's plain language and uncontroverted evidence of the numerous labor-related complaints lodged by Local 72 and USCSO against the Company—professes that Rodriguez' letter to the USMS was unrelated to any labor disputes. Second, the Company—ignoring uncontroverted testimony by Rodriguez and two other union officials, as well as documentary evidence, outlining the many unresolved complaints of contract violations that they had registered with the Company over a period of years—asserts that the letter's allegations were maliciously untrue. We show below, however, that the Board reasonably found that the Company utterly failed to meet its burden of proving those assertions. Its affirmative defense that the letter lost the Act's protection therefore fails.

As we also show (pp.43-45), the Company's own documentation squarely supports the Board's finding (JA 86, 88) that the Company suspended and

discharged Rodriguez for directly communicating with the USMS by sending the letter. We further show (pp. 43-46) that the reasons given by company officials at the time of Rodriguez' suspension and discharge were themselves proscribed by the Act. Accordingly, the Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Rodriguez for his protected concerted and union activity.

B. The Company Failed To Meet Its Burden of Showing that the Letter Lost the Act's Protection

1. The letter to the USMS was related to an ongoing labor dispute with the Company

Contrary to the Company's protestations (Br 19-23), the Board reasonably found that the letter was "part of and relate[d] to, a number of longstanding labor disputes" between the parties." (JA 85.) The Company knew full well that it was, because it was on the receiving end of the many grievances, unfair labor practice charges, and information requests lodged by Local 72 President Rodriguez and other union officers. The Company cannot seriously deny that there were labor disputes or that Rodriguez had knowledge of them, because it was Rodriguez himself who consistently brought them to the Company's attention. The record contains substantial and uncontroverted evidence of ongoing labor-related controversies, all of which fall within the notably broad definition of "labor

disputes” under the Act. *See* 29 U.S.C. § 152(9) (defining a labor dispute to include “any controversy concerning terms, tenure, or conditions of employment”).

Rodriguez and other union officers testified that, pursuant to the first step of the grievance process, they repeatedly brought employee complaints about working conditions to Site Supervisor Comas’ attention. They raised concerns about violations of the parties’ Agreement, such as unexplained payroll deductions, pay issues, seniority, and leave balances. (JA 108, 114-15, 151, 157-59, 164-65, 218-23.) These controversies over terms and conditions of employment are plainly “labor disputes” under the Act. *See Emarco, Inc.*, 284 NLRB 832, 833 (1987) (“labor disputes” include individual complaints to an employer). So were the two unfair labor practice charges filed by Local 72 President Rodriguez and Vice President Soto against the Company, and pending at the time that the letter was written. (JA 101, 108, 123, 168.) Site Supervisor Comas’ testimony confirms that Rodriguez had personally raised many of these concerns with him over the years and had given him Local 72’s initial information request, which he forwarded to the Company’s headquarters. (JA 151, 221.)

The Board reasonably found (JA 85) that Rodriguez’ letter was, on its face, an appeal for USMS assistance and protection in connection with these labor disputes. In the letter, Rodriguez alleged that the Company had violated the parties’ Agreement and its contract with the USMS, which incorporated key terms

of the Agreement and affected the CSOs' terms and conditions of employment. (JA 192.) Rodriguez further alleged violations of the labor laws, and claimed that the Company had "forgot[ten]" employees' right to bargain for benefits and protection. *Id.* Rodriguez concluded the letter with a plea for "protection," and asked the USMS to investigate the matter, since the Company had "done nothing to eliminate and correct the wrong doings of its staff." *Id.* The Board reasonably determined (JA 85) that these allegations and pleas for assistance were a response to the numerous ongoing labor disputes and, therefore, treated them as a protected appeal to the USMS "for the purpose of improving the 'lot' of employees."

Because the Company cannot dispute the Board's finding (JA 79-81) that there were ongoing labor disputes, it dances around the issue by asserting (Br 19) that the letter was unrelated to the parties' labor disputes simply because it did not describe the disputes specifically. This argument is a non-starter because "specificity and/or articulation are not the touchstone" for the Board's determination that an employee's statements are protected under the Act. *Springfield Library and Museum Ass'n.*, 238 NLRB 1673, 1673 (1979). To fall within the Act's protection, a plea for third-party assistance need not be a "carbon copy" of complaints raised directly with the employer; rather the plea is protected as long as it is "*part of and related to the ongoing labor dispute.*" *Allied Aviation Serv. Co.*, 248 NLRB 229, 231 (1980) (emphasis in original), *enforced mem.*, 636

F.2d 1210 (3d Cir. 1980). *Accord Five Star Transport, Inc. v. NLRB*, 522 F.3d 46, 53 (1st Cir. 2008) (communications that put the third party “on notice that there existed an ongoing labor dispute” were protected); *NLRB v. Greyhound Lines Inc.*, 660 F.2d 354 (8th Cir. 1981). *See also Endicott Interconnect Techs.*, 345 NLRB 448, 450 (2005) (article with enough information for an “ordinary reader to understand that a controversy involving employment is at issue” was part of the labor dispute), *rev’d on other grounds*, 453 F.3d 532 (D.C. Cir. 2006).

Although the letter described the Company’s misconduct in broad terms, it plainly concerned labor relations. The letter mentioned the Company’s violation of the Agreement and the labor laws, and its threats to discipline employees who complained about those breaches. Testimony by all three union officials verifies the disputes mentioned in the letter. Further, Local 72 President Rodriguez’ testimony on this matter was not only uncontroverted; it was corroborated by the detailed testimony of Local 72 Vice President Soto (JA 114-23) and Delegate Barreto (JA 157-59, 165-68). The Board therefore reasonably determined (JA 85) that the letter was related to the parties’ ongoing labor disputes.

The Company errs in asserting (Br 22) that Rodriguez “could not identify any disputes between the parties.” The testimony that the Company selectively excerpts (Br 19-22) shows little more than Rodriguez’ difficulty recalling, at a hearing more than 10 months later, individual names and dates of specific disputes.

Contrary to the Company's suggestion, this testimony does not establish that he was unaware of the parties' labor disputes at the time he drafted the letter. The Company (Br 22) also ignores Rodriguez' uncontroverted testimony about Local 72's ongoing disputes with the Company, including his protests about the Company's decision to withhold dues for Local 72 after USCSO became the employees' representative (JA 98-99), and a host of contract violations. *See, e.g.*, JA 102, 104-05, 108 (complaining about the Company's breach of contractual leave and vacation policies, leave statement provisions, and seniority, grievance, probationary period provisions); JA 103-05 (complaining about the Company's failure to fill vacancies, which forced CSOs to work overtime shifts); JA 110 (complaining about the Company's improper hiring of a CSO who was not fluent in English). The Company also overlooks Rodriguez' further testimony that it harassed and disciplined union officers including himself and Soto, as well as CSOs Barela, Padilla, Pena and Salgado. (JA 105-09.)

As Rodriguez also testified, the Company was unresponsive to the grievances that he lodged with Site Supervisor Comas, and to the repeated requests for information needed by Local 72 and USCSO to investigate employee complaints and negotiate a new contract. (JA 105, 108, 111.) Documentary evidence, including the unfair labor practice charge (JA 195-97) and letters to the Company (JA 198, 218-21), all signed by Rodriguez, support his testimony. Given

this evidence, it is of no moment that Rodriguez had difficulty recalling specific names and dates at the hearing. The Company presented no countervailing evidence to show that these issues were no longer in dispute when Rodriguez wrote the letter. Accordingly, the Board reasonably found (JA 88) that Rodriguez' letter to the USMS was related to the parties' ongoing labor disputes.

2. The Company failed to prove that Rodriguez' involvement with the letter was disloyal

Substantial evidence supports the Board's further finding (JA 86) that the letter retained its protected character as an "attempt to improve the lot of employees," notwithstanding its criticism of the Company. A communication can lose the protection of the Act if it appeals to an employer's contracting client in a way that disparages the quality of its services or undermines its reputation. *Five Star Transport., Inc.* 349 NLRB 42, 45-46 (2007), *enforced*, 522 F.3d 46 (1st Cir. 2008) (citing *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978)). On the other hand, employee criticism is protected if it "concern[s] primarily working conditions and . . . avoids needlessly tarnishing the [employer's] image." *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982). *See also NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (distinguishing *Jefferson Standard* on the ground that employee disloyalty in that case was "unnecessary to effectuate the employees' lawful aims"). Because the letter here was, as the Board reasonably

found (JA 86), “an attempt to improve the lot of employees, not harm the Respondent,” it did not lose the Act’s protection.

The Company’s selective misreading (Br 23-24) of the letter as a criticism of its services misses the mark. Contrary to the Company’s suggestion, the letter reassured the USMS that by contracting with the Company, it had found the “highly qualified individuals” it sought in the private sector, and that CSOs were “highly skill[ed]” employees who took “pride in protecting the Federal Enclave.” (JA 192.) Moreover, the letter’s allegation that the Company had breached its contract with the USMS was directly related to the CSOs’ terms and conditions of employment, given the USMS contract’s incorporation of collectively-bargained terms. Thus, the Board reasonably found (D&O 8-9) that the letter was neither disloyal nor disparaging of the Company’s services, but was “closely tied to working conditions and intended to force the Company to take [employee and union] complaints . . . seriously.”

The Company also errs in contending (Br 24-25) that the letter’s request for the USMS to investigate the Company’s performance before permitting it to bid on further contracts was “inherently disloyal” and “opposed to the Company’s business interests.” The performance that the letter asked the USMS to investigate concerned the Company’s alleged mistreatment of employees. And, as the courts have recognized, “concerted activity that is otherwise proper does not lose its

protected status simply because it is prejudicial to the employer.” *NLRB v. Circle Bindery*, 536 F.2d 447, 452 (1st Cir. 1976) (even if employee “pressed matters to the point of causing some harm to his employer’s business,” his activity remained protected); *accord Mohave Electric Cooperative, Inc. v. NLRB*, 206 F.3d 1183, 1189-90 (D.C. Cir. 2000) (employees filing a protective injunction were not disloyal, even though the injunction would interfere with employer’s relationship with its contracting client); *Allied Aviation Serv. Co.*, 248 NLRB 229, 231 (1980) (employee’s right to appeal for support is “not dependent on the sensitivity of the [employer] to his choice of forum”), *enforced mem.*, 636 F.2d 1210 (3d Cir. 1980). Thus, even if the letter could have affected the Company’s contracting relationship with the USMS, it was not “inherently disloyal.”

The Company errs (Br 25) in relying on *Endicott Interconnect Tech., Inc. v. NLRB*, 453 F.3d 532, 534 (D.C. Cir. 2006), a factually distinguishable case. There, the employee was quoted in a newspaper article as saying that company layoffs during a business transition had caused “gaping holes” in the business and “voids in the critical knowledge base for the highly technical business.” *Id.* at 534. Later, the employee wrote a web-post on the newspaper’s internet forum claiming that the business was being “tanked” by people with “no good ability to manage,” causing the business to be “put in the dirt.” *Id.* at 534-35. The Court found these comments to constitute a “sharp, public, disparaging attack” on the employer’s

business. *Id.* at 538 (quoting *Jefferson Standard*, 346 U.S. at 471). In contrast, Rodriguez made a limited, direct appeal to the USMS that solely concerned the CSOs' terms and conditions of employment. (JA 192.) Further, unlike the negative publicity at issue in *Endicott*, the letter here related to unfair treatment of CSOs, not poor security service or bad business management. Thus, the case actually supports the Board's decision here by highlighting the differences between truly disparaging and unprotected remarks and Rodriguez' protected appeal. The Board therefore reasonably found (JA 86) that the Company failed to meet its burden of showing that the letter lost the Act's protection.

3. The Company failed to prove that the letter was maliciously untrue

A third party communication can lose the protection of the Act if it is maliciously untrue, meaning that it was written "with knowledge that it was false or with reckless disregard of whether it was false or not." *Joliff v. NLRB*, 513 F.3d 600, 609 (6th Cir. 2008) (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)); accord *Valley Hosp. Medical Ctr.*, 351 NLRB 1250, 1252 (2007). On review, the Company essentially argues (Br 28-29) that the lack of detail in Rodriguez' testimony shows that he sent the letter "with reckless disregard" for its truth or falsity. As the Board reasonably found (JA 88), however, the Company failed to show that the statements in the letter were untrue, much less "maliciously untrue." *Springfield Library & Museum*, 238 NLRB 1673, 1673 (1979) (employer

has burden of proving statements were maliciously untrue); *American Hosp. Ass'n.*, 230 NLRB 54, 56 (1977) (same).

The Company is wrong to suggest (Br 28-29) that Rodriguez' uncertain recollection of details some 10 months after the events in question established that he acted recklessly at the time that he drafted the letter. To the contrary, as shown above (pp. 29-30), the record strongly supports—through the uncontroverted and mutually corroborative testimony of Rodriguez, Soto, and Barreto, the supporting documentary evidence, and Site Supervisor Comas' admissions—the Board's finding (JA 88) that Rodriguez "had knowledge supporting a good faith belief in the truth of the allegations." The Company did not present any evidence in rebuttal, much less affirmatively prove malice on Rodriguez' part.⁵ Thus, the Board reasonably found (JA 86-88) that the Company failed to meet its burden of proving that the allegations in Rodriguez' letter were untrue, let alone maliciously untrue.

Contrary to the Company's suggestion (Br 37), there was much more to the letter than a mere "fortuity of the coexistence of a labor dispute" about which Rodriguez assertedly knew nothing. The record—which includes Rodriguez' uncontroverted testimony, corroborated by documentary evidence and the

⁵ In any event, as the administrative law judge observed (JA 79), the evidence did not need to establish that the Company actually engaged in misconduct, only that Rodriguez believed in good faith that there were ongoing labor disputes.

testimony of two other union officials—establishes that Rodriguez not only knew about the parties’ labor disputes but directly participated in pressing union complaints. As outlined above pp. 5-10, Rodriguez’ testimony was that as Local 72’s President, he received complaints directly from employees, brought grievances to the Company’s management, reviewed Local 72’s mail, collaborated on the correspondence between Local 72 and the Company, and brought unfair labor practice charges against the Company. The Company can hardly claim that Rodriguez acted recklessly in basing his claims on information from other employees and union officers. *See Valley Hosp.*, 351 NLRB 1250, 1251-52 (2007) (“Where an employee relays in good faith what he or she has been told by another employee, reasonably believing the report to be true, the fact that the report may have been inaccurate does not remove the relayed remark from the protection of the Act”); *KBO, Inc.*, 315 NLRB 570, 571 (1994) (same).

For example, Rodriguez testified that he believed that the Company breached the Agreement’s seniority provision, and Site Supervisor Comas confirmed that Rodriguez had raised that concern with him. (JA 104-05, 151.) Furthermore, Comas recalled that Rodriguez had made complaints about the Company’s mishandling of sick and annual leave balance postings and its refusal to furnish information requested by Local 72. (JA 151.) Indeed, the record includes the information request addressed to Comas and the unfair labor practice

charge that Local 72 filed—both signed by Rodriguez. (JA 196, 221.) Thus, the Company cannot seriously take issue with Rodriguez’ knowledge of the disputes because it admittedly received grievances directly from him in his capacity as Local 72’s president. In these circumstances, the Company hardly met its burden of showing that Rodriguez wrote the letter with a “high degree of awareness of probable falsity.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1960) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

Soto and Barreto’s undisputed and mutually corroborative testimony further supports Rodriguez’ testimony that he knew about the parties’ ongoing labor disputes. Soto testified that he and Rodriguez discussed labor problems and letters that Local 72 sent to the Company. (JA 114-15, 121.) Barreto also recalled times that he had discussed with Rodriguez concerns such as Local 72’s information requests, the Company’s unexplained payroll deductions, and its failure to inform employees of their leave balances. (JA 158-60.) Both witnesses’ testimony also supports Rodriguez’ testimony about the parties’ disputes over other matters such as the Company’s breaches of the Agreement (JA 114-15, 159, 164), and its discipline and harassment of union officers (JA 121, 161-62, 166-67). Given this evidence, the Board reasonably found that Rodriguez had a good faith basis for writing the letter.

Contrary to the Company (Br 35-36), the judge properly relied on Soto and Barreto's testimony (JA 87) because it corroborated the ongoing nature of the labor disputes that Rodriguez mentioned in his letter. Rodriguez passed the letter on to Soto and Barreto so that they could sign it, and he believed that Barreto would "take care of it." (JA 93.) Given the fact that Soto signed the letter and Barreto mailed it (JA 158, 163), their knowledge of the parties' labor disputes further establishes that the letter was sent good faith. Thus, the judge properly relied (JA 87) on Soto and Barreto's testimony in concluding that the letter's allegations were not made with reckless disregard for their truth or falsity.

4. After the court reporter lost Barreto's testimony, the judge reasonably permitted it to be retaken

Contrary to the Company (Br 38-39), the administrative law judge reasonably allowed the testimony of Barreto to be retaken after the court reporter irretrievably lost nearly all of it. (JA 78 n.1.) Although the Company objected (JA 155), arguing that Barreto might change his testimony if it was retaken, the judge reasonably disagreed, noting that the Company's claim was entirely speculative. (JA 78 n.1.) Furthermore, the judge determined that any possible harm to the integrity of the record caused by the retaking of Barreto's testimony was outweighed by the harm that would necessarily result from excluding it. Thus, "in the interests of creating a complete record, and due process," the judge properly

exercised his discretion by permitting Barreto—“a significant witness”—to re-testify. (JA 78 n.1.)

Precedent supports the judge’s ruling. Although the situation is uncommon, the Board has allowed the retaking of testimony under similar circumstances. *See, e.g., Kentucky River Med. Ctr.*, 340 NLRB 536, 549 n.21 (2003) (witnesses recalled to repeat portions of testimony that was lost when court reporter lost recordings); *accord BI-LO*, 303 NLRB 749, 753 n.7 (1991) (witness was recalled after reporter failed to record a portion of her testimony and then recalled a third time after those tapes were lost in an airplane crash).

On review, the Company (Br 38-39) asks the Court to disregard Barreto’s testimony. The Company, however, has failed to directly allege, let alone prove, that the judge abused his discretion in permitting Barreto’s testimony to be retaken.⁶ Moreover, the Company fails to allege any specific instance in which its cross-examination of Barreto was rendered less effective because of the judge’s ruling. In explaining his ruling, the judge noted (JA 78 n.1) that Barreto was seeking no remedy, and that the substance of his testimony was generally not disputed by the Company’s witnesses. The judge further noted (JA 78 n.1) that

⁶ *See* 29 C.F.R. §§ 102.34, 102.35 (administrative law judge’s authority includes regulation of the course of Board hearings, receiving relevant evidence, and ordering hearings reopened); *NLRB v. Bryant Mfg. Co.*, 196 F.2d 477, 478 (7th Cir. 1952) (extent of examination of witnesses allowed in the hearing is within judge’s discretion and is reviewed for abuse of discretion) (citing *Bethlehem Steel Co.*, 120 F.2d 641 (D.C. Cir. 1941)).

Barreto was a current employee of the Company when he testified; this fact rendered even more speculative the Company's claim that he would alter his testimony. *See Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (testimony of current employee which is adverse to the employer is "given at considerable risk of economic reprisal" and therefore unlikely to be false).

Although the Company speculates (Br 38) that Barreto "undoubtedly" changed his testimony when it was retaken, the Company failed to allege any specific instances.⁷ In sum, the Company failed to meet its burden of showing that the judge abused his discretion by permitting Barreto's lost testimony to be retaken. Accordingly, the judge and the Board appropriately relied (JA 78 n.1) on Barreto's "generally undisputed" testimony to corroborate Rodriguez' testimony about his involvement in the parties' longstanding labor disputes.

C. The Company Unlawfully Suspended and Terminated Rodriguez Because of His Involvement in Sending the Letter

Substantial evidence supports the Board's finding (JA 88-89) that the Company unlawfully suspended and discharged Rodriguez because of his letter to the USMS. As the record shows, Project Manager Dolan informed Rodriguez in a

⁷ The Company takes its meritless argument a step further by asserting (Br 38) that the General Counsel pursued a new line of questioning when Barreto's testimony was retaken. The General Counsel disputed this claim, relying on her notes from the first hearing. (JA 158.) Although company counsel also had notes from the first hearing, he admitted that they were incomplete. (JA 155, 158.) Accordingly, the judge reasonably resolved the dispute in the General Counsel's favor. (JA 158.)

February 12 memorandum that he had been suspended for sending the letter to the USMS. (JA 179.) In addition, Human Resources Manager Evans' March 1 letter squarely states that Rodriguez was discharged for "communicating directly with the USMS." (JA 194.) And, as we have just shown, Rodriguez' communication with the USMS constituted protected concerted and union activity. Accordingly, the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Rodriguez.

Evans' letter and the Company's other documentation also faulted Rodriguez for violating the chain-of-command directive prohibiting employees from communicating with the USMS. (JA 132, 179, 187, 194, 199.) As the Board reasonably found (JA 88), however, "that prohibition was itself invalid." It is settled that an employer may not require that employees "take all work-related concerns through a specific internal process." *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1254; *see also Guardsmark LLC v. NLRB*, 475 F.3d 369, 365-66 (D.C. Cir. 2007) (rule that forbade employees to "register complaints with any representative of the client" was unlawful). Accordingly, the Company cannot rely on its chain-of-command rule as a ground for suspending and discharging Rodriguez. *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001) (disciplinary action is unlawful if it is taken pursuant to a rule that itself violates the Act). Indeed, the Company has now abandoned its reliance on that rule.

The Company's internal documentation also faulted Rodriguez for refusing to answer the Company's questions on February 27. (JA 145, 187, 194.) As we show below, the Company's questions constituted an unlawful interrogation. To the extent that Rodriguez' refusal to answer the Company's unlawfully coercive questions during the interrogation played a part in his discharge, the discharge was also unlawful. *See United Services Automobile Assn.*, 340 NLRB 784, 794 (2003), *enforced*, 387 F.3d 908 (D.C. Cir. 2004) (because employees have no obligation to respond during a coercive interrogation, their failure to do so is not a lawful reason for discharge); *accord Hertz Corp.*, 316 NLRB 672, 692 (1995). Therefore, the Board reasonably found that the Company could not take action against Rodriguez based on his refusal to participate in the unlawful interrogation.

The Company argues (Br 30-31) that it suspended and discharged Rodriguez, not for the act of sending the letter, as its internal documentation squarely states, but because the letter's contents allegedly were defamatory. The Company does not benefit from relying on this claim, belatedly made by Human Resources Manager Evans at the unfair labor practice hearing, because the judge reasonably discredited (JA 86) her assertion, and relied instead on her testimony showing that she focused only on whether Rodriguez had sent the letter to the USMS, "not whether the allegations in the letter were true or false."

In any event, as shown above (pp. 34-38), the Board reasonably found that the Company failed to meet its burden of proving that the letter's contents were false, much less made with a reckless disregard for their truth or falsity. The Company therefore cannot rely on Evans' discredited assertion (JA 136) that she discharged Rodriguez because the letter's contents were defamatory.⁸ Thus, the Board reasonably determined (JA 88) that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging Rodriguez for his participation in sending the letter.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING RODRIGUEZ ABOUT HIS INVOLVEMENT IN SENDING THE LETTER

A. An Employer Violates Section 8(a)(1) of the Act by Coercively Interrogating Employees

It is settled that an employer's interrogation of employees about their protected, concerted activities violates Section 8(a)(1) of the Act if it "tends to restrain, coerce, or interfere" with those activities. *United Services Auto Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (citing *Perdue Farms Inc. v. NLRB*, 144

⁸ Evans was unable to provide any evidence to support her assertion that the letter's contents were defamatory. Her supposed "investigation" consisted solely of questioning Rodriguez whether he had authored the letter—not whether its contents were false. (JA 133.) When pressed at the hearing about why she thought the letter's allegations were inaccurate, she made only a passing remark about her "understanding from the people [she] spoke to that there was nothing outstanding." (JA 84, n.14; 144-45.)

F.3d 830, 835 (D.C. Cir. 1998)). In determining whether an interrogation is unlawfully coercive, the Board considers the “totality of circumstances,” taking into account factors such as (1) whether there were proper assurances against reprisal, (2) the background and timing of the interrogation, (3) the nature of the information sought, (4) the identity of the questioner, and (5) the place and method of interrogation. *See Millard Refrigerated Services*, 345 NLRB 1143, 1146 (2005) (the “totality of circumstances,” including employer’s assurances against reprisal, are considered); *Rossmore House*, 269 NLRB 1176, 1177-78 (1984) (all relevant factors are considered, but not mechanically applied), *enforced sub nom. Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *accord Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835-36 (D.C. Cir. 1998). As we now show, the Board, applying the *Rossmore House* factors noted above, reasonably found (JA 78, 88) that the Company’s interview of Rodriguez on February 27, which it conducted after suspending him, constituted a coercive interrogation.

B. The Company Unlawfully Interrogated Rodriguez

Substantial evidence supports the Board’s determination (JA 88) that on February 27, company officials unlawfully interrogated Rodriguez about his involvement in sending the letter to the USMS. The Company described the interview as part of its “internal investigation into the allegations” that Rodriguez

had violated its directives. (JA 181.) As Human Resources Manager Evans explained to Rodriguez during the interview (JA 133), the Company was trying to determine if it was Rodriguez who had sent the letter. As shown above, Rodriguez' action—contacting the USMS to alert it to labor and contract disputes—was protected under the Act. As the Board found (JA 88), an employer may not interrogate employees about their involvement in protected activities. *See United Services Auto Ass'n v. NLRB*, 387 F.3d at 915-16 (employer questioned an employee to identify the employees involved in the protected activity of distributing fliers critical of the employer); *Foamex*, 315 NLRB 858, 858 (1994) (employer questioned individual employees to verify their signatures on a protected group letter).

Further, the Board reasonably determined that under the circumstances, the Company's questioning of Rodriguez was coercive. Human Resources Manager Evans, a high ranking official of the Company from Virginia, conducted the questioning, along with two of the Company's Puerto Rico managers, in a manager's office. (JA 132-33.) *See Perdue Farms, Inc. v. NLRB*, 144 F.3d at 835 (questioner was a high level human resources manager from out-of-state headquarters). The timing and circumstances of the meeting were coercive because Evans had just suspended Rodriguez. Thus, his future at the Company was precarious and subject to the outcome of Evans' "investigation." Furthermore,

the Company made no assurances that the interview would not result in further reprisals. To the contrary, the Company warned Rodriguez by letter that if he did not participate in the investigation, it would “adjudicate the matter” without his input (JA 181).⁹

The Company contends (Br 34-35) that it did not violate the Act because its officials asked “no substantive questions” about the letter’s contents. To the contrary, Evans’ attempts to determine if Rodriguez had engaged in the protected action of writing the letter are the very kind of “substantive questions” prohibited by the Act. *See United Services Auto Ass’n v. NLRB*, 387 F.3d 908, 915-16 (D.C. Cir. 2004). In sum, on this record, including Administrative Assistant Parilla’s uncontroverted testimony that “the questioning just [kept] going on” until Rodriguez terminated the interview by leaving (JA 140), the Board reasonably found (JA 78, 88) that the Company violated Section 8(a)(1) of the Act by questioning Rodriguez to determine if he had authored the letter to the USMS.

⁹ Rodriguez’s reticence, moreover, bolsters the Board’s finding that the interview was coercive. His evasive answers of “I don’t know” or “I don’t recall” (JA 102, 140, 151), and his refusal to answer further questions without speaking to his attorney, support an inference of coercion. *See Midwest Reg. Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977) (employee hedged in his responses to management, indicating the employee’s fear of reprisal).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and granting the Board's cross-application for enforcement in full.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

M.V.M., INC)
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)
)
 v.) Board Case No.
) 24-CA-10681
 NATIONAL LABOR RELATIONS BOARD)
)
 Respondent/Cross-Petitioner)
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,967 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 13th day of March 2009

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CERTIFICATE OF SERVICE

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

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