

Nos. 09-1344, 09-1518

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CINTAS CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues presented	3
Statement of the case.....	5
Statement of facts.....	7
I. The Board’s findings of fact.....	7
A. Charlotte.....	7
B. Branford	13
II. The Board’s conclusions and order.....	15
Summary of argument.....	17
Argument.....	21
I. Substantial evidence supports the Board’s findings that the Company violated Section 8(a)(3) and (1) of the Act.....	21
A. Violations at Charlotte.....	21
1. Restrictions on union hats and stickers	21
2. Restrictions on distribution of union literature.....	26
B. Unlawful interrogation at Branford	29
II. The Board reasonably concluded that alleged misconduct by the Union during its corporate campaign would not be a defense to allegations of coercive conduct by the Company against its employees	36

Headings – Cont’d

Page(s)

III. The Board acted within its discretion in declining to order the Union to produce notes, which had not been signed, adopted or approved by employee witnesses, were not substantially verbatim statements of those witnesses, and would have disclosed the union activities of nontestifying employees51

Conclusion58

TABLE OF AUTHORITIES

<i>American Cast Iron Pipe Co. v. NLRB</i> , 600 F.2d 132 (8th Cir. 1979)	4,27,35
<i>BE & K Construction Co. v. NLRB</i> , 536 U.S. 524 (2002)	50
<i>Beverly Hills Foodland, Inc. v. Food and Commercial Workers Local</i> 655, 39 F.3d 191 (8th Cir. 1994).....	4,33,35,45,47,49
<i>Borek Motor Sales, Inc. v. NLRB</i> , 425 F.2d 677 (7th Cir. 1970)	4,40
<i>Chinese Daily News</i> , 346 NLRB 906 (2006), <i>enforced mem.</i> , 224 Fed. Appx. 6 (D.C. Cir. 2007)	29
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978)	33
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building &</i> <i>Construction Trades Council</i> , 485 U.S. 568 (1988)	49
<i>F.W. Woolworth Co. v. NLRB</i> , 530 F.2d 1245 (5th Cir. 1976)	28
<i>Fabri-Tek, Inc. v. NLRB</i> , 352 F.2d 577 (8th Cir. 1965)	26
<i>Five Star Transportation Inc.</i> , 349 NLRB 42 (2007), <i>enforced</i> , 522 F.3d 46 (1st Cir. 2008).....	35-36
<i>Five Star Transportation Inc. v. NLRB</i> , 522 F.3d 46 (1st Cir. 2008).....	33,36

Cases --Cont'd	Page(s)
<i>GHR Energy Corp.</i> , 294 NLRB 1011 (1989), <i>enforced mem.</i> , 924 F.2d 1055 (5th Cir. 1991)	33
<i>H.B. Zachry Co.</i> , 310 NLRB 1037 (1993)	53
<i>Handicabs, Inc. v. NLRB</i> , 95 F.3d 681 (8th Cir. 1996)	33
<i>JCR Hotel, Inc. v. NLRB</i> , 342 F.3d 837 (8th Cir. 2003)	25
<i>JHP & Associates, LLP v. NLRB</i> , 360 F.3d 904 (8th Cir. 2004)	28
<i>Jefferson Standard Broadcasting Co.</i> , 94 NLRB 1507 (1951)	41
<i>KBO, Inc.</i> , 315 NLRB 570 (1994), <i>enforced mem.</i> , 96 F.3d 1448 (6th Cir. 1996)	47-48
<i>Laura Modes Co.</i> , 144 NLRB 1592 (1963)	4,40,41
<i>Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB</i> , 546 F.3d 469 (D.C. Cir. 2009) <i>petition for rehearing en banc filed</i> (May 27, 2009)	3
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992)	23
<i>Letter Carriers v. Austin</i> , 418 U.S. 264 (1974)	4,47
<i>Linn v. Plant Guard Workers Local 114</i> , 383 U.S. 53 (1966)	4, 35

Cases --Cont'd	Page(s)
<i>Lott's Electric Co.</i> , 293 NLRB 297 (1989), <i>enforced mem.</i> , 891 F.2d 281 (3d Cir. 1989)	30-31
<i>Meijer, Inc. v. NLRB</i> , 130 F.3d 1209 (6th Cir. 1997)	23
<i>Minnesota Licensed Practical Nurses Association v. NLRB</i> , 406 F.3d 1020 (8th Cir. 2005)	42
<i>NLRB v. Adco Electric, Inc.</i> , 6 F.3d 1110 (5th Cir. 1993)	40
<i>NLRB v. American Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc.</i> , No. 09-1194 (8th Cir.)	3
<i>NLRB v. Blades Manufacturing Corp.</i> , 344 F.2d 998 (8th Cir. 1965)	42
<i>NLRB v. Daylin, Inc.</i> , 496 F.2d 484 (6th Cir. 1974)	22
<i>NLRB v. Greyhound Lines, Inc.</i> , 660 F.2d 354 (8th Cir. 1981)	35
<i>NLRB v. IBEW Local 1229</i> , 346 U.S. 464 (1953)	41
<i>NLRB v. Intertherm, Inc.</i> , 596 F.2d 267 (8th Cir. 1979)	31, 32
<i>NLRB v. Peter Cailler Kohler Swiss Chocolate Co.</i> , 130 F.2d 503 (2d Cir. 1942)	4, 34
<i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978)	52

Cases --Cont'd	Page(s)
<i>NLRB v. Rockline Ind., Inc.</i> , 412 F.3d 962 (8th Cir. 2005)	22
<i>NLRB v. Scrivener</i> , 405 U.S. 117 (1972)	50
<i>NLRB v. Servette, Inc.</i> , 377 U.S. 46 (1964)	49
<i>NLRB v. Sunnyland Packing Co.</i> , 557 F.2d 1157 (5th Cir. 1977)	25
<i>NLRB v. Vought Corp.</i> , 788 F.2d 1378 (8th Cir. 1986)	27,29
<i>NLRB v. Washington Aluminum Co.</i> , 370 U.S. 9 (1962)	32, 34
<i>NLRB v. Weingarten, Inc.</i> , 420 U.S. 251 (1975)	34
<i>NLRB v. Whitesell Corp.</i> , No. 08-3291 (8th Cir.)	3
<i>NLRB v. Windemuller Electric, Inc.</i> , 34 F.3d 384 (6th Cir. 1994)	23
<i>National Telephone Directory Corp.</i> , 319 NLRB 420 (1995)	4,55,56
<i>New Process Steel, L.P. v. NLRB</i> , 564 F.3d 840 (7th Cir. 2009), <i>petition for cert. filed</i> , ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457)	3
<i>New York New York Hotel & Casino</i> , 334 NLRB 762 (2001), <i>remanded</i> , 313 F.3d 585 (D.C. Cir. 2002).....	38,39,44

Cases --Cont'd	Page(s)
<i>Northeastern Land Services, Ltd. v. NLRB</i> , 560 F.3d 36 (1st Cir. 2009).....	2-3
<i>Novotel New York</i> , 321 NLRB 624 (1996).....	55
<i>Palermo v. United States</i> , 360 U.S. 343 (1959)	4,53,57
<i>Passavant Memorial Area Hospital</i> , 237 NLRB 138 (1978).....	29
<i>Petrochem Insulation, Inc.</i> , 330 NLRB 47 (1999), <i>enforced</i> , 240 F.3d 26 (D.C. Cir. 2001).....	32,33
<i>Pikeville United Methodist Hospital v. Steelworkers</i> , 109 F.3d 1146 (6th Cir. 1997)	24
<i>Register-Guard</i> , 351 NLRB 1110 (2007).....	24
<i>Sears Roebuck & Co.</i> , 300 NLRB 804 (1990).....	22
<i>Smithfield Packing Co.</i> , 334 NLRB 34 (2001).....	52
<i>South Prairie Construction Co. v. Operating Engineers Local 627</i> , 425 U.S. 800 (1976)	49
<i>Sprint/United Mgt. Co.</i> , 326 NLRB 397 (1998).....	28
<i>St. Luke's Episcopal-Presbyterian Hospital v. NLRB</i> , 268 F.3d 575 (8th Cir. 2001)	36

Cases --Cont'd	Page(s)
<i>Stride Rite Corp.</i> , 228 NLRB 224 (1977)	53
<i>Sutherland v. NLRB</i> , 646 F.2d 1273 (8th Cir. 1981)	23
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	22
<i>W San Diego</i> , 348 NLRB 372 (2006)	22
<i>Wal-Mart Stores, Inc. v. NLRB</i> , 400 F.3d 1093 (8th Cir. 2005)	3,21-22,26
<i>Wilson Trophy Co. v. NLRB</i> , 989 F.2d 1502 (8th Cir. 1993)	29
<i>Wright Electric, Inc. v. NLRB</i> , 200 F.3d 1162 (8th Cir. 2000)	4,55,56,57

Statutes

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

Section 2(9)(29 U.S.C § 152 (9)).....47
Section 3(b)(29 U.S.C. § 153(b)).....2
Section 7 (29 U.S.C. § 157)5,21,32,33,38,39
Section 8(a)(1)(29 U.S.C. § 158(a)(1))..... 3,15,16,17,21,26,28,55
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....3,16,17,21
Section 8(d) (29 U.S.C. § 158(d)).....42
Section 8(g) (29 U.S.C. § 158(g)).....42
Section 10(a)(29 U.S.C. § 160 (a))2
Section 10(e)(29 U.S.C. § 160(e))2,3,22
Section 10(f)(29 U.S.C. § 160(f))2,3

Jencks Act (18 U.S.C. § 3500).....52,53

Miscellaneous:

Quorum Requirements, Department of Justice, OLC, 2003 WL
24166831 (O.L.C., March 4, 2003).....3

Board’s Rules and Regulations (29 C.F.R)

Section 102.31(b)(29 C.F.R. 102.31(b)).....52
Section 102.118(b) (29 C.F.R. 102.118(b)).....19,52,53
Section 102.118 (d) (29 C.F.R. 102.118 (d)).....53,54

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**BRIEF FOR
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STATEMENT OF JURISDICTION

No. 09-1314 is before the Court on the petition of Cintas Corporation (“the Company”) for review of an Order issued against it by the National Labor Relations Board (“the Board”). No. 09-1518 is before the Court on the Board’s

cross-application for enforcement of its Order. UNITE HERE (“the Union”) has intervened in support of the Board. The Board’s Decision and Order was issued on January 30, 2009, and is reported at 353 NLRB No. 81 (Add. 1-5.)¹

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160 (a)) (“the Act”), which empowers the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), as the Company transacts business within this circuit. The Board’s Order is a final order within the meaning of Section 10(e) and (f) of the Act and, we submit, was validly issued by a two-member quorum of a properly constituted three-member group within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).²

¹ “Add.” refers to the addendum to the Company’s brief. “A” refers to the separate two-volume appendix filed by the Company. References to portions of the record not included in the addendum or appendix are as follows: “GCX,” “CPX,” and “RX” refer, respectively, to exhibits introduced by the General Counsel, the Union and the Company. “Tr ___ (H)” refers to the transcript of the portion of the hearing conducted at Hartford, Connecticut. “Tr ___ (C)” refers to the separately paginated transcript of the portion of the hearing conducted at Concord, North Carolina. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² Chairman Liebman and Member Schaumber issued the Board’s Decision and Order as a two-member quorum of a three-member group (Members Liebman, Schaumber, and Kirsanow) to which the Board had previously delegated all of its powers. *See* Add. 1 n.1. The First and Seventh Circuits have upheld the issuance of decisions by the same two-member quorum. *See Northeastern Land Services,*

The Company filed its petition for review on February 13, 2009. The Board filed its cross-application for enforcement on March 4, 2009. Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or cross-applications for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by issuing verbal and written warnings to employees for wearing union stickers and hats, thereby discriminatorily enforcing its dress code, and violated Section 8(a)(1) of the Act by: threatening an employee with discharge if she again wore a union sticker or hat; overbroadly and discriminatorily prohibiting the possession of union flyers and confiscating such flyers from a break room; and coercively interrogating an employee concerning her protected activity.

Wal-Mart Stores, Inc. v. NLRB, 400 F.3d 1093 (8th Cir. 2005)

Ltd. v. NLRB, 560 F.3d 36, 40-42 (1st Cir. 2009); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457). The Department of Justice's Office of Legal Counsel had previously reached the same conclusion in a formal legal opinion. *See Quorum Requirements*, Department of Justice, OLC, 2003 WL 24166831 (O.L.C., March 4, 2003). The District of Columbia Circuit reached a contrary conclusion in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 546 F.3d 469 (D.C. Cir. 2009), *petition for rehearing en banc filed* (May 27, 2009) and *response ordered* (June 3, 2009), Nos. 08-1162, 08-1214. The issue has been presented to this Court in *NLRB v. Whitesell Corp.*, No. 08-3291, argued June 9, 2009, and *NLRB v. American Directional Boring, Inc. d/b/a ADB Utility Contractors, Inc.*, No. 09-1194 (no argument date set).

American Cast Iron Pipe Co. v. NLRB, 600 F.2d 132 (8th Cir. 1979)

NLRB v. Peter Cailler Kohler Swiss Chocolate Co., 130 F.2d 503 (2d Cir. 1942)

Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966)

2. Whether the Board reasonably concluded that alleged misconduct by the Union during its corporate campaign would not be a defense to allegations of coercive conduct by the Company against its employees.

Borek Motor Sales, Inc. v. NLRB, 425 F.2d 677 (7th Cir. 1970)

Laura Modes Co., 144 NLRB 1592 (1963)

Beverly Hills Foodland, Inc. v. Food and Commercial Workers Local 655,
39 F.3d 191 (8th Cir. 1994)

Letter Carriers v. Austin, 418 U.S. 264 (1974)

3. Whether the Board acted within its discretion in declining to order the Union to produce notes which had not been signed, adopted, or approved by employee witnesses, were not substantially verbatim statements of those witnesses, and would have disclosed the union activities of nontestifying employees.

Palermo v. United States, 360 U.S. 343 (1959)

Wright Electric, Inc. v. NLRB, 200 F.3d 1162 (8th Cir. 2000)

National Telephone Directory Corp., 319 NLRB 420 (1995)

STATEMENT OF THE CASE

On charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging, *inter alia*, that the Company had engaged in unfair labor practices at its facilities in Charlotte, North Carolina, and Branford, Connecticut. (GCX 1(kk), (rr), (tt).)³ In its answer to the complaint, the Company asserted, as an affirmative defense, that because the Union had engaged in unlawful and/or unprotected activity, “*any* activity by employees in support of the Union is not protected by Section 7 of the Act.” (GCX 1 (yy), p. 21; emphasis added).

At a hearing, Administrative Law Judge Ira Sandron ruled that the protected status of the employees' union activities must be determined on the basis of the employees' own conduct and motives and not on unrelated actions by the Union or on union objectives not shown to be shared by, or even known to, the employees. Accordingly, he barred the introduction of evidence concerning the Union's corporate campaign, although he permitted the Company to make an offer of proof. (Add. 6; Tr 42-49, 59 (H), Tr 8 (C).)

The administrative law judge also ruled that, after a witness' direct examination was completed, any statements of the witness in the Union's

³ The complaint originally alleged that the Company committed additional unfair labor practices, including the discriminatory discharge of two employees, at three other facilities. These allegations were later settled and are not in issue here.

possession would be producible to the same extent as statements in the General Counsel's possession. (Tr 306 (H), Tr 323 (C).) However, he refused to require production of union representatives' notes of their interviews of witnesses, on the grounds that the notes, not having been approved or adopted by the witnesses, were not producible under the Board's Rules and Regulations (Tr 310 (H)) and that the interest of nontestifying employees in confidentiality concerning their participation in protected activity, such as attendance at union meetings, outweighed the limited probative value of the notes. (Tr 45-46, 62-64, 66 (H), Tr 8, 326 (C).)

On the merits, the administrative law judge recommended that the complaint allegations be sustained in part and dismissed in part. (Add. 5-25.) The Company filed exceptions, and the General Counsel and the Union filed cross-exceptions.

The Board (Chairman Liebman and Member Schaumber) affirmed the procedural rulings discussed above, affirmed in part and reversed in part the findings of unfair labor practices, and ordered the Company to cease and desist from the conduct found unlawful and take affirmative remedial action. (Add. 1-5.) The Company filed a petition for review, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company provides customers with corporate uniforms and related services at numerous facilities nationwide. (Add. 7; Tr 380-81 (H), A 1.) The Board found that the Company had unlawfully interfered with specific actions of employees that the Board found to be protected by the Act. At the Charlotte facility, the Board found, the Company interfered, in several separate incidents between February 9 and March 1, 2004, with the wearing of union stickers and hats and the possession and distribution of union flyers. (Add. 22.) At the Branford facility, the Board found a single incident of unlawful interrogation in July 2005, concerning an employee's signing of letters to the Company's customers. The Board's factual findings concerning these incidents are set forth below.

A. Charlotte

The Company provides production employees, whom it calls "partners," uniforms free of charge. The uniform consists of dark blue pants and a light blue, v-neck, short-sleeved shirt with a patch with the Company's logo on the left and a patch with the employee's name on the right. In cold weather, employees can wear long-sleeved white or navy-blue T-shirts under the uniform shirt. (Add. 14; Tr 85-86, 228 (C).)

The corporatewide dress code states that all production employees must wear the official company uniform while on the job. (Add. 14; GCX 15 (a).) The Company's rental division, which includes the Charlotte facility, has a separate dress code requiring that all visible garments worn by production employees be navy blue except for white T-shirts. (Add. 14; GCX 14.) Prior to February 2004, only one employee was disciplined for violating the foregoing rules—an employee who received a written warning in November 2001 for wearing the wrong color T-shirt. (Add. 15; A 32-33.)

The Company also offers employees two kinds of hats with its logo. (Add. 14; GCX 17(a), (b).) According to its official policy, employees are not required to wear hats, but if they do, they must wear one of the two company hats.

(Add. 14; Tr 87, 1177, 1221 (C).) They are asked to remove other hats, but prior to February 2004, no employee was disciplined for wearing an improper hat.

(Add. 14, 15; Tr 301-02, 821 (C).) At least one employee, Emelinda Rivera, was repeatedly told to remove a non-company hat, but was never disciplined for wearing one. (Add. 14; Tr 801, 821 (C).) Rivera also frequently wore a colorful bandana to work, and was merely told to tuck it into her shirt when it dangled.

(Add. 14; Tr 1195 (C).)

The corporatewide dress code permitted female employees to wear jewelry only in their ears. (Add. 14, 15, GCX 15(a).) In practice, however, female

employees were allowed to wear as much jewelry as they wished, as long as no safety issue arose. (Add. 15; Tr 90, 818 (C).) Two employees, mother and daughter, regularly wore various types of pins on their uniform shirts. (Add. 15; Tr 295-96, 548, 805 (C).)

On February 9, 2004, approximately eight employees wore union stickers to work. The stickers requested a \$1.00 per hour pay raise for the employees, saying in English and Spanish, "Farmer [one of the Company's owners] has billions, we want just \$1." (Add. 15; Tr 148-49, 257, 262, 1112 (C), A 24-25.) Two days later, 2 of the employees presented management with a petition, signed by 28 employees and requesting that the Company give its employees a raise of \$1.00 per hour. (Add. 15; Tr 405, 407 (C), RX 43.) The petition was forwarded to corporate headquarters. (Add.15; Tr 154-55 (C).)

On February 9, employee Raquel Cruz wore the union sticker described above on the left side of her uniform, above the Company logo. Supervisor Stephen Coleridge, seeing the sticker as he passed by, told Cruz to remove it and throw it away. When Cruz put the sticker on her forehead instead, Coleridge again told her to take it off. She put the sticker on her arm. (Add 15; Tr 507-09 (C).)

On February 10, Cruz brought a union flyer into the plant. When Coleridge saw her with the flyer in her work area, he told her to put it in her pocketbook and take it home without showing it to anyone. (Add. 16; Tr 516, 518-19 (C).)

On February 16, employee Candy Galdamez wore a hat with the Union's logo to work. (Add. 16; Tr 783 (C), A 37.) While she was working, Coleridge told her that she had to take the hat off and put it away because it was not in compliance with company policy. She removed the hat and placed it in her purse. (Add. 16; Tr 785-86 (C).) Coleridge later advised Plant Manager Mark Stoy that he was going to give Galdamez a verbal warning for wearing the hat and placing it in her work area, in violation of the Company's no-solicitation rule. (Add. 16; Tr 161 (C).)⁴ Galdamez later received a verbal warning for "wearing a winter hat, black in color." (Add. 16; A 27.) No other Charlotte employee has received a warning for violating the no-solicitation rule. (Add. 16; Tr 170 (C).) Employees are permitted to keep personal belongings at their work stations as long as the belongings do not interfere with work, and no other employee has received a warning for having a prohibited item at her work station. (Add. 16; Tr 116-17, 169, 1136 (C).)

⁴ The rule, not alleged or found to be facially invalid, prohibited employees from, *inter alia*, "making or receiving any solicitation during the working time of the [employees] making the solicitation or being solicited." (GCX 27, p. 1, par. I (c).)

Prior to February 20, employees freely read books, newspapers, and magazines, distributed Avon catalogues, and sold Avon products in the plant breakroom. (Add. 18; Tr 195, 283 (C).) On the morning of February 20, employee Ana Callas went to the breakroom at the start of her break period and placed copies of two union flyers on tables. One flyer, in English and Spanish, criticized the Company for spending money to fight the Union instead of giving the employees a pay raise; the other, also in English and Spanish, described the wages and benefits employees were receiving at unionized plants, including the Company's Detroit plant. (Add. 18; Tr 276-77 (C), A 38-40.)

Two supervisors reported to General Manager Robbie Poole that flyers were being distributed in the breakroom. He ordered them to confiscate the flyers because they violated the Company's no-solicitation policy. They returned to the breakroom and confiscated the flyers. When employee Raquel Cruz protested that she wanted to read one of the flyers, Supervisor Coleridge told her to put it in her purse and read it at home, because no one could read it in the plant. (Add. 18; Tr 281, 523, 1072-73, 1134 (C).)

At some point during the next two weeks, management advised employees in several group meetings that the Union was allowed to leaflet in nonwork areas, apologized for the confiscation, and said it would not happen again. (Add. 18; Tr 369-78, 1075-77 (C).) No written retraction of the confiscation was posted, and

several employees did not attend the meetings at which the apologies occurred. (Add. 18; Tr 173, 474, 495, 524, 733 (C).) The confiscated leaflets were never returned to the employees or the breakroom. (Tr 172-73, 1134 (C).)

On March 1, employees Ana Callas, Raquel Cruz, Rosa Cruz, Candy Galdamez, and Emelinda Rivera wore union stickers, saying “Uniform Justice!” in English and Spanish, on their uniforms. (Add. 16; Tr 284-86, 540, 791 (C), A 21-22.) Supervisor Coleridge told Galdamez to take the sticker off. She put it on her forehead and, when Coleridge told her to remove it, did so, after protesting that company policy did not prohibit wearing stickers on her body. Later that morning, she was called to the office, where General Manager Stoy showed her a written warning for “wearing stickers on the front and back of her uniform blouse,” as well as the verbal warning of February 16. He said that since the new warning was her second, any further warnings could result in her discharge. (Add. 16; Tr 792-93 (C), A 27.)

The other four employees who wore union stickers that day were given verbal warnings for “wearing stickers on the front of [their] uniform blouse[s].” (Add. 16; A 28-31.) At least two of them (Callas and Raquel Cruz) were not told that they were receiving verbal warnings, although they were told that the Company did not allow employees to wear stickers on their uniforms. (Add. 16; Tr 288-90, 542-45 (C).)

B. Branford

In March 1998, the Company submitted to the Connecticut Department of Environmental Protection (“DEP”) an application to renew its state wastewater discharge permit. That application, as amended, was still pending in 2005. (CPX 5, p.1, pars. 1, 2.) In its application, the Company sought to expand its water discharge capacity at the Branford facility. (Add. 7; CPX 5, p. 6.) The Union, by letter to the DEP dated March 3, 2005, objected to the latter request, asserting, *inter alia*, that the Company was not adequately training its workers on safety issues. (Add. 7-8; CPX 7, RX 9.) The Union solicited employees to sign a petition opposing the permit, but the petition was never filed with the DEP. (Add. 8; GCX 3, 6, 10.) In July, some employees signed a petition in support of the application for a permit, and this letter was forwarded to the DEP. (Add. 8; GCX 6, 10.) After the Company agreed to changes in its proposal, the Union withdrew its objections, and the application for a permit was granted. (Add. 8; CPX 5, pp. 9-10.)

While the application for a permit was pending, the Union also solicited employees of the Company to send letters to the Company’s major customers, especially Terminix and Trugreen. In two identical letters, one signed by 5 employees at the Branford plant and the other signed by 27 employees from various plants nationwide, the signers asserted that the Company had not given

them equipment to protect them from toxic chemicals in uniforms used by the customers and cleaned by the signers; had not trained them on how to handle those uniforms to minimize the hazards; and had failed to furnish them with Material Safety Data Sheets (MSDSs) containing information about chemicals, pesticides, herbicides, or other toxins that might be found on the customers' uniforms.⁵ They asked the customers to provide that information either to OSHA or directly to them, and said that they would insist on receiving, not only the requested information, but also the necessary training and equipment. (Add. 8-9; GCX 4, 5(c), A 19-20.)

In late July, Branford Plant Manager Eric Pepe, having heard from corporate headquarters that some of the 27 signatures on one of the letters were forged, called employee Berta Campos, one of the two Branford employees whose signatures appeared on the letter, into his office. With Supervisor Brian Cardozo acting as interpreter, Pepe asked Campos whether she had signed the letter. Noting that her signature on the letter was blurry, Campos said that it looked like a forgery. (Add. 9; Tr 136, 152-53, 171 (H).) She also said that she wanted nothing to do with the Union or the Company. (Tr 102, 136 (H).)

⁵ Employee Berta Campos, who requested the MSDSs for Terminix and Trugreen on January 7, 2005 (CPX 3), did not receive them until July 1. (GCX 2, RX 7.) The letters to customers, denying receipt of those documents, are undated, but Campos estimated that she signed GCX 4 on June 1. (Tr 114 (H).)

After Campos said that her signature on the letter appeared to be a forgery, Pepe asked her whether she would sign an affidavit to that effect. He assured her that her doing so would be completely voluntary and that there would be no repercussions either way. (Add. 9; Tr 172, 389, 426 (H).) She signed the following affidavit (Add. 9; GCX 5 (b), A 18 (emphasis added)):

[M]y immediate response was one of surprise and confusion. I was also very concerned because I did not know what they were talking about because *I had never sent any letter like this to any customer of Cintas*. At that point, I was shown a copy of the letter attached hereto, which is made to look like it was signed by me and has my name listed. I never signed this letter and I did not authorize anyone to sign this letter on my behalf. What's more, it is clear that it is not my signature because among other things my name is incorrectly written. I am very upset that someone would forge my signature on this letter and I will provide whatever assistance I can to help uncover who did this terrible thing.

After Campos signed this affidavit, Pepe told her to be careful because her signature was being used on documents without her authorization. (Add. 9; Tr 390, 427 (H).) At the time of this interview, neither Pepe nor Cardozo was aware of the other letter to Terminix and Trugreen which Campos had signed. (Tr 383, 423-24 (H).)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that the Company, at Charlotte, violated Section 8(a)(1) of the Act on February 9 by telling Raquel Cruz that she could not wear a union sticker on her uniform; on February

10 by telling Cruz she could not have a union flyer in her work area and must take it home; on February 16 by telling Candy Galdamez that she could not display a union hat in her work area; on February 20 by confiscating union flyers from a nonwork area and telling employees they could not read such flyers in that area during nonwork time; and on March 1 by telling employees that they had to remove stickers from their uniforms and implying to Galdamez that she would be discharged if she again wore a union hat or sticker. (Add. 1-2, 15, 17, 19, 22.)

The Board further found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act on February 16 by giving Galdamez a verbal warning for wearing a union hat and on March 1 by giving her a written warning, and giving four other employees verbal warnings, for wearing union stickers on their uniforms. (Add. 1, 17, 22-23.) Finally, the Board found, contrary to the administrative law judge, that the Company violated Section 8(a)(1) of the Act at Branford by interrogating employee Berta Campos about her protected activity in signing letters, since its inquiry was not limited to the single letter on which her signature was arguably forged. (Add. 3-4.)⁶

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or

⁶ The administrative law judge and the Board dismissed a number of allegations of violations at both Charlotte and Branford. The dismissed allegations are not in issue in this Court.

coercing employees in the exercise of their statutory rights; to remove from its files any reference to the unlawful warnings and notify the warned employees in writing that it has done so and that the warnings will not be used against them in any way; and to post copies of an appropriate remedial notice at Charlotte and of a different notice at Branford. (Add. 4-5.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's findings of violations of Section 8(a)(3) and (1) of the Act. Even where special circumstances justify restrictions on union hats or insignia, such restrictions may not be disparately enforced by disciplining employees who wear union hats or insignia, but not those who wear other hats or insignia at least equally harmful to the employer interest at issue. Here, the Company disciplined only employees who wore union hats and insignia, but not employees who wore other hats and insignia, including one who regularly wore a brightly colored scarf.

The Company also violated the Act by prohibiting employees from reading or distributing union flyers in the breakroom and by confiscating such flyers. The prohibition was overbroad, since employees have a right to distribute union literature in nonworking areas during nonworking time. It was also discriminatory, since employees had been allowed to read and distribute other literature in the breakroom. The Company's apology did not cure the unlawful confiscation, since

it was not disseminated to all employees, and the confiscated flyers were never returned.

The interrogation of Branford employee Berta Campos about her signature on letters to the Company's customers was also unlawful. The interrogation was not limited to the one letter on which the Company had some basis for suspecting her signature was a forgery, but extended to all similar letters, including those concerning which it had no such basis for suspicion.

The letter was protected concerted activity under the Act. Employees have the right to engage in concerted activity to improve the working conditions of other employees, even though they derive no immediate benefit from their activity. The letter did not constitute unprotected product disparagement. It criticized only the Company's treatment of its employees, not the quality of its products or services or the effect of its environmental policies on the general public.

2. The Union's alleged misconduct during a corporate campaign is not a defense to allegations that the Company unlawfully coerced its employees. The protected status of the employees' union activity depends on the employees' own motives and actions, not those of the Union. The Board and courts have consistently held that union misconduct does not entitle employers to coerce employee supporters of the union. Rather, such coercion is permissible only when

the coerced employee has personally engaged in conduct forfeiting the statutory protection.

Any unlawful objectives of the Union cannot be imputed to its employee supporters. Rather, the burden was on the Company to prove that the employees themselves had an unlawful objective. The Company failed to meet this burden. Its evidence shows only that the employees supported the Union and desired union representation and a wage increase; these are core protected objectives and cannot serve as proof that the employees also support other, unlawful objectives. Similarly, the Company's offer of proof related solely to the Union's actions and motives, rather than those of the employees, and the Board was therefore justified in rejecting it as irrelevant.

3. The Board reasonably declined to order the Union to produce its agents' notes of their conversations with employee witnesses. Since the notes were not signed or otherwise adopted or approved by the witnesses, they were not producible under Section 102.118(b) of the Board's Rules and Regulations. They were prior statements of the note-takers, rather than of the witnesses, and thus could not properly be used to impeach the witnesses. Moreover, in view of the danger of intimidation if the Company, whose union animus is conceded, could obtain the names of employees who signed union authorization cards or attended union meetings, the Board properly held that the employees' interest in the

confidentiality of such information outweighed the limited value of the notes to the Company for impeachment purposes. Similarly, the Board properly rejected the Company's blanket demand for production of any documents relating to employee activity relevant to this case. The confidentiality interests of nontestifying employees cannot be defeated by mere speculation that the requested documents might contain relevant evidence.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT

In this section, we show that the conduct found unlawful by the Board constituted interference with classic protected activity by employees. In Section II of the Argument, at pp. 36-50, below, we deal with the Company's contention that the Union's corporatewide campaign rendered this employee activity unprotected.

A. Violations at Charlotte

The nine violations found at Charlotte are set forth at Add. 22. Seven of them involved discriminatory restrictions on the wearing of union hats or stickers and, in four cases, discipline or threats thereof for violating those restrictions. The other two violations involved overbroad, as well as discriminatory, restrictions on the distribution of union flyers.

1. Restrictions on union hats and stickers

Section 7 of the Act (29 U.S.C. § 157) gives employees the right, *inter alia*, "to form, join, or assist labor organizations" and "to engage in ... concerted activities for the purpose of mutual aid or protection..." Its is settled that the foregoing rights include the right to wear union insignia at work, even during working time, in the absence of special circumstances such as interference with production or discipline. *See Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093,

1097-98 (8th Cir. 2005). In some cases, the Board has found such special circumstances where the employer has demonstrated that the display of insignia may “unreasonably interfere with a public image that the employer has established” *W San Diego*, 348 NLRB 372, 373 (2006) (citation omitted). However, even a facially valid restriction on hats or insignia may not be disparately enforced by banning union hats or insignia, but allowing others similar in nature. *See, e.g., Sears Roebuck & Co.*, 300 NLRB 804, 809-10 (1990).

The Board’s factual findings are conclusive if supported by substantial evidence on the record as a whole (29 U.S.C. § 160(e)); a reviewing court “may [not] displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. Rockline Ind., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005).

Here, the hat worn by Galdamez on February 16 (A 37) explicitly referred to the Union. The Company concedes (Br 51) that the “Uniform Justice!” stickers worn by five employees on March 1 (A 21-22) also referred to the Union. These stickers were presumptively protected by the Act, whose protection extends to “[a]nything favorable said about a union or the labor movement...” *NLRB v. Daylin, Inc.*, 496 F.2d 484, 487 (6th Cir. 1974). The button worn by Cruz on February 9 (A 24-25) did not specifically refer to the Union, but said that the

employees wanted a \$1.00 per hour wage increase. Concerted employee activity in support of a demand for a wage increase is protected. *See Sutherland v. NLRB*, 646 F. 2d 1273, 1274 (8th Cir. 1981).

The Board expressly (Add. 2 n.7) declined to decide whether, as the Company contends (Br 47-52), its image as a provider of uniform-related services, and the need to have employees wear unadorned uniforms in the presence of customers or potential customers who sometimes visited the plant, qualified as a special circumstance which would justify a ban on union hats and stickers.⁷ Instead, the Board, in finding violations of the Act, relied (Add. 1-2) on the Company's disparate treatment of union activity, evidenced by its discipline of employees who wore union hats and stickers and failure to discipline employees who wore other hats and stickers at least equally inconsistent with its public image.

The record supports the Board's findings of disparate treatment. The Company's own general manager, Stoy, testified that employees wore improper

⁷ The Company further contends (Br 47-50) that its property rights in the uniforms outweigh the employees' interest in wearing union insignia. However, the cases it cites did not involve discrimination against union insignia, and the Supreme Court cases involved nonemployee union organizers, who do not have the same statutory right to solicit or distribute literature on the employer's property that employees do. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992) (referring to "critical distinction" between organizing activities of employees and nonemployees); *id.* at 537. To the extent that *NLRB v. Windemuller Electric, Inc.*, 34 F.3d 384, 393-95 (6th Cir. 1994), applies *Lechmere* to employee wearing of stickers without observing this critical distinction, it was repudiated in *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1213 & n.4, 1216-17 (6th Cir. 1997).

attire about once a month, but were merely told to remove it, not given verbal or written warnings. (Tr 231, 239 (C).) Not even an employee who regularly wore a colorful scarf was disciplined. (Tr 1195, 1221-22 (C).) Only Candy Galdamez, who wore a union hat, received a warning. (A 26.) Similarly, while five employees, including Galdamez, were disciplined for wearing union stickers on their uniforms, none were disciplined for wearing other kinds of stickers before the union stickers appeared.⁸ In particular, a mother and daughter regularly wore various types of pins with impunity. As the Board noted (Add. 1-2), the foregoing facts distinguish this case from *Register-Guard*, 351 NLRB 1110 (2007), relied on by the Company (Br 49). The discipline only of employees who wore union hats or stickers or kept them in their work areas constituted “disparate treatment of activities ... of similar character because of their union...status.” *Register-Guard*, 351 NLRB at 1118.

The Company also relies (Br 56-57) on cases holding that isolated incidents of failure to enforce a dress code do not establish discrimination. However, to establish discrimination, the General Counsel need not prove that a dress code has

⁸ The issuance of disciplinary warnings to three employees in April 2004 for wearing improper jackets does not help the Company’s case. By the time those warnings were issued, the Union had already filed charges alleging unlawful conduct at the Charlotte plant. (GCX 1(c).) That the Company may have begun strictly enforcing its dress code under such circumstances does not negate a finding that its earlier enforcement was selective. See *Pikeville United Methodist Hospital v. Steelworkers*, 109 F. 3d 1146, 1156 (6th Cir. 1997).

never been applied to nonunion clothing or stickers, but only that it has been applied to union clothing or stickers and frequently not applied to other clothing or stickers. *See NLRB v. Sunnyland Packing Co.*, 557 F. 2d 1157, 1162 (5th Cir. 1977). Here, the evidence that a few employees regularly wore unauthorized headgear or stickers over a protracted period of time is enough to show that unpunished violations of the dress code amounted to more than isolated incidents of nonenforcement.

The Company also argues (Br 51) that it was entitled to ban these union stickers because they were “large, garish, and controversial.” Neither the corporate dress code (GCX 15 (a)) nor the separate dress code for Charlotte (GCX 14) mentions any of these factors. More significantly, neither do the warnings given to the employees (A 28-31), which state that wearing *any* stickers is in violation of the Company’s policy, although, as shown above, the policy was not enforced that way. Thus, even if the employees could lawfully have been disciplined because of the color or size of the stickers, they were not disciplined on those grounds. The case thus falls within the familiar rule that the existence of a legitimate ground for discipline is no defense if the discipline was not based on that ground. *See, e.g., JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 842 (8th Cir. 2003). Moreover, the Company’s failure to discipline the employee who repeatedly wore a brightly

colored bandana suggests that its concern was not with the conspicuous nature of the stickers, but with their pro-union message.

The foregoing factors distinguish this case from *Fabri-Tek, Inc. v. NLRB*, 352 F.2d 577 (8th Cir. 1965), relied on by the Company (Br 50, 52). This Court there held that the employer, whose production process was extraordinarily complex and required a high degree of concentration because each component of the product had to be absolutely perfect, lawfully banned the wearing of large or flashy union buttons. However, the employer expressly permitted the wearing of smaller, less distracting union buttons. 352 F.2d at 581, 586. Further, there was no union animus and no discrimination against union buttons; employees were told that they could not wear any kind of large buttons, including presidential campaign buttons. *Id.* at 586-87. Here, the Company stipulated to its union animus (Tr 12(C)), and it punished the wearing of union stickers, regardless of size, but not the wearing of other stickers. It can find no support for its actions in *Fabri-Tek*, which does not hold that union insignia larger than a certain size are *per se* unprotected. *See Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1098 (8th Cir. 2005) (voiding ban on T-shirt arguably more visible than buttons in *Fabri-Tek*).

2. Restrictions on distribution of union literature

It is settled that, absent special circumstances, an employer violates Section 8(a)(1) by prohibiting distribution of union literature in nonworking areas during

nonworking time. *See American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 135-36 (8th Cir. 1979). Discriminatory application of even a facially valid restriction on distribution of literature is also unlawful. *See id.* at 136. The test of illegality is not the actual effect of the employer's actions, but whether those actions reasonably tend to interfere with the protected right to distribute union literature. *See NLRB v. Vought Corp.*, 788 F.2d 1378, 1381 (8th Cir. 1986).

The Board found that the Company violated the Act in two incidents involving the distribution of union literature: on February 10, when Supervisor Coleridge told employee Cruz to put a union flyer in her pocketbook and take it home without showing it to anyone, and on February 20, when supervisors confiscated union flyers from the breakroom and again told Cruz to put a flyer in her purse and take it home, because no one could read it in the plant. The record fully supports both findings of violations.

On February 10, Supervisor Coleridge told Cruz to “put [the union flyer] inside [her] wallet and not to show it to anybody.” (Tr 519 (C).) This instruction, unqualified as to time and place, was impermissibly broad insofar as it prohibited Cruz from showing the flyer to other employees in the breakroom during nonworking time. It was also discriminatory, since employees had previously been permitted to distribute other literature and read books, magazines, and newspapers in the breakroom. (Tr 195, 283 (C).) Similarly, on February 20, Coleridge told

Cruz that no one could read the union flyers in the plant (Tr 281, 523 (C)), again an overbroad and discriminatory prohibition. On February 20, Coleridge also confiscated union flyers from the breakroom, a separate violation of Section 8(a)(1). *See Sprint/United Mgt. Co.* 326 NLRB 397, 399 (1998); *F.W. Woolworth Co. v. NLRB*, 530 F.2d 1245, 1246 (5th Cir. 1976).

The Company, in its argument, does not challenge these findings of violations.⁹ However, in its Statement of Facts, it criticizes the Board for crediting the testimony of Cruz as to the February 10 incident (Br 20) and suggests (Br 22) that the unlawful conduct on February 20 was cured by the subsequent assurance to employees that they could distribute the literature in nonwork areas during nonwork time. Assuming that the foregoing statements are enough to preserve a challenge to the Board's findings of violations, those challenges should be rejected. As to the former, it is settled that the administrative law judge's credibility determinations are entitled to great deference. *See JHP & Associates, LLP v. NLRB*, 360 F.3d 904, 910-11 (8th Cir. 2004). As to the latter, the Board properly found (Add. 1 & n.8, 18-19) that the Company did not effectively repudiate the unlawful confiscation of union flyers, in view of its other, unrepudiated unfair

⁹ The Company does contend (Br 75-76) that the General Counsel failed to prove that the February 10 flyer contained protected material. However, the testimony of Cruz (Tr 516-19 (C)) showed that it was a union flyer and that it was treated differently from nonunion flyers. Nothing more was needed to show discrimination.

labor practices and the failure to disseminate the alleged retraction to all of the employees who had been present at the time of the unlawful conduct. *See Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511-12 (8th Cir. 1993); *NLRB v. Vought Corp.*, 788 F.2d 1378, 1381 (8th Cir. 1986) (finding of violation upheld despite plant supervisors' overruling of security officers' attempt to enforce invalid no-distribution rule); *Chinese Daily News*, 346 NLRB 906, 906 n.4 (2006), *enforced mem.*, 224 Fed. Appx. 6 (D.C. Cir. 2007); *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978). In addition, since the Company concededly never returned the confiscated flyers to the employees or the breakroom from which they were taken (Tr 1134 (C)), it cannot claim to have cured the effect of the unlawful confiscation.

B. Unlawful Interrogation at Branford

The Union sent two separate, but identically worded, letters to Terminix and Trugreen, customers of the Company's Branford plant. Both letters (GCX 4, A 19-20) purported to bear the signatures of employees of the Company. Upon receiving reports of forged signatures on only one of the letters (A 19-20), the Branford plant manager called employee Berta Campos, whose signature appeared on both letters, into his office. Campos agreed, in response to his questions, that her signature on one, and only one, letter—the one reproduced at A 19-20—looked like a forgery. (Tr 136, 152, 171 (H).) She also specifically stated that she *had*

signed other letters. (Tr 136, 151 (H).) Nevertheless, the plant manager asked her to sign an affidavit saying, not only that she had not signed the letter with the allegedly forged signature, but also that she had not signed any similar letter to any customer of the Company. (A 17-18.) The Board found (Add. 3-4) that the use of this overbroad language constituted unlawful interrogation concerning protected activity. As shown below, this finding was fully justified.

At the outset, it is clear that the request that Campos sign the broadly worded affidavit did amount to interrogation into whether Campos had signed other letters, and particularly GCX 4, in support of the Union's campaign at Branford. Contrary to the Company's contention (Br 44-46), the language of the affidavit was clearly broad enough to encompass GCX 4. Since that letter was identical in substance to the allegedly forged letter, a reasonable employee could not help but view it as a "letter like this" within the meaning of the affidavit.

Further, the Board was warranted in viewing the request that Campos sign the affidavit as equivalent to interrogation concerning the truth of the broad assertions in the affidavit. It is comparable to distributing campaign propaganda in such a manner that an employee's acceptance or rejection thereof identifies her as a union supporter or opponent, a practice long found unlawful. *See, e.g., Lott's Electric Co.*, 293 NLRB 297, 303-04 (1989) (request that employee wear "Vote No" button held coercive interrogation), *enforced mem.*, 891 F.2d 281 (3d Cir.

1989). In this case, Campos, by signing the proffered affidavit, denied that she had signed either of the letters to the Company's customers; if she had refused to sign the affidavit, she would have been implying that she did sign one of the letters. In either case, she would have been revealing her views, if not about the Union in general, then at least about its environmental campaign against the Company.

The Board assumed, without deciding, that the Company could properly question Campos about the letter (A 19-20) on which it had objective grounds for believing that her signature might be a forgery. However, it does not follow that the Company was justified in going further and questioning her generally about her signatures on letters to customers. She had specifically told the questioners that she had signed such letters (Tr 136, 151 (H)); at the Board hearing, she specifically identified GCX 4 as a letter she had signed (Tr 98 (H)); and the Company had no basis for believing that her signature on that letter was forged. The two suspicious aspects of A 19-20 are wholly inapplicable to GCX 4; the Company had received no reports of forged signatures on the latter, and the signatures on the latter, unlike some of those on the former, were not blurred. Accordingly, the questioning of Campos concerning her signature on GCX 4 served no legitimate purpose.

Interrogation of employees concerning protected activity violates the Act if, under all the surrounding circumstances, it reasonably tends to coerce employees into refraining from such activity. *See NLRB v. Intertherm, Inc.*, 596 F.2d 267, 274

(8th Cir. 1979). Most of the relevant factors mentioned in *Intertherm* support the finding of coercion here. The questioner was the highest official at the Branford plant, and he called Campos into his office, thereby creating an atmosphere of unnatural formality. The questioning was not general, but related to Campos' own activities. Finally, she replied falsely, both by signing the affidavit which falsely denied that she had signed the letter to the Company's customers (GCX 4) and by saying she wanted nothing more to do with the Union (Tr 102 (H)), although she had signed both the letter to customers and a petition opposing the Company's water discharge permit application at the Union's behest. (Tr 92-100 (H).) The lack of a legitimate justification for the broad scope of the interrogation also supports a finding of coercion. See *NLRB v. Intertherm, Inc.*, 596 F.2d at 274 n.2. Thus, the finding of unlawful coercion is entitled to affirmance if, as we now show, the letter to customers was protected by the Act.

Section 7 of the Act (29 U.S.C. § 157) protects the right of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." This language has been viewed as broadly protecting "the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). This includes concerted activity designed to protect the health and safety of employees by compelling an employer to take steps to minimize the exposure of his employees to toxic materials. See *Petrochem*

Insulation, Inc., 330 NLRB 47, 49 (1999), *enforced*, 240 F.3d 26, 30-31 (D.C. Cir. 2001); *GHR Energy Corp.*, 294 NLRB 1011, 1014 (1989), *enforced mem.*, 924 F.2d 1055 (5th Cir. 1991). The protection of Section 7 also extends to efforts of employees to improve their lot through channels outside the immediate employee-employer relationship. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-67 (1978). This includes the right to appeal to the employer's customers to assist the employees, so long as the employees "act[] for some arguably job-related reason and not out of pure social or political concerns" *Beverly Hills Foodland, Inc. v. Food and Commercial Workers Local 655*, 39 F.3d 191, 195 (8th Cir. 1994). *Accord Five Star Transportation Inc. v. NLRB*, 522 F.3d 46, 52-54 (1st Cir. 2008); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996).

Here, the letter which Campos signed (GCX 4) expressed the signers' concern about the health risks from hazardous chemicals on uniforms which the customers to whom the letter was addressed returned to the Branford plant, and specifically criticized the Company on three grounds: that it failed to train its workers in the proper handling of possibly contaminated uniforms; that it failed to give them protective clothing to minimize the risk to their health and safety; and that it failed to give them copies of the MSDSs which would give them information about the risks they faced. The expression of concern and all of the criticisms related to the employees' working conditions. Accordingly, the letter

was protected activity unless it was “unlawful, violent, or in breach of contract” or could be “characterized as ‘indefensible’ because [it] . . . show[ed] a disloyalty to the [Company] which [was] . . . unnecessary to carry on the workers’ legitimate concerted activities.” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). As shown below, the letter fell into none of these categories.

At the outset, the Company’s contention (Br 38, 40, 45) that Campos’ signing of the letter was unprotected because she did not work with the dirty laundry from Terminix and Trugreen, and the assertions in the letter were therefore false as to her, must be rejected. The right to engage in concerted activity in protest of working conditions is not limited to employees directly affected by those conditions. As Judge Learned Hand observed in the early days of the Act (*NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503, 505-06 (2d Cir. 1942), quoted with approval in *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 261 (1975) (citation omitted)):

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, . . . they engage in a “concerted activity” for “mutual aid or protection,” although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is “mutual aid” in the most literal sense, as nobody doubts.

The right of an employee thus to join in a protest of other employees’ working conditions would be undermined if the use of the word “we” or “us” in a

letter like GCX 4 were deemed to be the sort of knowing or reckless falsehood required to render such an employee's participation unprotected. *See Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61-63 (1966); *Beverly Hills Foodland, Inc. v. Food and Commercial Workers Local 655*, 39 F.3d 191, 194-96 (8th Cir. 1994); *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). To render Campos' signature unprotected, the Company would have to show that she knew, or recklessly disregarded the possibility, that the statements in the letter were false as to all the signers. The Company did not do so.

The Company's further contention (Br 38, 41, 45-46)—that the letter was unprotected because it disparaged the Company—must also fail. The letter disparaged only the Company's treatment of its employees and its alleged disregard for the effect of hazardous chemicals on their health. Nowhere in the letter was there any negative comment on the quality of the products or services which the Company was offering its customers, or any suggestion that its actions were endangering the environment or the public. Only the latter types of disparagement, not disparagement of an employer's labor policies, are unprotected. *See NLRB v. Greyhound Lines, Inc.*, 660 F.2d 354, 357 (8th Cir. 1981); *Five Star Transportation Inc.*, 349 NLRB 42, 45-47 & n.9 (2007) (employees whose letters to school district disparaged bus company's business held unprotected, but employees whose letters related primarily to their terms and conditions of

employment held protected), *enforced*, 522 F.3d 46, 52-54 (1st Cir. 2008). Since the letter here concerned only terms and conditions of employment, it was protected, and the Board properly found the Company's interrogation of Campos concerning it to be unlawful.¹⁰

II. THE BOARD REASONABLY CONCLUDED THAT ALLEGED MISCONDUCT BY THE UNION DURING ITS CORPORATE CAMPAIGN WOULD NOT BE A DEFENSE TO ALLEGATIONS OF COERCIVE CONDUCT BY THE COMPANY AGAINST ITS EMPLOYEES

According to the Company (Br 23-32), the Union has engaged in a nationwide corporate campaign against it, designed to force it to agree to a neutrality/card-check agreement, whereby the Company would agree not to campaign against the Union during an organizing drive and would recognize the Union without a Board election if a neutral third party finds, on the basis of a check of union authorization cards, that a majority of the employees in an

¹⁰ *St. Luke's Episcopal-Presbyterian Hospital v. NLRB*, 268 F.3d 575 (8th Cir. 2001), relied on by the Company (Br 38, 45, 64-65), is not to the contrary. The employee in *St. Luke's* held a press conference in which she not only criticized changes in the working conditions of nurses, but specifically asserted that those changes jeopardized the health of patients, including newborn babies. This Court held the latter statement to be unprotected as a disparagement of the quality of patient care at the hospital in question. 268 F.3d at 580-81. Thus, it was the "product disparagement" aspect of the employee's statements, not their false criticism of labor policies, that rendered them unprotected. Moreover, the statements in *St. Luke's* also disparaged the work of the hospital's doctors to the extent that they refused to work with the nurse who made the statements. 268 F.2d at 582. The letter here contains no disparagement of the work of any Branford employees.

appropriate bargaining unit support the Union.¹¹ Although the Company asserts that many aspects of this campaign are unlawful, including some that allegedly violate the Act (Br 67-71), it has never filed unfair labor practice charges against the Union. Instead, it attempted to use the hearing in this case, based on unfair labor practice charges against it, as a forum in which to try its allegations of misconduct by the Union. The administrative law judge, affirmed by the Board, rejected the attempt to shift the focus of the hearing from the Company's conduct to the Union's, ruling that any misconduct by the Union would not be a defense to the charges against the Company. As shown below, this ruling was eminently proper.

None of the Company's conduct which the Board found unlawful was directed to the Union. All of the unlawful conduct at Charlotte was directed toward employees engaged in classic forms of protected prounion activity: wearing union hats and stickers and distributing union flyers. As shown above, pp. 29-36, the single violation found at Branford was also directed to an employee whose activity was less typical, but no less protected: joining a concerted effort to enlist the aid of the Company's customers in obtaining better working conditions.

¹¹ The record does not include the terms of any nationwide agreement of this type submitted by the Union to the Company. However, the Company's offer of proof includes a neutrality/card-check proposal, limited to the Detroit metropolitan area, which the Union submitted during negotiations in Detroit, where it represents a unit of the Company's employees. (A 241-42). The offer of proof also includes a similar agreement between the Union and another employer. (A 201-33.)

The question thus presented is whether any unlawful conduct by the Union during its corporate campaign entitled the Company, not to retaliate directly against the Union, but to interrogate, threaten, discipline, and, by implication, discharge employees who engaged in the classic, protected union activity described above.

The Company's "corporate campaign" defense necessarily assumed an affirmative answer to this question. Thus, in its answer to the complaint, the Company asserted, as an affirmative defense, that because of the alleged illegality of the corporate campaign, "*any* activity by employees in support of the Union is not protected by Section 7 of the Act." (A 15; emphasis added). Consistent with this position, the Company's entire offer of proof related to the actions or motives of the Union. (A 64-67.) At no time has the Company offered to prove that the Charlotte employees against whom its unfair labor practices were directed did not really want a wage increase or representation by the Union, or that Branford employee Campos, whom it unlawfully interrogated, did not really want to help her fellow workers get training or equipment to protect them from toxic chemicals, or that the employees at either plant wanted to put the Company out of business and themselves out of jobs—an objective which the Board has previously found absurd to attribute to employees. *See New York New York Hotel & Casino*, 334

NLRB 762, 764-65 (2001), *remanded on other grounds*, 313 F.3d 585 (D.C. Cir. 2002).¹²

The administrative law judge and the Board rejected this offer of proof, holding that the employees' own actions and motives, not those of the Union, were dispositive, and that there was no evidence or offer of proof that would indicate that the employee conduct in issue, protected on its face, was anything other than what it appeared to be. (Add. 1 n.3, 6.)

The Board properly rejected the Company's "guilt by association" theory. Section 7 of the Act guarantees the right "to form, join, or assist" unions, and does not limit that right to unions that meet a particular standard of conduct. Board and court decisions have consistently refused to permit employers to coerce employee supporters of unions that have engaged in, or allegedly intend to engage in, unlawful conduct, either after obtaining recognition or as a means of obtaining it.

¹² The Company's contention that the Union sought to put it out of business is based on remarks, taken out of context, by the Union's recently resigned president. Viewed in context, those remarks (A 71) indicate nothing more than a strong desire to obtain a neutrality/card-check agreement. As to the Union's activities at Branford (*see* A 65, par. 12h, A 66, par. 18), it is noteworthy that the Union ultimately agreed to a settlement whereby the Company obtained the permit it sought in return for agreeing, *inter alia*, to give all employees spill-control training and restrict the use of certain harmful laundering chemicals to which employees might be exposed. (CPX 5, pp. 9-10.) This agreement strongly suggests that the Union was genuinely seeking to improve the lot of the Branford employees, not to shut down the Branford plant or impose costs on the Company simply to punish it for resisting a neutrality/card-check agreement.

In *NLRB v. Adco Electric, Inc.*, 6 F.3d 1110, 1116 (5th Cir. 1993), the court rejected the employer's contention that it was entitled to show that the union was its competitor in business and that its discharge of two union adherents was therefore lawful. The court held that, even if the union's actions created a conflict of interest that would disqualify it from acting as the employees' bargaining representative, their organizational activity on its behalf would be protected and could not be a lawful basis for discharging them.

In *Borek Motor Sales, Inc. v. NLRB*, 425 F.2d 677, 682 (7th Cir. 1970), the employer attempted to defend its discharge of an employee for union activity by asserting that the union had indicated its intent to submit a price-fixing proposal which allegedly would have violated the antitrust laws. The court rejected this defense, saying that the employer "cannot use the asserted antitrust violation to justify its own improper actions in resistance to union organization. [It] could have countered illegal union propaganda without employing the coercive threat and unfair discharge" found by the Board. The employer's remedy, the court suggested, would be to refuse to bargain over the allegedly illegal proposal if the union made it after becoming the bargaining representative.

Unlike the Union here, the union in *Laura Modes Co.*, 144 NLRB 1592 (1963), sought to obtain bargaining rights by violent conduct which, the Board found, "evidenced a total disinterest in enforcing its representation rights through

the peaceful legal process provided by the Act” 144 NLRB at 1596. This violence led the Board to withhold the remedial bargaining order which it would otherwise have issued. However, the Board stressed that “the employees’ right to choose the [u]nion as their representative survives [its] misconduct” (*id.*), and that, despite the union’s violence, “it does not follow that the [employer was] free to threaten [its] employees with reprisals because of their affiliation with or their adherence to the [u]nion.” *Id.* at 1595. The Board thus found that such threats, although made after the union’s violent acts, were still unlawful. *Id.*

NLRB v. IBEW Local 1229, 346 U.S. 464 (1953), relied on by the Company (Br 63, 66), is also instructive. The Supreme Court there upheld the Board’s finding that nine employees who sponsored or distributed a handbill which disparaged the employer’s product, but did not refer to an ongoing labor dispute, were lawfully discharged. Significantly, however, the Court noted, without disapproval, the Board’s finding that a tenth employee, who had not sponsored or distributed the objectionable handbill, but only distributed other, protected handbills, was unlawfully discharged. *See* 346 U.S. at 470, 475; *Jefferson Standard Broadcasting Co.*, 94 NLRB 1507, 1513-14 (1951).

The lessons of the foregoing decisions are clear. When an employee engages in otherwise protected activity, retaliation or coercion directed at that

employee can be justified only by a showing that she personally—not her union or other employees—has engaged in misconduct forfeiting the statutory protection.

The cases cited by the Company (Br 77-79) are not to the contrary. In *Minnesota Licensed Practical Nurses Assn. v. NLRB*, 406 F.3d 1020, 1025-27 (8th Cir. 2005), the nurses engaged in a strike in violation of Section 8(g) of the Act (29 U.S.C. § 158(g).) A specific statutory provision, Section 8(d) (29 U.S.C. § 158(d)), states that engaging in such a strike results in automatic forfeiture of employee status. More important, only those nurses who personally participated in the strike were discharged in *Minnesota LPN*. Similarly, in *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1005 (8th Cir. 1965), this Court, upon finding that a series of walkouts were unprotected, held that “the employer was free to discharge *the participating employees* for *their* unlawful disloyal tactics.” (Emphases added.) Nothing in either opinion suggests that either employer was entitled to take action against other prounion employees who engaged in other, protected types of prounion activity.

The administrative law judge correctly observed (Add. 6) that to impute the Union’s motives to employees, absent evidence that the employees were aware of those motives, would “pervert[] common law principles of agency and run contrary to the purposes of the Act.” He also noted (*id.*) that the Company had submitted

no evidence or offers of proof that any of the employees subjected to the Company's unlawful conduct were aware of the Union's alleged unlawful motives.

The Company contends (Br 77-79) that it does not matter whether employees had such knowledge; that the fact that their activities had the effect of furthering the Union's allegedly unprotected objectives is enough to render the activities unprotected. This sweeping assertion amounts to another way of contending that the Union's undisclosed motives rendered all prounion employee activity unprotected. For example, an employee's signing a union authorization card or urging other employees to do so, even on nonworking time, could be deemed unprotected, since it would further the ultimate goal of the corporate campaign—recognition through a card check—which could be achieved only if the Union succeeded in obtaining signed cards from a majority of the employees in an appropriate bargaining unit. Similarly, an employee's urging her United States Representative or Senator to support the proposed Employee Free Choice Act could be deemed unprotected, since that proposed legislation would allow the Board to certify a union, and thus compel an employer to bargain with it, on the basis of a card check. The Board properly declined to adopt so drastic a limitation on employee rights.

An employer may assert as a defense that employees' conduct is unprotected because *they* have an unlawful objective, but it has the burden of establishing this

defense. *See New York New York Hotel & Casino*, 334 NLRB 762, 764-65 (2001), *remanded on other grounds*, 313 F.3d 585 (D.C. Cir. 2002). The Company contends (Br 72-77) that all of the union activity which was the subject of its coercive conduct was in furtherance of the Union's corporate campaign. The evidence it cites falls far short of proving this.¹³

The "Farmer has billions, we want just \$1" sticker (A 24-25) does not mention the corporate campaign and, on its face, suggests only that the employees want a \$1.00 per hour wage increase, an inference strengthened by the fact that 28 employees signed a petition demanding just such an increase and also not mentioning the corporate campaign. (RX 43.) However, the Company asserts (Br 76) that if the sticker was a union sticker, which we concede, it was necessarily designed to show support, not only for the Union, but also for its corporate campaign. This bald assertion is but another version of the Company's basic argument that the mere existence of the corporate campaign taints any and all union activity by employees. Like the other versions of this argument discussed above, it should be rejected.

¹³ The Company also contends (Br 79-81) that it was improperly precluded from showing the connection between the employees' union activity and the corporate campaign. However, as noted above, p. 38, the Company's entire offer of proof (A 64-66), as well as the 250 pages of attached documents (A 68-320), related solely to the nature of the corporate campaign, not to the involvement of Branford or Charlotte employees therein. The Board properly viewed the inadequacy of the offer of proof as a basis for rejecting the Company's defense. *See New York New York Hotel & Casino*, 334 NLRB at 763 n.10.

The “Divided We Beg, Together We Bargain” sticker (A 23) has a “\$1” in the middle, also indicating that the employees want a \$1 per hour wage increase. The surrounding language is nothing more than classic union propaganda. The Company cannot prove an unlawful object merely by showing that employees resorted to such a plea to their colleagues to engage in concerted activity.

Galdamez was warned for wearing a hat with no message but the Union’s name (A 37). Once again, the Company is reduced to arguing (Br 74-75) that any expression of support for the Union is necessarily an endorsement of its corporate campaign. To the Company’s rhetorical question of what other reason one of its employees could have for wearing a union hat, the answer is obvious: to show that she wanted representation by the Union. The fact that the Union may not have been seeking immediate recognition as her representative does not prove otherwise. *See Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 194-95 (8th Cir. 1994).

The Company (Br 74) attacks the “Uniform Justice!” stickers (A 21-22) on the ground that “Uniform Justice!” is the official slogan of the corporate campaign. However, it cites no evidence that the employees who wore the stickers told other employees—their intended audience—that the stickers were meant as a show of support for that campaign, rather than as a general protest against alleged injustice by the Company, nor is there evidence that either group of employees was

sufficiently aware of the details of the corporate campaign to know what its slogan or official logo was. Absent such evidence, the Company has proven only coincidence, and coincidence is not enough to establish an unlawful object on the part of employees.

The Company's attack on the union flyers (Br 75) is equally unconvincing. One flyer (A 40) was admitted into evidence only as a document bearing the Union's name (Tr 281(C)); only a Spanish version of the flyer was offered into evidence. The Company attacks it for having the corporate campaign logo (but does not show that it tells its readers what the significance of the logo is) and for mentioning the Union's website (although it does not show that the flyer refers readers to the website to obtain information about the corporate campaign, as distinguished from, for example, information on how employees can, and why they should, join the Union). The Company would condemn this website because it is linked to another website which allegedly contains objectionable material (Br 76). However, the flyer does not mention the second website, and the Company cites no authority for the proposition that any objectionable material on a website taints a flyer twice removed from that website.

The second flyer (A 38-39), which also refers to the first website but not to the second, also does not mention it as a source of information about the corporate campaign. The above comments about the significance of the reference to the first

website are therefore equally applicable to this flyer. The flyer does, however, refer to the corporate campaign in another context: It quotes a statement by the Company's CEO that the Company has incurred unanticipated costs related to the corporate campaign, and criticizes the Company for spending money on consultants to fight unionization, instead of using the money to give employees wage increases. As shown below, these comments clearly do not remove the flyer from the realm of protected speech.

It is clear that the Union and the Company were engaged in a "labor dispute" within the meaning of Section 2(9) of the Act: "any controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation to the employer and employee." *See Beverly Hills Foodland, Inc. v. Food and Commercial Workers Local 655*, 39 F.3d 191, 194-95 (8th Cir. 1994). Accordingly, any union statement "arguably relevant" to its organizational efforts is protected unless knowingly or recklessly false. *See Letter Carriers v. Austin*, 418 U.S. 264, 279 (1974). The Company does not contend that the statements about its spending money on consultants were knowingly or recklessly false, and there can be no doubt that such statements are relevant to employees' decisions on whether to organize. *See, e.g., KBO, Inc.*, 315 NLRB 570, 570-71 (1994), *enforced mem.*, 96 F.3d 1448 (6th Cir.

1996). Further, the fleeting reference in the flyer to the corporate campaign is not enough to remove it from the protection of the Act, especially since it is not an appeal to readers to support the campaign, but merely a quotation from a statement by the Company's CEO in which he mentioned the campaign. The Company cannot immunize its own statements about labor relations from criticism by referring therein to the corporate campaign.

Finally, the Company contends (Br 73-74) that the Branford employees' letter to its customers was unprotected because it was similar to other, allegedly unprotected letters. The Board did not have to rule on any letter except GCX 4. As shown above, pp. 35-36 & note 10, 39 note 12, that letter, contrary to the Company's contention, did not disparage the Company's business practices, but only its treatment of its employees, and the claim that Campos had requested and not received Terminix/Trugreen MSDSs was true when she signed the letter. Moreover, although a request that Terminix and Trugreen exercise their managerial discretion not to do business with the Company would not necessarily be unprotected, the letter contained no such request. Thus, whatever the status of other letters written at Branford, GCX 4 was plainly protected, and the Company was not entitled to interrogate Campos coercively concerning her signature on it.

In light of its ruling that any unprotected or unlawful conduct during the corporate campaign would not be a valid defense to the charges against the

Company, the Board did not have to, and did not, determine whether any such conduct, in fact, occurred. For this Court to make such a determination would be “incompatible with the orderly function of the process of judicial review.” *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976) (citation omitted). We note, however, that both the Company’s offer of proof and its brief rest on an unduly restrictive view of what constitutes protected activity and, as a result, characterize as unprotected many aspects of the corporate campaign which clearly appear to be protected. Thus, as shown above, pp. 47-48, the corporate campaign involves a “labor dispute” within the meaning of the Act, and the Union is therefore entitled to make known its views concerning that dispute, as long as it does not make knowingly or recklessly false assertions of fact. Evidence of such statements is conspicuously lacking in the attachments to the offer of proof. (A 68-320.) The Union also has the right to seek support from the Company’s customers, and even to ask its business customers to exercise their managerial discretion not to do business with the Company for the duration of the labor dispute. *See Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 197 (8th Cir. 1994); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Construction Trades Council*, 485 U.S. 568, 582-88 (1988); *NLRB v. Servette, Inc.*, 377 U.S. 46, 50-54 & n.4 (1964).

The reliance in the offer of proof (A 66, par. 12(1)) on the Union's filing of numerous charges against the Company before the Board is also questionable. The right to file charges with the Board has received strong protection. *See, e.g., NLRB v. Scrivener*, 405 U.S. 117, 121-25 (1972). Further, *BE & K Construction Co. v. NLRB*, 536 U.S. 524, 529-36 (2002), suggests that such protection is lost only when a charge is "objectively baseless." Nothing in the offer of proof suggests that any of the Union's charges met that standard. As shown above, p. 39 note 12, the same is true of the Union's intervention in opposition to the Company's application for a water-discharge permit in Branford.

Finally, to the extent that the offer of proof does show arguably unprotected or unlawful corporate campaign activity, that activity took place hundreds of miles from Branford and Charlotte, and there is no evidence or offer of proof that any Branford or Charlotte employee was involved in it or even aware of it. Accordingly, there is no basis for holding that any of the employees subjected to the Company's unlawful conduct did anything to forfeit the protection of the Act.

III. THE BOARD ACTED WITHIN ITS DISCRETION IN DECLINING TO ORDER THE UNION TO PRODUCE NOTES, WHICH HAD NOT BEEN SIGNED, ADOPTED, OR APPROVED BY EMPLOYEE WITNESSES, WERE NOT SUBSTANTIALLY VERBATIM STATEMENTS OF THOSE WITNESSES, AND WOULD HAVE DISCLOSED THE UNION ACTIVITIES OF NONTESTIFYING EMPLOYEES

After each of the General Counsel's witnesses had testified on direct examination, the General Counsel, in accordance with the Board's Rules and Regulations, gave the Company, for use in cross-examination, copies of any statements of the witness that were in her possession, with material unrelated to the witness' direct testimony redacted. In addition, when it was revealed that one employee witness had taken notes of relevant events at the Charlotte plant and given them to the Union, the administrative law judge ordered their production for use in cross-examining her. (Tr 319-23 (C).) When the Union was unable to find those notes (Tr 329 (C)), and when another employee witness testified that she had taken similar notes but destroyed them (Tr 680 (C)), the judge drew an adverse inference as to their credibility. (Add. 13.) However, the judge revoked subpoenas issued by the Company to union representatives insofar as they called for the production of the representatives' notes of their conversations with the employee witnesses. (A 61-63, Tr 45-47, 65-66 (H), Tr 8-10, 325-27 (C).) The Company contends (Br 81-83) that the revocation was prejudicial error. As shown below, this contention is without merit.

Section 102.31(b) of the Board's Rules and Regulations (29 C.F.R. 102.31(b)) requires revocation of a subpoena "if for any . . . reason sufficient in law the subpoena is . . . invalid." Contrary to the Company's contention (Br 81), the judge did not "create[] a privilege covering communications between unions and employees" and then rely on that privilege as a ground for revoking the subpoena. Instead, he revoked the subpoena on two separate grounds, either of which would be a "reason sufficient in law" for revocation: that the material sought was not producible for impeachment purposes under the Board's Rules and Regulations, and that the interest of nontestifying employees in confidentiality with respect to their participation in protected union activity outweighed the Company's interest in seeing the subpoenaed material.

As to the first ground, the judge expressly relied (Tr 40, 310 (H)) on Section 102.118(b) of the Board's Rules and Regulations (29 C.F.R. 102.118(b)), which is the exclusive source of discovery of witness statements in Board proceedings. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241-42 & n.21 (1978); *Smithfield Packing Co.*, 334 NLRB 34, 34-35 (2001). The ALJ specifically noted that Section 102.118(b) closely parallels the Jencks Act (18 U.S.C. § 3500), which governs the discovery of such statements in criminal prosecutions.

The definition of a “statement” producible under Section 102.118(b) is taken almost verbatim from the Jencks Act (18 U.S.C. § 3500 (e)(1-2)). Section 102.118(d) defines “statement” as:

- (1) A written statement made by said witness and signed or otherwise adopted or approved by him; or
- (2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

Shortly after the enactment of the Jencks Act, the Supreme Court held that “summaries of an oral statement which evidence substantial selection of material, . . . are *not* to be produced. Neither . . . are statements which contain the [note taker’s] interpretations or impressions.” *Palermo v. United States*, 360 U.S. 343, 352-53 (1959) (emphasis added). The Board has consistently followed this holding and refused to require production of a third party’s notes which the witness now on the stand has not “signed or otherwise adopted or approved.” *See, e.g., Stride Rite Corp.*, 228 NLRB 224, 226 n.3 (1977).¹⁴

This limitation is “designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital.” *Palermo v. United States*, 360 U.S. at 352.

¹⁴ The limitations of Section 102.118(b) apply to statements in the possession of the charging party, as well as those solely in the possession of the General Counsel. *See H.B. Zachry Co.*, 310 NLRB 1037, 1038 (1993).

The purpose of allowing production of witness statements—a purpose stressed by the Company (Br 82-83)—is to impeach a witness’ credibility by showing that she had made prior inconsistent statements. Requiring the production of notes not within the scope of Section 102.118(d) does not serve this purpose, for such notes are the prior statement, not of the witness, but of the note-taker, and any inconsistency with the witness’ testimony is as likely to be the product of the distortions arising from the note-taker’s editing as from the witness’ original statement.¹⁵ The Board properly held that such notes were too unreliable to be used for impeachment purposes.

The judge also expressly relied (Tr 45-46, 62-63 (H)) on “the confidentiality interest of employees who signed authorization cards and attended union meetings,” an interest which, he said, the Board viewed as one of “fundamental importance” and as “an overriding concern” which “outweighed the employer’s need to obtain [the employees’ identities for purposes of] cross-examination” (Tr 62, 63 (H).) He also held that since it was the employees whose interests were at stake, the Union could not waive their right to confidentiality. (Tr 63-64 (H).)

¹⁵ There is no inconsistency between the judge’s refusal to order production of the union representatives’ notes and his ordering production of the employees’ notes. As the judge pointed out (Tr 323 (C)), the latter, unlike the former, represented the employees’ own words.

Contrary to the Company's contention (Br 81), the judge did not create this confidentiality interest out of whole cloth. He gave a direct quotation from *National Telephone Directory Corp.*, 319 NLRB 420, 421-22 (1995).¹⁶ The Board there expressed concern about the possibility of intimidation; concluded that the danger thereof would be "seriously heightened" if the employer could obtain the names of employees who signed authorization cards or attended union meetings; forbade cross-examination of a union organizer on this subject; and quashed a subpoena seeking this information. This danger of intimidation is especially present where, as here, the Company has conceded its own union animus. (Tr 12 (C).)

This Court has also recognized the chilling effect on employees of an employer's attempt to learn the identity of authorization-card signers. In *Wright Electric, Inc. v. NLRB*, 200 F.3d 1162, 1167 (8th Cir. 2000), the Court upheld the Board's finding that the employer violated Section 8(a)(1) by seeking, during its state court lawsuit against a union, to use discovery procedures to obtain copies of all authorization cards signed by its employees. Citing with approval the Board's finding in *National Telephone Directory* that the use of a subpoena to obtain the

¹⁶ The judge also quoted similar language in *Novotel New York*, 321 NLRB 624, 637 (1996) (Tr 63 (H)), and cited three other Board decisions with similar holdings (Tr 64 (H)). *National Telephone Directory Corp.*, in turn, relied, *inter alia*, on six Board decisions and decisions of three United States Courts of Appeals holding, in various contexts, that an employer is not entitled to obtain or seek information as to which employees have signed authorization cards.

names of employees who had signed authorization cards or attended union meetings was highly coercive, the Court viewed the use of state court discovery proceedings for the same purpose as “essentially no different” Thus, it found, the employer’s discovery attempt had an unlawful objective and, in the absence of any overriding business justification, violated the Act.

The Company does not attempt to distinguish *National Telephone Directory* or *Wright Electric*, nor does it deny that its subpoena (A 61-63), which calls for “All documents that support or contradict” each of the allegations in the complaint and “any notes, correspondence, or summaries concerning” each allegedly unlawful incident, is broad enough to include union authorization cards and lists of employees signing such cards or attending union meetings. Indeed, in response to the judge’s ruling explaining why he was partially revoking its subpoena, it did not assert that the subpoena did not include such information. It simply insisted on receiving the notes for the purpose of cross-examination. (Tr 76-77 (H).) The judge properly held that the confidentiality concerns precluded production of the unredacted notes and that redacted notes would be of too little value for impeachment purposes to justify ordering their production. (*Id.*)

In this Court, the Company seeks “any documents reflecting communications by employees about the events in question, as well as any other documents reflecting employee activity relevant to the case.” (Br 83; emphasis

added.) No mention is made of redaction, and the Company's demand is not limited to documents by or about the six employees found to have been unlawfully coerced. This Court should just say no, as the judge did. The Company has not shown the overriding justification which *Wright Electric* requires for efforts to seek such information about nontestifying employees. Even as to the six, it can only say that the documents in question "*could* reveal specific connections between the Union's corporate campaign and the events in Branford and Charlotte."

(Br 82; emphasis added.) This sort of generic speculation hardly meets the Company's burden of showing prejudicial error. Nor can the Company make the circular argument that it needed to examine the subpoenaed documents merely on the chance that they might contain something relevant. The limitations which the Board has imposed on discovery would be rendered meaningless, and the employee interest in confidentiality which underlies them defeated, by holding "that the [Company] may see statements in order to argue whether it should be allowed to see them." *Palermo v. United States*, 360 U.S. at 354.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied and that the Board's Order should be enforced in full.

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National Labor Relations Board
June 2009

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

CINTAS CORPORATION	:
	:
Petitioner/Cross-Respondent	:
	:
	: Nos. 09-1344, 09-1518
v.	:
	:
NATIONAL LABOR RELATIONS BOARD	: Board Case Nos.
	: 4-CA-34160 et al.
Respondent/Cross-Petitioner	:
	:
and	:
	:
UNITE HERE	:
	:
Intervenor	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,980 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben
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Dated at Washington, DC
this 10th day of June, 2009

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

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	:	
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	:	Board Case Nos.
and	:	4-CA-34160 et al.
	:	
UNITE HERE	:	
	:	
Intervenor	:	
	:	

CERTIFICATE OF SERVICE

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

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this 10th day of June 2009