**ORAL ARGUMENT NOT YET SCHEDULED**

# 08-17080-DD, 09-10537-DD

## UNITED STATES COURT OF APPEALS
## FOR THE ELEVENTH CIRCUIT

**MORSE OPERATIONS, INC. d/b/a SAWGRASS AUTO MALL AND d/b/a ED MORSE CHEVROLET.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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# BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**UNITED STATES COURT OF APPEALS**
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| **Petitioner/Cross-Respondent** | ) | **No. 08-17080-D** |
| **v.** | ) | |
| **NATIONAL LABOR RELATIONS BOARD** | ) | **Board Case Nos. 12-CA-25466, 12-CA-25478, 12-CA-25493, 12-CA-25674** |
| **Respondent/Cross-Petitioner** | ) | |

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of this Court's Rules, the Respondent/Cross-Petitioner, the National Labor Relations Board ("the Board"), by and through the undersigned Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Beck, Allison, General Counsel for the Charging Party
2. Broido, Julie, Board Counsel
3. Byrne, Mike, Operations Director for Petitioner
4. Cates, William N., Administrative Law Judge

5. Cornnell, Fred, Board Counsel

6. Devitt, Michelle, Board Counsel

7. Dreeben, Linda, Deputy Associate General Counsel for the Board

8. Higgins, John, Deputy General Counsel for the Board

9. International Association of Machinists and Aerospace Workers, USA-CIO, Charging Party

10. Kentov, Rochelle, Regional Director for Region 12

11. Liebman, Wilma B., Board Member

12. Maldonado, Marinelly, Regional Office Trial Attorney for the Board's General Counsel

13. Meisburg, Ronald, General Counsel for the Board

14. Morse Operations, Inc., d/b/a Sawgrass Auto Mall and d/b/a Ed Morse Chevrolet, Petitioner

15. National Labor Relations Board, Respondent

16. Ohanesian, Nicholas, Regional Office Trial Attorney for the Board's General Counsel

17. Porter, Dave, Organizer for the Charging Party

18. Rickenbacker, Denise C., Compliance Officer for Region 12

19. Robinson, Craig, Discriminatee

20. Rosenfeld, Stuart A., Counsel for Petitioner

21. Schaumber, Peter C., Board Chariman

22. Smith, Jeffery M., Counsel for the Charging Party

/s/Linda Dreeben

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Dated at Washington, D.C.
this 8th day of May, 2009

## TABLE OF CONTENTS

**Headings** **Page(s)**

**Headings-Cont'd** **Page(s)**

**Headings-Cont'd** **Page(s)**

## TABLE OF AUTHORITIES



---

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

**Cases--Cont'd** **Page(s)**



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

**Cases--Cont'd** **Page(s)**



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**Cases--Cont'd** **Page(s)**



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

**Cases--Cont'd** **Page(s)**



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

# TABLE OF AUTHORITIES

## Statues

### National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)



## Other Authorities:

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Nos. 08-17080-DD & 09-10537-DD

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MORSE OPERATIONS, INC. d/b/a SAWGRASS AUTO MALL
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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Morse Operations, Inc. d/b/a Sawgrass Auto Mall and d/b/a Ed Morse Chevrolet ("the Company") to review a decision and order of the National Labor Relations Board ("the Board"), issued

October 30, 2008, and reported at 353 NLRB No. 40 (2008). (D&O 1-13.)[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. The Board submits that this Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because 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)), and the underlying unfair labor practices occurred in the state of Florida, where the Company operates.[2] (D&O 4; Complaint ¶2(a) (GCX 1(v)), Answer ¶2(a) (GCX 1(x).)

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[1] "D&O" refers to the consecutively paginated decisions of the Board and the administrative law judge, which can be found at Volume III, Document 8 of the record. "Tr" refers to the transcript of the unfair labor practice hearing, contained in Volume I of the record. "GCX" refers to the General Counsel's exhibits and "JX" refers to the parties' joint exhibits, contained in Volume II of the record, with exhibit page numbers in parentheses. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br" refers to the Company's opening brief.

[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, OLC, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The

The Company filed its petition for review on December 19, 2008, and the Board filed its cross-application for enforcement on February 4, 2009. Both filings were timely, as the Act places no time limitations on either filing.

## STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves well-settled principles that are fully presented in the briefs, and that argument would therefore not be of material assistance to the Court. In the event, however, that the Court believes that argument is necessary, the Board is fully prepared to participate and assist the Court in its resolution and understanding of this case.

## STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement with respect to its uncontested finding that the Company violated Section 8(a)(1) of the Act by telling employee Craig Robinson that he could not be rehired and was "blackballed" because of his union activities, and by interrogating employee Christopher Oland about his union activities.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively

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First Circuit and the Seventh Circuit have agreed, upholding the authority of the two-member Board to issue decisions. *New Process Steel, L.P. v. NLRB*, ___ F.3d ___, 2009 WL _____ (7th Cir. May 1, 2009); *Northeastern Land Services, Ltd. v. NLRB*, 560 F.3d 36, 40-42 (1st Cir. Mar. 13, 2009). The D.C. Circuit has disagreed. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, ___ F.3d ___, 2009 WL _____ (D.C. Cir. May 1, 2009).

interrogating employee Robinson and creating the impression that employees' union activities were under surveillance, and by threatening employee Andrew Smith with unspecified reprisals if he voted for the Union.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Robinson because of his union organizing activities.

## STATEMENT OF THE CASE

Acting on the unfair labor practice charge filed by the International Association of Machinists and Aerospace Workers, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) and (3) of the Act. (D&O 3; GCX 1(dd).) After a hearing, the administrative law judge issued a decision finding that the Company violated Section 8(a)(1) of the Act by: coercively interrogating employees about their union activities; creating an impression that their union activities were under surveillance; threatening them with reprisal if they voted for the Union; and telling employee Robinson that he could not be rehired because of his union activities. Further, the judge found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Robinson and thereafter failing to reinstate him because of his union activities, rejecting as pretextual the Company's proffered reasons for his discharge. (D&O 2-3, 11.)

On review, the Board substantially affirmed the judge's rulings, findings, and conclusions, except that the Board found it unnecessary to pass upon the judge's finding that the Company unlawfully threatened employees in a June 28 speech. (D&O 2-3.) The Board therefore adopted the judge's recommended Order, modifying it only in minor respects. (D&O 3.)

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background: The Company's Business and Management Structure

The Company sells new and used vehicles and provides vehicle service and repairs at two business locations: Sawgrass Auto Mall ("Sawgrass"), and Ed Morse Chevrolet ("Ed Morse"). (D&O 4; Complaint ¶2 (GCX 1(v)), Answer ¶2 (GCX 1(x)).) Sawgrass is managed by General Manager Harry Astor, and Operations Director Mike Byrne supervises both the Service and Parts Departments. (D&O 4; Tr 20, 155.) Parts Manager Joe Benitez, Service Director John Myers, and Technical Service Manager David Quenzer all report to Byrne. (D&O 4; Tr 20-21.) The technicians in the Service Department at Sawgrass are under Byrne's general supervision, but are supervised directly by Technical Service Manager Quenzer. (D&O 4; Tr 21-22, 65, 99, 109, 117, 125, GCX 11(p.2).) Daniel Leatherman is the Service Manager at Ed Morse. (D&O 4; Tr 130.)

### B. Robinson Attempts To Organize the Company's Service Technicians; the Company Receives the Union's Petition for Recognition as the Employees' Bargaining Representative

Service Technician Craig Robinson began working at Sawgrass as its sole transmission technician in July 2005. (D&O 4; Tr 65.) He has over 30 years of experience as a General Motors transmission technician and has received several service awards over the years. (D&O 4; Tr 66-68, GCX 12.)

In June 2007, Robinson contacted Union Organizer David Porter to discuss what the Union could do for the Company's service technicians. (D&O 4; Tr 68-69) Porter told Robinson that "if he was serious about starting a union," he should gather 10 "trust members" (employees who could be trusted not to leak information about union organizing to the Company), and Porter would meet with them. (D&O 4; Tr 69.)

Robinson made invitations for a party at his home on June 14 that did not mention the Union. (D&O 4; Tr 69-70.) He distributed the invitations by leaving them on employees' toolboxes and handing them out in the parking lot. (D&O 4; Tr 69-70.) Ten employees attended the meeting at his home, where Porter explained what the Union could do for them and what their rights were. (D&O4; Tr 70.) The next day at work, Robinson solicited union authorization cards from employees during breaks, around employees' toolboxes, and in the parking lot. (D&O 4; Tr 70-71.) On June 19, the Union petitioned the Board for recognition as

the employees' bargaining representative, and the petition was served on the Company by fax the same day. (D&O 4; JX 1.)

### C. General Manager Astor Questions Robinson About His Union Activities, Identifying Him as the "Leader of the Rebel Gang"

On June 20, Robinson and employee Kevin Rose took an afternoon break together in the employee parking lot. (D&O 4; Tr 71.) They were discussing the weather when General Manager Astor and Operations Director Byrne approached and greeted them. (D&O 4; Tr 71, 117-18.) Astor asked Robinson how the "leader of the rebel gang" was doing. (D&O 4, 8; Tr 71-72, 118, 121.) Robinson responded "fine," and after Astor made a remark about safety glasses, he and Byrne left. (D&O 4; Tr 72, 118-19.) Rose told Robinson that he "just got licked," and then explained that he meant that Robinson was "just tagged the Union leader." (D&O 4, 8-9; Tr 72, 119.)

### D. The Company Discharges Robinson, Claiming that He Engaged in Warranty Fraud

On June 26, Byrne informed Technical Service Manager Quenzer, Robinson's immediate supervisor, that he planned to terminate Robinson, and asked Warranty Administrator Maryanne Rayot to witness the termination meeting the next day. (D&O 7; GCX 11(p.9, 11-12).) On June 27, Operations Director Byrne called Robinson into his office for a meeting. (D&O 5, 7; Tr 72, 159, GCX 11(p.9).) Rayot was present, but said nothing. (D&O 5, 7; Tr 72, GCX 11(p.14).).

Byrne discussed three invoices for work done by Robinson, and expressed concern about a "surplus of transmission fluid" in Robinson's work area. (D&O 5, 7, 11; Tr 60, GCX 3-5.)

Upon producing the first invoice, which involved a transmission overhaul, Byrne asked Robinson why he charged for four gallons of transmission fluid on every overhaul. (D&O 5; Tr 73, 77-78, GCX 3, 11(p.10).) Robinson explained to Byrne that he used 10-12 quarts to refill the transmission and five to eight quarts to flush metal and debris from the system with the shop's flush flow machine. (D&O 5, 7, 11; Tr73, 75, 78.) When Byrne pressed him about how much fluid the machine used, Robinson explained that he was probably billing two quarts more than he used. (D&O 2, 7; Tr 59, GCX 11(p.10).) This was consistent with the Company's standard operating procedures. Because the fluid came in one-gallon containers, technicians had to order it in gallon increments, and even if a job required only a partial gallon, customers were charged for the entire container. (D&O 2, 5, 11; Tr 104-05, 143.) Byrne claimed that the second invoice he discussed with Robinson had the same transmission fluid overcharge "problem" as the first. (D&O 7; GCX 11(p.11)).

With regard to the third invoice, Byrne told Robinson that he had been paid for an alignment that he had not done. (D&O 5, 11; Tr 76, 80-82, GCX 4, 11(p.10).) Robinson protested that he did not do alignments or even know how to

work the machine, and added that if the Company had paid him for the alignment, it was a mistake. (D&O 5; Tr 76, GCX 11(p.10-11.) Usually, if a vehicle required an alignment, Robinson would take it to the alignment technician to do the work. (D&O 5; Tr 78.) Afterward, he would take the paperwork to the warranty administrator and explain who had done what work. (D&O 5; Tr 78.) Because Robinson did not see the invoices or the warranty clerks' entries into the computer to generate invoices, he would not have known if the clerks had made a mistake. (D&O 5; Tr 78-79.)

Nevertheless, Byrne told Robinson that he was going to "separate" Robinson—fire him—because the Company had paid Robinson for the alignment. (D&O 5, 11; Tr 76-77.) Byrne also subsequently claimed that he discharged Robinson for "warranty fraud," because the manufacturer was billed for transmission fluid that Robinson did not actually use. (D&O 7, 10; Tr 43, 58-59, 159-60, GCX 11 (p.8-9).)

The Company's investigation of Robinson's alleged misconduct, and its decision to discharge him, differed from its prior practice. (D&O 11; GCX 8, 9.) Operations Director Byrne had discharged technicians James Petersen and Mike Brock for theft in December 2005. (D&O 7, 11; Tr 52-56, GCX 11(p.13-14).) In both of those cases, Technical Service Manager Quenzer, the employees' immediate supervisor, took part in investigating the alleged misconduct and

meeting with the employees, and company managers confronted the employees before making their final discharge decision. (D&O 11; Tr 53-56, GCX 8, 9.) By contrast, in Robinson's case, Byrne conducted his own investigation without Quenzer's involvement, and he had already decided to discharge Robinson before confronting him about the alleged misconduct. (D&O 11; Tr 38-43, GCX 11(pp.9, 11-12).)

### E. The Company Delivers an Antiunion Speech to Employees; Technician Smith Tells Company Officials that Robinson's Discharge Had the Desired Effect; the Company Questions Technician Oland About His Union Activities and Sympathies

The day after discharging Robinson, Operations Director Byrne delivered a campaign speech to employees in the Sawgrass lunchroom, telling them that they would be "making a big mistake" by voting for the Union. (D&O 6, 9; JX 1.) Byrne added that the Union's "interference" could change the "family relationship" between employees and the Company forever, and urged them to "maintain that family closeness" by voting against the Union. (*Id.*)

On June 30, Technician Andrew Smith asked to speak with Operations Director Byrne and Technical Service Manager Quenzer because he had heard that the Company viewed him as a union organizer. (D&O 3, 6; Tr 110.) Smith confronted them with this concern and said that if it was true, he "would start looking for another job." (D&O 3, 6; Tr 110-11.) He acknowledged that he had attended some union meetings, but said that he understood that Robinson's

discharge three days earlier had been because of his union activities. (D&O 3, 6; Tr 111.) Smith told Byrne and Quenzer that Robinson's discharge "had the desired effect" and "scared [him] away," and that he couldn't afford to lose his job. (D&O 6; Tr 111.) Byrne and Quenzer did not respond or attempt to assuage Smith's concerns. (D&O 3, 6; Tr 111.)

In July, Service Director Myers engaged employee Oland in a conversation on the shop floor during which he asked if Oland had attended the union meetings. (D&O 6, 9; Tr 125-26.) Oland replied that he had not gone to any meetings because no one had told him about them, and added that he was not going to vote and opposed the Union. (D&O 6, 9; Tr 126.) Myers encouraged Oland to vote, adding that he could not tell him how to vote. (D&O 6, 9; Tr 126.) Oland replied that he "just wanted to be left alone about it" and do his job. (D&O 6, 9; Tr 126.)

### F. Robinson Applies for a Job at Ed Morse; Service Manager Leatherman Tells Him that He Cannot Be Hired Because the Company Had Blackballed Him for His Union Activity

After his discharge from Sawgrass, Robinson telephoned Service Manager Leatherman, who had worked with Robinson years before at another dealership, to see if Ed Morse needed technicians. (D&O 5, 9; Tr 85, 131, 133.) Leatherman told Robinson that he needed technicians and would hire Robinson "in a second." (D&O 5, 10; Tr 85-86.) At Leatherman's invitation, Robinson drove to the dealership on July 9, but before he could get out of his car, Leatherman said that

Robinson could not be rehired at Ed Morse—that the Company had "blackballed" Robinson because of his union activity. (D&O 5, 10; Tr 86-87.) Robinson left his resume with Leatherman and drove off. (D&O 5-6, 10; Tr 87.)

### G. Operations Director Byrne Tells Employee Smith that Voting in Favor of Union Representation Would Be a Personal Attack

On July 18, Technician Smith was called to Byrne's office, where Quenzer and Byrne initially inquired about an "immigration problem" that Smith's wife was having. (D&O 2, 6, 9; Tr 111-12.) Byrne then told Smith that based on his experience in a union shop, management and employees wouldn't have the same type of relationship if employees voted for a union. (D&O 2, 6, 9; Tr 112.) Smith replied that he had also worked in a union shop, and in his experience, it did not affect their relationship at all. (D&O 2, 6, 9; Tr 112.) Byrne responded that voting for the Union would be a "personal attack against him." (D&O 2, 6, 9; Tr 113.) Smith said that was not the case, and that he hoped that Byrne would not take it that way because it was about corporate policies, not Byrne personally. (*Id.*) Byrne told Smith that the Company would not see it Smith's way. (D&O 6, 9; Tr 113.)

## 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)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively

interrogating Robinson and Oland about their union activities and sympathies, creating the impression of unlawful surveillance, telling Robinson that he could not be rehired because he had been "blackballed" for his union activities, and threatening employee Smith with unspecified reprisals for supporting the Union. (D&O 1-3, 11.) The Board also found, again in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging and refusing to reinstate Robinson because of his union organizing activities. (D&O 1-2.)

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). (D&O 3, 12.) Affirmatively, the Board's order directs the Company to offer Robinson full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position; to make him whole for any loss of earnings and benefits; to expunge any reference to the unlawful discharge or failure to reinstate him from his personnel file; to preserve and produce the information necessary to compute backpay on request; and to post a remedial notice. (D&O 3, 12.)

## SUMMARY OF ARGUMENT

This case concerns the Company's unlawful response to a union organizing campaign initiated by employee Robinson, whom the Company discharged because he was, as it told him, the "leader of the rebel gang." On review, the Company does not contest the Board's finding that after Robinson's discharge, the Company directly told him that it was "blackball[ing]" him because of his union activities, in violation of Section 8(a)(1) of the Act. Nor does the Company challenge the Board's finding that it further violated Section 8(a)(1) of the Act by coercively interrogating employee Oland about his union sympathies. Thus, the Board is entitled to summary enforcement of those findings, which linger and color the Company's other unfair labor practices.

Substantial evidence supports the Board's finding that the Company coercively interrogated Robinson, and created the impression that union activities were under surveillance, by asking him how "the leader of the rebel gang" was doing the day after a union representation petition was filed. This question—which identified Robinson as the union leader despite his efforts to keep his activities secret—had no valid purpose, and tended to give the impression that the Company was spying on his union activities. The Board therefore reasonably found that the Company thereby violated Section 8(a)(1) of the Act.

As the Board also reasonably found, the Company further violated Section 8(a)(1) by threatening employee Smith with unspecified reprisals if he supported the Union. Operations Director Byrne told Smith that the Company would consider a vote for the Union to be a "personal attack." This remark impermissibly associated union support with disloyalty to the Company, particularly in light of the violations already committed by the Company, one of which—Robinson's discharge—was still fresh in Smith's mind. The Board therefore reasonably determined that the statement tended to imply a threat of similar reprisals against Smith, in violation of Section 8(a)(1).

Finally, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Robinson for his union activities. After all, the Company does not dispute telling Robinson that he had been "blackballed" for this unlawful reason. Further, given this remark, as well as the Company's identification of Robinson as the "leader of the rebel gang," the Company cannot seriously challenge the Board's finding that it was well aware of his union activities. The suspicious timing of Robinson's discharge, and the Company's other unfair labor practices, also strongly support the Board's finding that Robinson's union activities motivated the Company to discharge him.

As the Board reasonably found, the Company failed to establish that it would have taken the same action notwithstanding Robinson's union activities.

The shifting rationales on which the Company purportedly relied in its failed attempt to justify Robinson's discharge were plainly false, and could not conceal the Company's true motive, which was to "blackball[]" the "leader of the rebel gang." Thus, the Board reasonably rejected as pretextual the Company's claim that it discharged Robinson for committing "warranty fraud." The record shows that he did no such thing; rather, his billing practices were consistent with company policies. The Board also rejected as pretextual the Company's belated assertion that it discharged Robinson for stealing transmission fluid. The record is devoid of evidence that he stole anything. As the Board further noted, because the Company did not present its assertion until its post-hearing brief, the alleged theft could not have been the real reason for Robinson's discharge. In sum, on this record, the Board reasonably found that the Company's stated rationales for discharging Robinson were false—a mere pretext to mask its true reason, which was to rid itself of a union leader. The Court should therefore uphold the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging Robinson.

## STANDARD OF REVIEW

This Court's review of the Board's order is limited. Its 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). 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. Thus, the Court may not overturn the Board's determinations, so long as it "has made a plausible inference from the record." *NLRB v. U.S. Postal Service*, 526 F.3d 729, 732 (11th Cir. 2008) (citation omitted).

Furthermore, it is not this Court's role "to re-weigh the evidence or make credibility choices." *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983). Rather, "if the evidence is conflicting," this Court is "bound by the credibility determinations of the Board unless they are inherently unreasonable or self-contradictory." *Id.; accord NLRB v. McClain of Georgia*, 138 F.3d 1418, 1422 (11th Cir. 1998). Moreover, the courts have held that explicit credibility determinations on each issue are not necessary "when the [judge] implicitly resolves conflicts in the testimony" by making fact findings that are supported by the record as a whole. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *accord NLRB v. Katz's Delicatessen of Houston Street, Inc.*, 80 F.3d 755 (2d. Cir. 1996) (citations omitted).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TELLING ROBINSON THAT HE HAD BEEN BLACKBALLED BECAUSE OF HIS UNION ACTIVITIES, AND BY COERCIVELY INTERROGATING EMPLOYEE OLAND ABOUT HIS UNION ACTIVITIES

The Board found (D&O 10) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when Service Manager Leatherman informed Robinson that the Company had "blackballed" him because of his union activities, and therefore would not rehire him at Ed Morse. (Tr 85-87, 131-32.) The Board also found (D&O 9) that the Company further violated the same section of the Act when Operations Director Byrne interrogated employee Oland about his union activities. (Tr 123-26.) Those findings are fully supported by the record and by settled law. *See Bandag, Inc. v. NLRB*, 583 F.2d 765, 771 (5th Cir. 1978) (threatening to "blacklist" the union's leader is unlawful);[3] *Hartford Insurance Group*, 178 NLRB 579, 580 (1969) (mentioning a blacklist, even in jest, to employee union leader during an organizing campaign is unlawful), *enforced mem.*, 434 F.2d 1312 (9th Cir. 1970); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d

[3] The decisions of the former Fifth Circuit, issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

1418, 1422-23 (11th Cir. 1998) (interrogating employees about their union sympathies is unlawful).

In its opening brief, the Company fails to mention, let alone contest, the unfair labor practice findings described above. By failing to provide supporting argument and authority, the Company has waived any challenge to those findings in this Court. *Doe v. Moore*, 410 F.3d 1337, 1349 n.10 (11th Cir. 2005) (to preserve an issue on appeal, the brief must actually argue the issue with support from authority and the record); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1427-28 (11th Cir. 1985) (same); Fed R. App. P. 28(a)(9)(A). Therefore, the Board is entitled to summary enforcement of the portions of its order related to the uncontested findings. *NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1313 n.2 (11th Cir. 1999).

These uncontested violations, however, do not disappear from the case simply because the Company fails to mention them in its brief. Rather, "'they remain, lending their aroma to the context in which the [challenged] issues are considered.'" *Purolator Armored, Inc. v. NLRB*, 764 F.2d at 1428 (quoting *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982)). We show below, pp. 22-26, that the Company further violated Section 8(a)(1) of the Act by tagging Robinson as the "leader of the rebel gang" under circumstances that constituted an unlawful interrogation, and created the impression of surveillance.

We also show, pp. 27-30, that the Company again violated Section 8(a)(1) of the Act by threatening Smith with unspecified reprisals for supporting the Union. Finally, we show, pp. 30-42, that the Company violated Section 8(a)(3 ) and (1) of the Act by discharging Robinson for his union activities on blatantly pretextual grounds.

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING ROBINSON AND CREATING THE IMPRESSION THAT EMPLOYEES' UNION ACTIVITIES WERE UNDER SURVEILLANCE, AND BY THREATENING SMITH WITH UNSPECIFIED REPRISALS IF HE VOTED FOR THE UNION

### A. An Employer Violates Section 8(a)(1) by Interfering with, Restraining, or Coercing Employees' Union Activity

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) insures this guarantee by prohibiting employers from interfering with, restraining, or coercing employees in the exercise of their right to self-organization. In determining whether an employer's statements to employees violate Section 8(a)(1) of the Act, the Board asks whether the "questions, threats, or statements tend to be coercive, not whether employees are, in fact, coerced." *TRW-Greenfield Div. v. NLRB*, 637 F.2d 410, 415-16 (5th Cir. 1981); *accord Mead Corp. v. NLRB*,

697 F.2d 1013, 1025 (11th Cir. 1983). Recognizing the difficulty of parsing the intended meaning and effect of statements, the Supreme Court has admonished that "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 Packing Co. v. NLRB*, 395 U.S. 575, 620 (1969).

As we show below, in addition to the uncontested violations addressed above at pp. 18-20, the Company made unlawfully coercive statements on two other occasions during the union campaign. The day after the Company received the union petition, General Manager Astor asked Robinson how the "leader of the rebel gang" was doing. (Tr 71-72.) The Board reasonably determined that this questioning was coercive, and that it gave an impression that employees' union activities were under surveillance. (D&O 1, 8-9.) Further, after Operations Director Byrne unlawfully discharged Robinson, he told employee Smith that he would consider voting for the Union to be a "personal attack" against him, and that the Company would agree. (Tr 113.) The Board reasonably determined that Byrne thereby threatened unspecified reprisals against Smith if he voted for the Union. (D&O 2-3, 9.)

### B. The Company Unlawfully Interrogated Robinson and Created the Impression that Employees' Union Activities Were Under Surveillance

It is settled that an employer violates Section 8(a)(1) of the Act by coercively interrogating an employee about union matters. *Mead Corp. v. NLRB*, 697 F.2d 1013, 1025 (11th Cir. 1983); *NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 922 (11th Cir. 1982). An employer also violates Section 8(a)(1) of the Act by coercively creating the impression that employees' union activities are under surveillance. *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984) (noting that "conveying the impression of surveillance can have a natural, if not presumptive, tendency to discourage union activity"); *accord Brewton Fashions*, 682 F.2d at 922. The Board reasonably found (D&O 8-9) that Astor's June 20 conversation with Robinson constituted a coercive interrogation that unlawfully created the impression of surveillance.

In determining whether an interrogation is unlawfully coercive, the Board considers the "totality of circumstances," taking such factors into account as: (1) whether the employee is an open or active union supporter, (2) the background and timing of the interrogation, (3) the nature and purpose of the information sought, (4) the identity of the questioner, (5) the place and method of interrogation, and (6) the truthfulness of any reply by the questioned employee. *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 NLRB v. United Sanitation Serv.*, 737 F.2d 936, 939 (11th Cir. 1984) (approving the *Rossmore House* test).

In this case, the direct testimony of employees Robinson and Rose support the Board's finding that General Manager Astor and Operations Manager Byrne approached them on June 20, and that Astor asked Robinson "how the leader of the rebel gang" was doing. (Tr 71-72, 117-18.) Only days before, Robinson had begun his effort to organize the Company's employees. (Tr 68.) Robinson did not make his union activities and sympathies known, but took pains to keep them secret. (Tr 69-71.) Astor, the highest-level manager at Sawgrass, questioned him while Byrne, the second-highest manager, stood by. Astor's reference to Robinson as "the leader of the rebel gang" clearly conveyed that Astor believed Robinson was the union leader, as Rose confirmed by commenting that Robinson had been "tagged." (Tr 72, 119.) Yet, Astor asserted no valid purpose for asking the question.

The Company's characterization (Br 13) of the confrontation between Robinson and Astor as a "passing conversation" does nothing to alter the Board's finding that it had a tendency to be coercive. When posed by a high-ranking company official like Astor, such a question "as perceived by the employee[] could

appear coercive as opposed to casual, isolated, or friendly," particularly where, as here, the official lacks "a persuasive, explicit, legitimate explanation" for making the inquiry. *NLRB v. Berger Transport*, 678 F.2d 679, 690 (7th Cir. 1982) (citations omitted). In these circumstances, the Board reasonably found that by asking Robinson how "the leader of the rebel gang" was doing, Astor interrogated him in violation of Section 8(a)(1) of the Act. (D&O 9.)

The Board's further finding that General Manager Astor's question gave the coercive impression of surveillance is equally well supported. (D&O 9.) Robinson had endeavored to keep his union activities secret by inviting only "trust members" to the union meeting and not mentioning the Union in his invitation. (Tr 69-70.) Because he initially organized only out of his home, and attempted to collect authorization cards at work without the Company's knowledge, Robinson could reasonably presume that someone had been watching him or spying on his activities, which could tend to have a chilling effect union activity. *See Belcher Towing Co. v. NLRB*, 726 F.2d 705, 709 (11th Cir. 1984) (distinguishing an employer's "passive" observance of union activity "conducted in full public view" from more "furtive" and therefore coercive surveillance). Astor's identification of Robinson, not just as a union activist, but as the "leader of the rebel gang," adds further to the chilling effect of his inquiry. *See Peter Vitalie Co., Inc.*, 310 NLRB

865, 874 (1993) (identifying "ringleaders" who had not openly shown support is coercive).

The lone case cited by the Company (Br 13-14) is factually distinguishable from the one at hand. In *NLRB v. Pilgrim Foods, Inc.*, 591 F.2d 110, 114 (1st Cir. 1978), the employee was known as a "leader" of the employees who frequently dealt with management about their complaints before the Union came onto the scene. The First Circuit found that, in those different circumstances, the employer's "mere recognition of [the employee's] union activity," had not, "'without more'," created an impression of surveillance that was coercive or threatening. *Id.* (quoting *NLRB v. Rich's of Plymouth, Inc.*, 578 F.2d 880, 885 (1st Cir. 1978)). By contrast, there is no evidence here that Robinson was openly involved in employee-management dealings; to the contrary, he had taken pains to keep his union activities secret. Thus, Astor's confrontation with Robinson, unlike the one in *Pilgrim Foods*, was coercive and therefore unlawful.

Although the Company makes the broad but generic assertion (Br 16-18) that the administrative law judge's credibility rulings "are not reasonably supported," its brief challenges only one such ruling—namely, the judge's determination to credit Robinson and Rose's mutually corroborative testimony that Astor asked Robinson "how the leader of the rebel gang was doing" over Astor's flat denial. (D&O 11; Tr 71-72, 118, 121, 156.) The Company, however, falls

woefully short of establishing that the judge's decision to credit Robinson and Rose over Astor was "inherently unreasonable or self-contradictory." *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983).

Contrary to the Company's assertion (Br 15, 17-18), the judge adequately explained the basis for his ruling. He specifically noted Robinson's "ability and willingness to recall events and conversations accurately," and was favorably impressed by Robinson's demeanor as a witness. (D&O 8.) The judge also relied on the fact that Rose corroborated Robinson's testimony (Tr 117-22).[4] By contrast, as the judge noted (D&O 8), no witness corroborated Astor's unelaborated denial (Tr 156); indeed, Operations Director Byrne, who was privy to the conversation, did not testify at all on the subject. Contrary to the Company's further claim (Br 15), the judge, in making his credibility ruling, reasonably placed no weight on the fact that Robinson and Rose perceived the weather differently from Astor on the day in question. (D&O 8; Tr 71, 117, 157-58.) In sum, on this record, the Company fails to meet its heavy burden of establishing any basis for disturbing the judge's credibility ruling. Thus, the Court should uphold the Board's reasonable determination that the Company violated Section 8(a)(1) of the Act by interrogating Robinson and giving the impression of surveillance.

[4] The Company does not help itself by baldly asserting (Br 15) that Robinson and Rose "practiced testifying together" and colluded. Indeed, the Company (Br 18) undermines its assertion by inconsistently faulting the judge for crediting Rose even though his testimony was not identical to Robinson's.

### C. The Company Unlawfully Threatened Smith with Unspecified Reprisals If He Voted for the Union

An employer violates Section 8(a)(1) of the Act if, "under the 'totality of the circumstances,' the employees would reasonably conclude that the employer is threatening economic reprisals" for supporting the union. *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 418 (11th Cir. 1981) (quoting *Hendrix Mfg. Co. v. NLRB*, 321 F.2d 100, 105 (5th Cir. 1963)). Although an employer may express "views, argument, or opinion" about unionization to his employees, such statements are not protected under Section 8(c) of the Act (29 U.S.C. §158(c)) if they contain a "threat of reprisal or promise of benefit." *Gissel Packing Co. v. NLRB*, 395 U.S. 575, 619 (1969). In balancing these competing principles, the Board appropriately will "take into account the economic dependence of employees on employers and the tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel Packing*, 395 U.S. at 617.

The Board reasonably determined (D&O 2-3) that the Company violated Section 8(a)(1) of the Act when Operations Director Byrne told employee Smith that voting for the Union would be viewed by the Company as a "personal attack" on Byrne. Equating employees' union support with disloyalty to the employer can violate Section 8(a)(1) of the Act where, as here, the circumstances are sufficiently coercive. *Harpercollins San Francisco v. NLRB*, 79 F.3d 1327, 1330 (2d Cir.

1996); *Peavey v. NLRB*, 648 F.2d 460, 462 (7th Cir. 1981); *NLRB v Suburban Ford, Inc.*, 646 F.2d 1244, 1247 (8th Cir. 1981). Under this standard, the Board has found statements like Byrne's to be unlawfully coercive. *See, e.g., Amptech, Inc.*, 342 NLRB 1131, 1135 (2004) (referring to the union organizing drive as a "personal attack"), *enforced* 165 Fed.Appx. 435 (6th Cir. 2004); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 492-93 (1995) (telling union supporters that they were "fighting him and his family" and likening unionization to "a war—we don't kiss and make up"), *enforced in relevant part*, 97 F.3d 65 (4th Cir. 1996).

The Board reasonably found (D&O 2) that the circumstances surrounding Byrne's statement were sufficiently coercive to render it an unlawful threat of unspecified reprisals. In so ruling, the Board properly took into consideration the other unfair labor practices committed by the Company, including discharging Robinson for being the union leader and then telling him that the Company had blackballed him because of his union activities, interrogating Robinson and Oland, and creating the impression of surveillance, all of which added to the coercive impact of Byrne's implicit threat to Smith. As the Fifth Circuit recognizes, "threats of reprisals for union activity which may be innocuous standing alone become coercive and unlawful when they are a part of a pattern that includes actual indications that the threats are real." *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 663 (1968).

As the Board further explained (D&O 3), the coercive effect of Byrne's remarks is confirmed by an earlier interaction between Smith and managers Byrne and Quenzer. On June 30, just three days after Robinson's unlawful discharge, Smith directly told the managers that Robinson's discharge for union organizing had "the desired effect" on him. (Tr 111.) Neither Byrne nor Quenzer responded to Smith's statement. As the Board noted (D&O 3), their silence could reasonably be interpreted as a tacit confirmation that the Company had, in fact, retaliated against Robinson for his union activities. *See Maremont Corp.*, 294 NLRB 11, 40 (1989) (supervisor's "silence reinforced [employee's] interpretation" of a comment to mean the employer was going to fire employees); *Coca-Cola Bottling Co.*, 313 NLRB 1197, 1200 (1994) (silence in the face of an accusation can imply an admission if a "reply of denial would normally be expected").

As the Board found (D&O 3), this background added to the coercive impact of Byrne's subsequent remarks that he and the Company would view a vote for the Union as a "personal attack." (Tr 113.) In these circumstances, Smith could reasonably have interpreted Byrne's remarks as implying that the Company would also seek reprisal against him if he supported the Union. Thus, the Board appropriately held (D&O 2-3, 9) that Byrne's statements unlawfully "raised the issue of Smith's loyalty" to the Company in violation of Section 8(a)(1) of the Act.

The Company's protestation (Br 12) that the Board ignored parts of Smith's testimony misses the mark. Although Smith testified that he did not personally understand Byrne's comments as a threat against union adherents (Tr 115), the Board considers a statement's objective tendency to coerce, not its actual effect. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 366 (5th Cir. 1990); *accord Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 488 (11th Cir. 1982). Furthermore, contrary to the Company (Br 12), Byrne's assurances that he did not want to know Smith's position on the Union, which might have been relevant if the issue had been whether Byrne had interrogated Smith, were not relevant to determining whether he had threatened Smith. Thus, the portions of Smith's testimony cited by the Company (Br 12) do not help it here, and the Board properly determined that the threat was coercive in violation of Section 8(a)(1) of the Act.

## III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING ROBINSON BECAUSE OF HIS UNION ACTIVITIES

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

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) 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 Section 8(a)(3) and (1) of

the Act by discharging an employee for participating in union activities. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).[5] In determining whether a discharge violates the Act, the Board applies the test articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401-03. Under that test, if substantial evidence supports the Board's finding that an employee's union activity was "a motivating factor" in the employer's adverse action, then the Board's decision must be affirmed, unless the employer demonstrated that it would have taken the same action even in the absence of protected conduct. *Wright Line*, 251 NLRB at 1089; *accord NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

Where, as here, the record shows that the neutral reasons asserted by the employer for its adverse action were a pretext—that is, the reasons did not exist or were not in fact relied upon—the employer's affirmative defense fails, as there is no remaining basis for finding that the employer would have taken the adverse action absent the union activity. *Wright Line*, 215 NLRB at 1084. Otherwise stated, evidence of pretext will "conclusively restore the inference of unlawful motivation." *NLRB v. United Sanitation Serv.*, 737 F.2d 936, 939 (11th Cir. 1984).

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[5] Because such action also tends to "interfere with, restrain, or coerce employees" in exercising their Section 7 rights, a violation of Section 8(a)(3) of the Act results in a "derivative" violation of Section 8(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Motive is a question of fact, and the Board may rely on both direct and circumstantial evidence to determine motive. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *NLRB v. Malta Const. Co.*, 806 F.2d 1009 (11th Cir. 1986); *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 311 (5th Cir. 1988). Here, a high-ranking company official squarely told Robinson that the Company had "blackballed" him because of his union activities. (Tr 87.) Moreover, circumstantial evidence strongly supports the Board's finding of antiunion motive. That evidence includes the Company's knowledge of Robinson's union activities—it tagged him as the "leader of the rebel gang" (Tr 71-72)—and the timing of his discharge, which was "stunningly obvious." *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991) (citing *NLRB v. S.E. Nichols*, 862 F.2d 952, 959 (2d Cir. 1988)). The Company's other contemporaneous unfair labor practices, contested and uncontested, also support the Board's finding of unlawful motive. Finally, the Company is doomed by the blatantly pretextual nature of its stated rationales for discharging Robinson. *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1127 (11th Cir. 2008); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998); *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007); *Wright Line*, 251 NLRB 1083, 1090-91 (1980).

Because motive is a factual question, judicial review of that issue is limited "to determining whether the Board's inference of unlawful motive is supported by

substantial evidence—not whether it is possible to draw the opposite inference." *NLRB v. McClain of Georgia, Inc.*, 138 F.3d at 1424; *see also Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985) (task of determining motive is "particularly within the purview of the Board"). We show below that substantial evidence supports the Board's finding (D&O 2, 11) that the Company discharged Robinson because of his union activities.

### B. The Company Discharged Robinson Because of His Union Activities

The evidence strongly supports the Board's finding (D&O 2, 4) that the Company discharged Robinson because he was, as General Manager Astor called him, the "leader of the rebel gang" that had just filed a union petition. (Tr 72.) Indeed, the Company's admission that it had "blackballed" Robinson because of his union activities (Tr 78)—a finding that the Company does not contest on review—directly establishes that the Company did not want to employ Robinson because of his organizing activities. Given this uncontested admission, the Company also cannot seriously take issue with the Board's finding (D&O 10) that the Company knew about Robinson's union activity.

Moreover, the timing of Robinson's discharge—a factor that the Company on review does not contest—strongly supports the Board's finding that the Company got rid of him because of his union activities. The day after receiving the representation petition, General Manager Astor interrogated Robinson and

created the impression of surveillance by tagging him as the "leader of the rebel gang." (Tr 72, JX1.) Just one week later, on June 27, the Company discharged Robinson. (JX 1.) Less than two weeks later, Service Manager Leatherman told Robinson that he could not be rehired because he had been "blackballed" for his union activity. (Tr 85-87.)

Finally, the Company's numerous 8(a)(1) violations, challenged and unchallenged alike, are evidence of its hostility to unionization and "form the background" of this Court's evaluation of the unlawful discharge. *NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1122 (11th Cir. 2008) (quoting *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985)). By interrogating employees Robinson and Oland, giving the impression of surveillance, threatening employee Smith with unspecified reprisals, and telling Robinson that he had been "blackballed," the Company indicated its hostility to union activities in general and Robinson's organizing activities in particular. In sum, on this record, the Board reasonably found that Robinson's union activity motivated the Company's decision to discharge him.[6] (D&O 1, 10.)

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[6] Additionally, the judge considered the Company's deviation from its normal employee discipline procedures as evidence of its unlawful motive. (D&O 11.) When Byrne suspected Robinson of misconduct, he did not involve his immediate supervisor in the investigation or allow Robinson to explain before taking final action. Byrne's abrupt handling of Robinson's discharge contrasts sharply with his previous treatment of employees Brock and Peterson, who were not involved with the Union. Before deciding to discharge them, Byrne consulted with their

### C. The Company's Proffered Reasons for Discharging Robinson Were Pretextual; Therefore, It Failed to Show that It Would Have Discharged Robinson Absent His Protected Activities

The Board reasonably found (D&O 2, 10-11) that because the various rationales the Company proffered for Robinson's discharge were false, the Company failed to show that it would have discharged him in the absence of his union activities. The plainly pretextual nature of the Company's stated rationales establishes that its real motive was "one it desired to conceal—an unlawful motive." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). We show below that substantial evidence supports this finding.

Initially, it should be noted that at the time of Robinson's discharge, Operations Director Byrne said that the Company was "separat[ing]" him because it had paid him for an alignment that he did not perform. (D&O 5, 11; Tr 76-77.) It is uncontroverted, however, that Robinson—who was not an alignment technician and had nothing to do with such repairs—also had no involvement with the invoicing for those repairs. (D&O 5; Tr 78.) In these circumstances, the administrative law judge could reasonably find that Byrne's assertion that he discharged Robinson for such an apparent error "did not withstand scrutiny."

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immediate supervisor and permitted them to give their side of the story. (Tr 52-56, GX 8, 9.) Byrne's departure from his usual practice in discharging Robinson is evidence of his unlawful motive. *See Jamco*, 294 NLRB 896, 905 (1989), *enforced mem.*, 927 F.2d 614 (11th Cir. 1991).

(D&O 10; GCX 11(pp.8, 10-11).) In its opening brief, the Company does not mention, let alone contest, the foregoing, and has therefore waived any challenge to the judge's findings on this point. *See* cases cited above at p.19.

At this stage, the Company is relying entirely on two other rationales that are equally pretextual. First, the Company (Br 8) repeats its assertion that Robinson engaged in "warranty fraud" by billing for more transmission fluid than he used for transmission overhauls. As shown below, however, the Board reasonably found that Robinson had done nothing wrong because his practice was consistent with the Company's standard operating procedures. (D&O 2; Tr 76-77.) Second, the Company asserts (Br 8-10) that it discharged Robinson for "theft" of 10-12 gallons of unopened containers of transmission fluid. As the Board explained, however, because the Company did not raise this allegation until its post-hearing brief, it could not have relied, and did not rely, on this rationale at the time of Robinson's discharge. (D&O 2.) Moreover, the record does not support the Company's allegation of theft. Thus, as discussed below, the Board reasonably found (D&O 2) that the Company "seized upon the transmission fluid and/or warranty concerns" as a pretext to conceal its real reason, which was to "blackball[]" Robinson because he was the "leader of the rebel gang" that tried to bring in a union. (Tr 71-72, 87-88.)

### 1. Contrary to the Company, Robinson did not commit warranty fraud; the Company's reliance on this rationale was therefore pretextual

Substantial evidence supports the Board's finding (D&O 2, 10-11) that the Company's claim that it discharged Robinson for "warranty fraud" was pretextual. In his pretrial affidavit, Operations Director Byrne asserted that Robinson "admitted" to warranty fraud during his discharge interview when he stated that he routinely billed for two quarts more transmission fluid than he needed in servicing the transmission of cars under warranty. (GCX 11, pp.8-11.) Byrne repeated this assertion in his testimony. (Tr 43, 58-59.) As the Board reasonably found, however, Robinon's practice "was consistent with the Company's standard operating procedure." (D&O 2.) The record shows that technicians could only order transmission fluid in one-gallon containers, and that even if they did not use the entire container, they would still charge for it. (Tr 104-05.) Indeed, the Company's own witness confirmed that technicians normally charge customers for an entire container once it has been opened. (Tr 143.) Given this evidence, Robinson's statement that he billed for more transmission fluid than he actually used accords with company practice, as the Board reasonably concluded. (D&O 2.) Further, as the Board noted, the evidence shows that the amount of fluid used by Robinson (10-12 quarts per overhaul to refill the transmission, plus 5-8 quarts in the flush-flow machine) was consistent with the other technicians' estimates of

normal use. (D&O 11; Tr 73, 101-02.) Thus, Byrne's assertion that Robinson committed "warranty fraud" does not withstand scrutiny, and the Board reasonably rejected it as pretextual.

**2. The Board also reasonably rejected as pretextual the Company's unsubstantiated, post-hoc assertion that it discharged Robinson for stealing transmission fluid**

After the unfair labor practice hearing closed, the Company, in its post-hearing brief, presented for the first time yet another rationale for discharging Robinson—namely, his alleged theft of transmission fluid. The Board reasonably found (D&O 2, 11), however, that the Company did not discharge Robinson for this reason either. The Board noted (D&O 11) that the Company's evidence did not even establish that Robinson committed such theft, much less that it was the reason for his discharge. Indeed, the Company never claimed any such motive at the time of the discharge or at the hearing; it was not until it filed a post-hearing brief that the Company made this claim. Thus, the Board reasonably rejected this rationale as pretextual. (D&O 2.)

Contrary to the Company (Br 8-11), the record fails to establish that Robinson stole anything. Operations Director Byrne claimed that he found 10-12 unopened gallons of fluid at Robinson's workstation on May 28, and that the containers were gone a week later but had not been returned to inventory. (Tr 32-34, GCX 11(p. 6-7).) However, he never claimed that he knew what had happened

to the fluid or asked Robinson about it when he noticed it was gone, nor did he accuse Robinson of stealing it. Indeed, Byrne admitted that there was insufficient evidence to prove that Robinson had stolen the "missing" transmission fluid. (D&O 2 n.2; GCX 11(p.8).) Given Byrne's admission, the Company's claim that Robinson stole the containers, and that it discharged him for that reason, does not withstand scrutiny.

Further, contrary to the Company (Br 11), the testimony of Norton, who replaced Robinson as an automotive technician, establishes that at the time of Robinson's discharge, the Company permitted technicians to keep unopened containers of fluid in their work areas. (D&O 11; Tr 102.) The Company (Br 11) mistakenly relies on Norton's testimony that, about one month after Robinson's discharge, the Company changed its policy, and instructed technicians not to keep unopened containers of transmission fluid at their stations. (Tr 102-03, 105.) Norton's testimony about the Company's post-discharge change in practice is irrelevant here. On the key point—that before Robinson's discharge, technicians were permitted to keep up to 10-12 gallons of unopened containers of fluid at their work stations—Norton's testimony was uncontroverted. (Tr 102, 105-06.) Thus, Norton's testimony actually supports the Board's determination (D&O 2, 11) that Robinson had not engaged in any misconduct with regard to keeping unopened containers of transmission fluid at his workstation.

Furthermore, the Company failed to show that Byrne's decision to discharge Robinson was actually motivated by his suspicion of theft. In discharging Robinson, Byrne made only a passing comment about investigating a "surplus of transmission fluid," which might have referred to the unused portion of opened containers billed to customers in accordance with company practice. (Tr 59-62, GCX 11(p.10).) Warranty Administrator Rayot's testimony supports this reading of Byrne's testimony: she testified that Robinson was discharged because he was "about six quarts over per job." (Tr 159.) And, as the Company concedes (Br 9), Byrne claimed that he discharged Robinson for "transmission fluid that was billed out and not used" (Tr 43)—not for the disappearance of unopened containers of fluid. In short, because Byrne did not discuss any suspected theft of unopened containers with Robinson or testify to any such motive at the time of the discharge, the Board reasonably found (D&O 2) that the Company did not rely on the "post-hoc" rationale that it belatedly offered in its post-hearing brief—a rationale that was "[i]n short," pretextual. *Conley v. NLRB*, 520 F.3d 629, 643 (6th Cir. 2008).

The Company errs (Br 8) in suggesting that it has always relied on this rationale because its chief witness, Operations Director Byrne, assertedly used the terms "theft" and "warranty fraud" "interchangeably." It was company counsel—not Byrne—who used the terms "theft" and "warranty fraud" interchangeably when posing questions to Byrne. (Tr 43.) Byrne resisted counsel's insistence on

characterizing his motive as "theft." (Tr 43.) Instead, he maintained in his testimony that the Company discharged Robinson for "fraud," by which he meant unused portions of opened containers of transmission fluid that were billed out and not used. (Tr 43.) As we have shown above, pp. 37-38, the Board reasonably rejected that rationale as pretextual.

Further, the Company mistakenly relies (Br 9) on the testimony of its expert witness, who stated in response to a hypothetical question that if he saw 8-10 gallons of fluid at a work station, and if it was not returned to inventory, he would conclude that it was stolen. (Tr 136-37.) Despite the Company's protestations, however, the Board reasonably accorded no weight to his reply to this hypothetical query. Because the witness based his answer on an industry standard that differed from the Company's actual practice at the time of Robinson's discharge, his conclusions were not relevant to this case. Indeed, as noted, Technician Norton's uncontroverted testimony establishes that the Company permitted technicians to store unopened containers of transmission fluid—up to 10-12 gallons at a time—at their workstations until about a month after Robinson's discharge. (Tr 102-03.) Moreover, because, as shown above p. 40, Byrne did not claim that he discharged Robinson for theft, it is even more irrelevant that the Company's expert witness inferred, based on an industry practice that the Company did not follow, that there had been a theft. Thus, the Board reasonably determined (D&O 2) that the alleged

theft of transmission fluid was a pretextual rationale on which the Company did not rely at the time of Robinson's discharge.

In sum, shortly after identifying Robinson as the "leader of the rebel gang" that had just filed a union petition, the Company suddenly discharged him on shifting and plainly pretextual grounds. The Company then indisputably told him that he had been "blackballed" because of his union activities—thereby effectively admitting that its real reason for not wanting to employ him was an unlawful one. On this record, the Board reasonably found (D&O 2, 11) that the Company violated Section 8(a)(3) and (1) of the Act by discharging Robinson because of his union activities.

## 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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May 2009

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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| MORSE OPERATIONS, INC. d/b/a SAWGRASS AUTO MALL AND d/b/a ED MORSE CHEVROLET | : | |
| Petitioner/Cross-Respondents | : | Nos. 08-17080-DD<br>09-10537-DD |
| v. | : | Board Case Nos.<br>12-CA-25466, 12-CA-25478 |
| NATIONAL LABOR RELATIONS BOARD | : | 12-CA-25493, 12-CA-25674 |
| Respondent/Cross-Petitioner | : | |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,854 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 8th day of May 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 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 listed below:

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