

FINAL BRIEF

Nos. 09-2249-ag (L), 09-2591-ag (XAP), 09-2885-ag (XAP)

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

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

**MATROS AUTOMATED ELECTRICAL CONSTRUCTION CORP., BTZ
ELECTRICAL CORP., SINGLE EMPLOYERS; LOCAL 363, UNITED
ELECTRICAL WORKERS OF AMERICA, IUJHAT**

Respondents/Cross-Petitioners

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITIONS FOR
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Order issued against Matros Automated Electrical Construction Corp. (“the Company”) and Local 363, United

Electrical Workers of America, IUJHAT (“Local 363”). The Board’s Decision and Order, issued on December 8, 2008, is reported at 353 NLRB No. 61 (SPA1-24).¹

The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”).² The Board’s Order is final with respect to all parties.³

The Board filed an application for enforcement of its Order on May 28, 2009. The Company filed its petition for review on June 15. Local 363 filed its petition for review on June 17. All were timely filed, as the Act imposes no time limit for such filings. The Court has jurisdiction over the application and cross-petitions pursuant to Section 10(e) and (f) of the Act⁴ because the unfair labor practices occurred in New York, New York.

¹ “SPA” references are to the Special Appendix, containing the Board’s Decision and Order, attached to the Company’s opening brief. “A” references are to the Appendix submitted with the Company’s brief. “SA” references are to the Supplemental Appendix. “CoBr” and “UBr” refer to the opening briefs of the Company and Local 363, respectively. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² 29 U.S.C. §§ 151, 160(a).

³ The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 11, 2009) (No. 09-328).

⁴ 29 U.S.C. § 160(e) and (f).

STATEMENT OF THE ISSUES PRESENTED

It is undisputed that the Company engaged in a pattern of unlawful preelection conduct — including threats, interrogations, promises of benefits, and assistance to Local 363 — to discourage employees from voting for Local 3, International Brotherhood of Electrical Workers (“Local 3”). After Local 3 lost the election and while its objections to the fairness of the election were pending, the Company recognized Local 363 as the employees’ union and signed a collective-bargaining agreement with it. Then, the Company retaliated against Local 3 supporters by discharging, and denying wage increases to, them.

The Company does not contest any of the preelection misconduct. It also does not contest that it violated the Act by assisting, recognizing, and signing a contract with Local 363. It contests only the Board’s findings that it unlawfully discharged, and denied wage increases to, Local 3 supporters after the election.

Local 363 recognizes that, under extant Board and in-circuit precedent, an employer and non-incumbent union may not enter into a collective-bargaining relationship while an election case is pending. Instead, it argues that the Court should not apply that precedent in this case.

Thus, the specific questions presented are:

1. Whether the Board is entitled to summary enforcement of its findings that the Company unlawfully interrogated and threatened its

employees and promised them benefits, all to discourage them from voting for Local 3, and that it unlawfully assisted, recognized, and signed a contract with Local 363.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by discharging two employees and refusing to grant wage increases to three employees in retaliation for their support for Local 3.
3. Whether substantial evidence supports the Board's findings that Local 363 violated Section 8(b)(1)(A) and (2) by accepting recognition and signing a collective-bargaining agreement while Local 3's election petition was pending and by threatening an employee with discharge if he did not join Local 363.

STATEMENT OF THE CASE

Acting on charges filed by Local 3 and individual employees, the Board's General Counsel issued a consolidated complaint against the Company and Local 363. After a hearing, an administrative law judge issued a decision and recommended order. He found that the Company violated Section 8(a)(1) of the Act⁵ by interrogating employees about Local 3, threatening that it would shut down its operations and that it would never sign a contract with Local 3, and

⁵ 29 U.S.C. § 158(a)(1).

promising benefits and promotions to dissuade employees from voting for Local 3. He further found that by assisting, recognizing, and entering into a collective-bargaining agreement with Local 363, the Company violated Section 8(a)(1), (2), and (3) of the Act.⁶ Correspondingly, the judge found that Local 363 violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition and entering into a contract with the Company and by threatening an employee with discharge if he failed to become a member of Local 363 pursuant to the contract.⁷ Finally, the judge found that the Company violated Section 8(a)(3) and (1) of the Act⁸ by discharging and refusing to grant raises and retroactive payments to Local 3 supporters. (SPA21.) The administrative law judge, however, dismissed several other allegations involving the Company and a related entity (BTZ Electrical Corp., which, it is undisputed, constituted a single employer with the Company) and against Local 363. (SPA16-21.)

The Company, Local 363, and the General Counsel all filed exceptions to the judge's decision with the Board. (SPA1.) The Board (Members Liebman and Schaumber) agreed with the judge's findings of the violations described above. (SPA1-5.) The Board, however, disagreed with the judge and dismissed other

⁶ 29 U.S.C. § 158(a)(1), (2), and (3).

⁷ 29 U.S.C. § 158(b)(1)(A) and (2).

⁸ 29 U.S.C. § 158(a)(3) and (1).

findings of violations involving Local 363 and BTZ. (SPA3-4.) The Board otherwise affirmed the findings and decision of the administrative law judge and modified his recommended remedy and order. (SPA5-7.) The facts supporting the Board's Order are summarized below; the Board's conclusions and Order are described thereafter.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Operations and Union History

Matros and BTZ both provide electrical contracting services in the New York City area.⁹ The Company stipulated that the two entities constitute a single employer. Stuart Moskowitz owns and operates Matros and also runs BTZ. (SPA1; A25-33.)

The Company was a member of the Industrial Electrical Contractors Association ("IECA"), a multiemployer bargaining association, which had a contract with the United Food and Commercial Workers ("UFCW"). After changes in the local union, UFCW Local 342 determined that the electricians' needs would be better served by an electrical union. Thus, it asked Local 3 if it would administer the IECA contract on the UFCW's behalf. Local 3 agreed and the two unions signed a service agreement in January 2004. (SPA1-2, 11; A11-17, 23-24, 332-36, 500-22.) The IECA, however, refused to recognize Local 3 as the contract administrator. The IECA dissolved on April 1, 2004. (SPA2; A16-17, 335-36.) The IECA-UFCW collective-bargaining agreement expired on June 30, 2004. (SPA11; A820-29.)

⁹ The Board dismissed the allegations pertaining to BTZ. (SPA3-4, 18-19.) Although the Board dismissed allegations specific to BTZ, its Order runs against Matros and BTZ because it is undisputed that they constitute a single employer.

B. In the Run-Up to the Election, the Company Interrogates, Threatens, and Promises Benefits to Employees to Dissuade Them From Voting for Local 3; It Also Assists Local 363 in the Hopes of Defeating Local 3 and Bringing in Local 363

Given the IECA's refusal to recognize it, Local 3 held meetings with employees in early 2004 to keep them informed of developments and with an eye towards becoming their bargaining representative. (SPA11; A16-22, 335-36.) Company supervisors Joe Estimable and Peter Azic attended some of the meetings. (SPA2, 11; A77-82, 266-67, 303-08, 675-76.)

On March 23, 2004, company owner Moskowitz gave employees a letter regarding Local 3 stating, in part:

You may be aware that Local 3 and Local 342 have tried to force us to deal with Local 3 right now Local 3 and Local 342 signed an agreement that Local 3 would handle your issues for Local 342 for the remainder of the union contract. Again, we think that this was a way for Local 342 to give Local 3 a head start We weren't willing to be pushed around or have Local 3 forced on us or on you. We refused to deal with Local 3 and they took us to the Labor Board. We fought back — and we won. The Labor Board said that we don't have to deal with Local 3 unless or until they win an election You have many options — maybe more than you think you have — and we'll be writing to you about them in the coming months.

(SPA2, 11; A765.)

Consistent with the "options" alluded to in the letter, Moskowitz gave employee Aparicio Garay the letter and said that he was trying to get Local 363 for

the employees and that it had good benefits. He said his lawyer told him not to talk about it, but that he still wanted Garay to know which union he wanted to get for the employees. Moskowitz asked Garay if he was part of his team; Garay responded, "I'm with you." (SPA12; A274-76.)

On April 12, Local 363 filed a petition with the Board for an election at the Company. The election was scheduled for May 21. (SPA12; A525-27, 536.)

In April, the Company's secretary summoned Garay to a meeting with Moskowitz at the office. Moskowitz asked Garay if he had attended a Local 3 meeting. After Garay said yes, Moskowitz asked him who else was there. Garay named several employees who also attended. Moskowitz asked what the Local 3 wage-scale paid mechanics. Garay said \$24 per hour, but Moskowitz disputed that. Moskowitz said that if he could get the employees to join Local 363, their pay would be \$25 per hour for mechanics and \$31 per hour for foremen. (SPA12; A276-78.)

In early May, at a jobsite, Moskowitz asked Garay if he would support him by voting no in the election. Moskowitz told Garay that he wanted to get the employees to vote no so he could get them in Local 363. Garay responded, "You do whatever you have to do." (SPA12; A279-80, 322.)

Also in May, a few weeks before the election, Moskowitz told employee Jean Thony, "I will always take care of you. You are a good worker. I want you to

stay with me.” Thony asked Moskowitz why he was not classified as a mechanic. Moskowitz replied that if Local 3 lost the election, he would make Thony a mechanic. (SPA13; A360-61.)

The week before the election, company supervisor John Mata asked employee Jaroslaw Wencewicz if he was going to vote for or against Local 3. Wencewicz said that he would vote for Local 3 because he was not very happy with the way Moskowitz treated him and the other employees. Afterwards, Mata told Wencewicz to stop working and go to the office to talk to Moskowitz about the election. (SPA13; A221-22.)

Later that day, Moskowitz told Wencewicz that he had heard from Mata that Wencewicz was not happy. Wencewicz replied that employees with less experience had better positions. Moskowitz said that in the future, they were going to get rate increases and that everything would be very favorable for the employees. Then Moskowitz asked Wencewicz if he was going to vote for Local 3. Wencewicz said yes. (SPA13; A222-23.)

Also in May before the election, Moskowitz asked employee Joseph Hodge if he was on Moskowitz’s side. Hodge said yes. On the day of the election, Moskowitz again asked if Hodge was on his side. Hodge said yes. Moskowitz said if he was happy, Hodge would be happy. (SPA13; A96-99.)

In addition to the one-on-one conversations with employees preceding the election, the Company directed employees and supervisors to attend several group meetings with Local 363 representatives. Supervisor Estimable obtained meeting space in the Company's building. The Company's secretary called employees at their jobsites and told them to attend the meetings, which occurred during working hours. The Company paid the employees for their full day's work. At those meetings, Local 363 representatives told the employees about its benefits and showed them copies of Local 363's collective-bargaining agreements. The Local 363 representatives also urged the employees to vote against Local 3 in the election because when the UFCW contract expired at the end of June, Local 363 could come in. (SPA2, 12; A87-93, 168-72, 270-73, 350-60.)

Moskowitz attended the last group meeting, the day before the election, to urge employees to vote against Local 3. Moskowitz said that he would never sign a contract with Local 3 and that if he lost the election, he would close the shop. He said that he would not "go Local 3," would rather shut down, and that "hell will freeze over" before he accepted Local 3. (SPA2; A91-93, 172-75, 223-25, 358-60.)

C. While the Election Case Was Pending, the Company Recognizes Local 363 as the Employees' Union and Signs a Collective-Bargaining Agreement

On May 21, Local 3 lost the election. (SPA2; A529.) Given the Company's preelection misconduct, including its threats, promises and assistance to Local 363, Local 3 filed objections contesting the fairness of the election. (SPA2; A530-34.) The Board's Regional Director held the election case in abeyance pending the investigation and resolution of the unfair-labor-practice allegations. (SPA12.)

While the election objections were pending, the Company recognized Local 363 as the employees' bargaining representative based on cards signed by employees designating Local 363 as their representative. On November 17, an arbitrator certified the card count. On the same day, the Company and Local 363 signed a collective-bargaining agreement that was effective from November 1, 2004 to November 30, 2005. (SPA3, 13; A450-53, 725-43, 761-64.) The contract included a union-security provision requiring employees to join Local 363 as a condition of their employment and a dues-deduction provision to deduct the employees' Local 363 dues from their paychecks. (SPA3; A725-26.)

In early December 2004, Local 363 representative Chuck Shimkus told employee Hodge that unless Hodge filled out an application for Local 363 membership, he would recommend to the Company that Hodge be fired. (SPA3;

A101-03.) The Company and Local 363 signed a successor contract that was effective from January 1, 2005 to October 31, 2007. (A744-57.)

D. The Company Discharges and Denies Wage Increases to Local 3 Supporters

1. Discharge of Aparicio Garay

Garay joined the Company in 1997. (SPA14; A261.) In Spring 2004, Garay attended a number of Local 3 meetings, along with a few other employees including Hodge, Wencewicz, and Gonzalez. Company supervisors Estimable and Azic also attended some of those meetings. (SPA14; A264-67, 303-08.)

Garay became a vocal supporter of Local 3. He spoke to coworkers about Local 3's benefits and solicited employees to sign cards designating Local 3 as their union. (SPA14; A267-68.) As described above (pp. 8-9), company owner Moskowitz repeatedly questioned Garay about Local 3.

Garay continued those efforts even after Local 3 lost the election and filed its objections. In July 2004, company supervisor Mata asked Garay if he was a Local 3 member. Garay denied it. When Mata insisted that Garay was a member, Garay asked him, "Are you a rat?" (SPA14; A280-83, 347.)

In late August, Garay wrote a lengthy memorandum to coworkers explaining why he was supporting Local 3. He distributed it to many employees and four company supervisors. Garay continued soliciting Local 3 cards into Fall 2004. (SPA14; A118-19, 159-64, 237-38, 288-92, 309-10, 348-49, 766.)

On September 22, 2004, the day after returning from Panama following his father's death, Garay talked about Local 3 with coworker Gonzalez at their jobsite. Company supervisor Mata approached them. Garay told Gonzalez "watch out what you're saying because this guy's a rat." (SPA14; A283-85, 322-28.)

On October 29, at Moskowitz's direction, company supervisor Victor Treccaricho informed Garay that he was terminated. He did not give Garay any reason. No one from the Company ever discussed any problems with Garay or disciplined him before his termination. (SPA14; A60-62, 299-301, 471.)

2. Discharge of Jaroslaw Wencewicz

Wencewicz joined the Company in 1999. He was an early Local 3 supporter, attending meetings and soliciting cards in 2001. At that time, company supervisor Mata found the cards in Wencewicz's notebook and temporarily confiscated them. (SPA15; A214, 216-18, 257-60.)

Like Garay, Wencewicz was one of the employees who began attending Local 3 meetings in Spring 2004, which were also attended by company supervisors. Around that time, Wencewicz solicited more cards for Local 3. (SPA15-16; A220-21, 244-45, 338-43.) As described above (p. 10), company owner Moskowitz and supervisor Mata interrogated Wencewicz regarding his views on Local 3. Wencewicz told Moskowitz that he intended to vote for Local 3.

On January 21, 2005, supervisor Estimable told Wencewicz to take 2 or 3 days off because business was slow. Wencewicz objected, stating that layoffs were by rotation and that he had been off for a couple of days in December. Estimable said that it was Moskowitz's decision. (SPA16; A228-30, 247.)

Wencewicz returned to work after 2 days off. When he called the office to report in, Estimable asked, "who told you to come back to work?" Wencewicz replied that Estimable had said he would be out for only 2 or 3 days. Estimable said, "No, no, no. We will call you when you're supposed to come back to work." At the end of that week, Wencewicz went to the office to pick up his paycheck. At that time, he asked Estimable if he was being fired. Estimable put up his hands and said that he did not know anything and it was Moskowitz's decision. (SPA16; A230-31.)

The Company did not contact Wencewicz until March — after Wencewicz had filed an unfair-labor-practice charge. Estimable called Wencewicz and said he could go back to work. Wencewicz replied that he had already taken another job. (SPA16; A231-32, 247.) The Company sent Wencewicz a letter dated March 11 stating that if Wencewicz did not return to work by March 16, the Company would view him as having resigned. (SPA16; A807.)

3. Denial of wage increases and retroactive payments to Local 3 Supporters Jaroslaw Wencewicz, Joseph Hodge, and Gilberto Gonzalez

All employees — except Wencewicz, Hodge, and Gonzalez — received wage increases and/or retroactive payments starting in November 2004 with additional raises in January, March, and June 2005. (SPA18; A9, 41, 103-04, 219-20, 329-30, SA280-84.) Moskowitz had complete discretion over which employees received raises. (SPA18; A36-37.)

As described above, Wencewicz was an active Local 3 supporter and had informed Moskowitz that he was voting for Local 3. Likewise, Hodge was an open Local 3 supporter. Moskowitz repeatedly interrogated him about his union views. Hodge also served as Local 3's observer at the election. After the election, Hodge continued soliciting cards for Local 3 in anticipation of Local 363's contract expiring in November 2005. (SPA18; A72-82, 126-33, 142, 338-39, 344-46, 435-38.) Gonzalez also openly supported Local 3 and solicited cards for Local 3 into 2005.¹⁰ (SPA16; A196-98, 242-43, 346-48.)

Moskowitz provided various explanations for why he excluded these employees from the raises: they were not as productive as others; he had to be highly "selective" in distributing raises because his costs had increased;

¹⁰ The Board dismissed (SPA16-17) the allegation that Gonzalez's December 2005 discharge was unlawful.

Wencewicz was inexperienced and broke fixtures; Wencewicz and Gonzalez had trouble communicating in English; and, Hodge worked slowly and made mistakes. (SPA18; A36-48, 66-69, 458-66, 481-82.) The Company did not issue any discipline or warnings to those employees for these supposed deficiencies. Although Moskowitz stated that, as a small employer, the Company did not issue written warnings, the record included numerous warnings issued to employees for a range of infractions. (A61-62, 68-69, 808-17.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found (SPA1-5), in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act¹¹ by interrogating employees, promising employees promotions and other benefits to dissuade them from voting for Local 3, threatening employees that it would shut down the business if Local 3 won the election, and telling employees that even if Local 3 won the election, it would never sign a contract with that union. The Board also found (SPA4 n.8), in agreement with the judge, that the Company violated Section 8(a)(1), (2) and (3) of the Act¹² by recognizing and signing a collective-bargaining agreement, which included union-security and dues-checkoff clauses, with Local 363. The Board

¹¹ 29 U.S.C. § 158(a)(1).

¹² 29 U.S.C. § 158(a)(1), (2) and (3).

found (SPA4 n.8) that Local 363 violated Section 8(b)(1)(A) and (2) of the Act¹³ by accepting recognition and signing the collective-bargaining agreement with the Company and by threatening an employee with discharge if he did not become a member of Local 363. Finally, the Board found (SPA4-5) that the Company violated Section 8(a)(3) and (1) of the Act¹⁴ by discharging employees Garay and Wencewicz and by denying wage increases and retroactive payments to employees Wencewicz, Hodge, and Gonzalez because of their support for Local 3.

The Board's Order requires the Company and Local 363 to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.¹⁵ (SPA5-6.) The Order further requires the Company and Local 363 to cease and desist from recognition of Local 363 as the employees' collective-bargaining representative and from maintaining or giving any effect to their collective-bargaining agreement, unless and until Local 363 is certified by the Board as the employee's bargaining representative. (SPA5-6.)

¹³ 29 U.S.C. § 158(b)(1)(A) and (2).

¹⁴ 29 U.S.C. § 158(a)(3) and (1).

¹⁵ 29 U.S.C. § 157.

Affirmatively, the Order directs the Company to withdraw and withhold all recognition from Local 363 until the Board has certified it as the employees' exclusive representative. (SPA5.) The Board also directs the Company and Local 363 to jointly and severally reimburse, with interest, all employees for fees, dues, and other moneys collected under the terms of the collective-bargaining agreement. (SPA5-6.) Further, the Order requires the Company to make whole, with interest, employees Garay, Wencewicz, Hodge, and Gonzalez for any loss of earnings and other benefits as a result of the discrimination against them. The Company also must offer Garay and Wencewicz reinstatement to their former jobs. (SPA5-6.) Finally, the Order directs the Company and Local 363 to post remedial notices. (SPA6-7.)

SUMMARY OF ARGUMENT

It is undisputed that, in an effort to avoid dealing with Local 3, the Company interrogated, threatened, and promised benefits to employees to dissuade them from voting for that union, all the while providing assistance to its preferred union, Local 363. After it succeeded in its unlawful campaign against Local 3, the Company recognized and quickly executed a collective-bargaining agreement with Local 363 even though Local 3's election objections were pending before the Board. Finally, not satisfied with coercing employees to vote against Local 3 and contracting with sweetheart union Local 363, the Company retaliated against Local

3 supporters. It fired two Local 3 advocates and denied wage increases to three of them.

The Company does not contest any of its preelection violations. It only contests the postelection retaliation against Local 3 supporters. Its arguments largely consist of urging this Court to take the extraordinary step of disregarding the Board's credibility determinations. That step — which this Court will take only when credibility determinations are “hopelessly incredible” — is unwarranted because the Board's credibility findings are reasonably grounded in demeanor and other considerations.

Local 363 urges this Court to ignore established precedent holding that an employer and non-incumbent union cannot enter into a collective-bargaining relationship while a rival union's election case is pending. In essence, Local 363 argues that it should not have to wait while the Board resolves the election case. Its arguments that Local 3, by virtue of its election loss, is a minority union standing in Local 363's way are flawed because it completely ignores the undisputed findings of preelection misconduct that likely affected the validity of the election. The Board's bright-line rules, accepted by this Court and others, are rational and consistent with the Act. Local 363 offers no compelling reason to disregard established precedent, particularly on these facts.

STANDARD OF REVIEW

The Court enforces the Board's orders if its legal conclusions have a reasonable basis in law and if its factual findings are supported by substantial evidence on the record considered as a whole.¹⁶ Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."¹⁷ Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*.¹⁸ As this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board."¹⁹ In other words, this Court will reverse the Board based on a factual determination — such as a determination of employer motive — only if it is "left with the impression that no rational trier of fact could reach the conclusion drawn by the Board."²⁰

Moreover, this Court has long had a policy of deferring to the Board's adoption of administrative law judges' credibility determinations. It will only

¹⁶ *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

¹⁷ *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951). Accord *NLRB v. G & T Terminal Packing Co., Inc.*, 246 F.3d 103, 114 (2d Cir. 2001).

¹⁸ *G & T*, 246 F.3d at 114.

¹⁹ *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). See also *Universal Camera*, 340 U.S. at 488.

²⁰ *NLRB v. Katz's Delicatessen*, 80 F.3d 755, 763 (2d Cir. 1996).

disturb them in very limited circumstances where they are “incredible or flatly contradicted by undisputed documentary testimony.”²¹

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED THE ACT BY INTERROGATING, THREATENING, AND PROMISING BENEFITS TO EMPLOYEES AND BY ASSISTING, RECOGNIZING, AND SIGNING A COLLECTIVE-BARGAINING AGREEMENT WITH LOCAL 363

In its opening brief, the Company does not challenge the Board’s findings of numerous preelection violations of the Act. Specifically, the Company’s violations of Section 8(a)(1) include:

- interrogating employees about their sympathies or activities on behalf of Local 3;
- promising employees promotions and other benefits in order to dissuade them from voting for Local 3;
- threatening employees that it would shut down the business if Local 3 won the election; and
- telling employees that, even if Local 3 won the election, it would never sign a contract with that union.

The Board is entitled to summary enforcement of those portions of its Order remedying the uncontested violations.²² Moreover, the Company does not contest

²¹ *Id. Accord G & T*, 246 F.3d at 114.

²² *See, e.g., Torrington Extend-A-Care Employees Ass’n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994) (uncontested violations of the Act summarily enforced); *NLRB*

that it violated Section 8(a)(2) and (1) of the Act by assisting Local 363 and by recognizing and signing a collective-bargaining agreement with Local 363. It also does not dispute that it violated Section 8(a)(3) and (1) because the collective-bargaining agreement included union-security and dues-checkoff provisions. Thus, if this Court agrees with the Board that Local 363's arguments are devoid of merit, the Board is entitled to summary enforcement of the portions of its Order remedying these violations as well.

The uncontested violations do not disappear by not being raised. Rather, “[i]t is against the background of acknowledged violations” that the Court considers the Board's remaining findings.²³

v. State Plate Color Service, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (refusing to consider claims not raised in opening brief).

²³ *Torrington Extend-A-Care*, 17 F.3d at 590. *Accord NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (uncontested violations “remain, lending their aroma to the context in which the [contested] issues are considered”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING TWO EMPLOYEES AND DENYING WAGE INCREASES TO THREE EMPLOYEES IN RETALIATION FOR THEIR SUPPORT FOR LOCAL 3

A. Applicable Section 8(a)(3) Principles: An Employer Violates the Act by Taking Adverse Action Against Its Employees Based on Their Union Activities

Section 8(a)(3) of the Act²⁴ prohibits employers from discriminating “in regard to hire or tenure of employment or any term or condition of employment to ... discourage membership in any labor organization.” Accordingly, an employer violates Section 8(a)(3) and (1)²⁵ of the Act by taking adverse action against an employee because of his union activity.²⁶ Once it is shown that the employer’s opposition to union activity was a motivating factor in its decision to take adverse action against an employee, the employer will be found to have violated the Act, unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even absent the employee’s union activity.²⁷ The Board may

²⁴ 29 U.S.C. § 158(a)(3).

²⁵ An employer that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). *Office & Professional Employees Int’l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1992).

²⁶ See *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957, 959-60 (2d Cir. 1988).

²⁷ See *Transportation Mgmt. Corp.*, 462 U.S. at 400-04; *Wright Line*, 251 NLRB 1083, 1084 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). *Accord S.E. Nichols*, 862 F.2d at 957.

infer motive from direct and circumstantial evidence.²⁸ Courts, including this one, afford particularly deferential review to the Board’s motive findings because “[d]rawing ... inferences from the evidence to assess an employer’s ... motive invokes the expertise of the Board.”²⁹

The Board need not accept “at face value the reason advanced by the employer” if the “evidence, and the reasonable inferences drawn therefrom,” indicate that the employer was motivated by union animus.³⁰ An employer fails to prove its affirmative defense where, as here, the record shows that the employer’s stated justifications for the adverse actions are “pretext[s] to mask discrimination.”³¹

B. The Company Fails To Meet Its Extremely Heavy Burden In Seeking To Overturn the Board’s Credibility Resolutions

The Company’s arguments largely consist of urging the Court to overturn the Board’s credibility determinations. It bears an extremely heavy burden. This

²⁸ See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey’s Transp. Servs.*, 837 F.2d at 579.

²⁹ *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). See also *S.E. Nichols*, 862 F.2d at 956 (“Act vests primary responsibility in the Board to resolve these critical issues of fact” including motive).

³⁰ *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962). See also *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (employer’s explanation rejected where it is an “excuse rather than the reason for [its] retaliatory action”).

³¹ *S.E. Nichols*, 862 F.2d at 957.

Court conducts a very limited review of the Board's credibility findings and will reverse them only in extreme circumstances.³² As the Company acknowledges (CoBr 26-27), the Court will affirm the Board's credibility determinations unless they are either "hopelessly incredible ... or flatly contradict[] either a so-called 'law of nature' or undisputed documentary testimony."³³ That deference is particularly appropriate when, as here, the judge bases credibility determinations on demeanor (SPA9), because only the judge has had the opportunity to observe the witnesses on the stand.³⁴

The Company fails to overcome the standard of review. First, it fails to show that "the rejected evidence [from company witnesses] had [the] quality of inherent veracity" or that "the credited evidence [from the General Counsel's witnesses] carried the mark of obvious falsehood."³⁵ In addition to relying on the judge's assessment of demeanor, the Board observed (SPA4, 9, 11) that documentary evidence contradicted the veracity of the testimony of the Company's main witness, owner Moskowitz, on several points. For example, Moskowitz

³² See n.21 above.

³³ *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952). *Accord G & T*, 246 F.3d at 114.

³⁴ *Dinion Coil*, 201 F.2d at 487 (Board assessment of demeanor is "ordinarily unreviewable"). See also *Lin v. Gonzales*, 446 F.3d 395, 400-01 (2d Cir. 2006).

³⁵ *Sardis Luggage Co. v. NLRB*, 234 F.2d 190, 193 (5th Cir. 1956).

testified (A 442-44) that he did not become aware of Local 3's organizing efforts until he received Local 3's election petition, which was filed April 12. Yet, his own March 23 letter to employees (A765) makes it clear that he was aware of, and opposed, Local 3's campaign weeks before. The Company does not dispute that finding.

Similarly, Moskowitz's assertions to a state unemployment agency regarding discharged employee Garay conflicted with other evidence. He asserted to the agency that Garay was terminated 2 weeks after his alleged insubordination, but the Company's internal write-up states that the time lag was 4 days (A819, 832). Moskowitz's statement (A496, 819) that Garay received numerous warnings prior to his discharge conflicted with his admission at trial (A61-62) that there were none. Further, while Moskowitz said that his was a small company that does not normally issue written warnings (A61-62, 68-69), the record included numerous examples of formal warnings issued to employees (A808-17).

Further, in contrast to the accounts of the General Counsel's witnesses who substantially corroborated each other (SPA5), Moskowitz's summary denials of his various interrogations, threats, and promises — which are now uncontested — were not convincing. For example, he testified (SPA13; A 446-49) that he never made unlawful statements because his attorney's advice was too expensive to ignore.

Next, the Company's argument (CoBr 36-37, 44, 46, 49) that the judge was required to credit its witnesses on points on which the General Counsel chose not to cross-examine them is just absurd. It cites no authority to support its notion that a party must cross-examine witnesses on every point. The General Counsel need not rehash company witnesses' unconvincing denials of misconduct. The Company wrongly assumes that whenever a respondent's witness denies the allegations, then those allegations must be dismissed unless the General Counsel induces them to recant their denials on cross-examination.

More generally, the Company errs in claiming (CoBr 29, 36-38, 44-45, 46, 49, 57-58) that where the testimony is in "equipoise" or simply conflicts, the balance tips towards the respondent. The Board often is faced with materially conflicting accounts of the same incidents and courts, including this one, defer to its acceptance of one version over another.³⁶ Equipoise requires two equally believable accounts. That is not the situation here. The testimony of company

³⁶ See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597 (1941) ("The Board, like other expert agencies dealing with specialized fields ... has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony;" court of appeals lacks the authority to substitute its judgment for the Board's judgment). See also *Silverman v. J.R.L. Food Corp.* 196 F.3d 334, 338 (2d Cir. 1999) (Court upheld ALJ's credibility resolutions where record "contained conflicting testimony on virtually all of the key issues ... [and those] conflicts could be resolved only on the basis of assessments of the credibility of the various witnesses on each issue."); *NLRB v. Midwestern Personnel Services, Inc.*, 322 F.3d 969, 977 (7th Cir. 2003) ("[w]here two versions of the same incident materially conflict, the ALJ's credibility determinations are entitled to deference").

witnesses was not believable for various reasons, including demeanor. In contrast, the General Counsel’s witnesses substantially corroborated each other and were convincing. Where, as here, the Company “simply disagrees with the Board’s findings and asks [the Court] to accept its characterization of the evidence,” the Court will reject those arguments because its function is not “to determine facts” but to “decide whether the Board’s findings are supported by substantial evidence
....”³⁷

C. The Company Unlawfully Retaliated Against Local 3 Supporters Jaroslaw Wencewicz and Aparicio Garay

1. Jaroslaw Wencewicz

The Company does not dispute that it was aware of Wencewicz’s support and advocacy for Local 3. Further, by not contesting the numerous preelection violations of the Act — including interrogations of Wencewicz, among other employees, threats, promises, and assistance to Local 363 — it concedes that it harbored animus against Local 3. Instead, the Company focuses on overturning the Board’s finding that its defense — that it never fired Wencewicz and, instead, he voluntarily quit — was pretextual. The Board reasonably rejected that defense because it was based solely on the testimony of two discredited company witnesses. The Company fails to show that the Board’s credibility determinations

³⁷ *S.E. Nichols*, 862 F.2d at 958.

were hopelessly incredible or flatly contradicted by either the law of nature or documentary evidence.

In late January 2005, company supervisor Estimable told Wencewicz to take 2 or 3 days off because business was slow. Wencewicz objected, but Estimable said that it was Moskowitz's decision. When Wencewicz returned to work after 2 days off, Estimable said, "No, no, no. We will call you when you're supposed to come back to work." At the end of that week, Wencewicz asked Estimable if he was being fired. Estimable replied that he did not know and that it was Moskowitz's decision.

Wencewicz did not hear anything from the Company until March — after he resorted to filing an unfair-labor-practice charge. Faced with weeks of silence from the Company, Wencewicz had obtained another job. The Company sent Wencewicz a letter telling him to return to work on March 16 or it would view him as having resigned. On those facts, the Board reasonably concluded (SPA16) that the Company retaliated against Wencewicz by falsely leading him to believe that his layoff would only be a couple of days and then ignoring him until after he filed an unfair-labor-practice charge.

All sides agree that the Company asked Wencewicz to return in mid-March. The dispute is only whether it called him back to work in late January after only a few days' layoff. That issue turns solely on credibility. Discredited witnesses

Moskowitz and Estimable testified (CoBr 11-12) that Estimable telephoned Wencewicz after only a few days of layoff to tell him to return to work and that Wencewicz said “leave me alone” and hung up. Moskowitz testified that, after Estimable told him about Wencewicz’s response, he tried to call Wencewicz “about three weeks later, two or three weeks.” (A469.) Earlier in the trial, however, Moskowitz testified (A252) that, after Estimable’s report, “I don’t know if it was a week later” when he called Wencewicz. Thus, the record, with Moskowitz’s varying testimony, supports the Board’s finding that Moskowitz waited “*up to 3 weeks*” (SPA16, emphasis added) before attempting to call Wencewicz after Wencewicz purportedly said “leave me alone.”

The Company fails to show that the Board’s crediting of Wencewicz over Moskowitz and Estimable was hopelessly incredible. Again, the Board was faced with materially conflicting accounts of the same events with no documentary evidence to resolve the conflict. The Board simply believed Wencewicz over Estimable and Moskowitz. Wencewicz’s account of being left idle without any word from the Company was far more plausible than the Company’s story. It makes no sense for Wencewicz, an employee who had been with the Company for over 4 years, to say “leave me alone” and abruptly hang up after a layoff of only a few days.

It is equally far-fetched that the Company continued to call Wencewicz back to work if, weeks earlier, he told Estimable “leave me alone” and hung up on him. At trial, Moskowitz did not explain why — weeks after Estimable’s initial contact with Wencewicz — he was unable to “get through” to Wencewicz or why he did not leave a message or send a letter telling Wencewicz to return to work. Moskowitz also never explained why he waited 2 to 3 weeks to call Wencewicz after his own allegedly unsuccessful attempt.

The Company’s story becomes even more incongruous when, on one hand, it portrays (CoBr 21-22, 56) Wencewicz as a substandard employee who was one of only a few employees who did not deserve a pay raise, and, on the other hand, it repeatedly tried to get Wencewicz back to work after being rudely rebuffed. The Company’s implausible explanation of events only bolsters the force of the Board’s findings of unlawful motive and pretext.³⁸

Lastly, the Company’s attack (CoBr 39-40) on the remedy is premature. The Board’s established practice is to leave to the compliance stage the particulars of its remedial orders.³⁹ In the compliance proceeding, the Company may argue

³⁸ *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (employer’s “implausible” explanation indicates unlawful motive); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 116-17 (8th Cir. 1973) (pretext is evidence of unlawful motive).

³⁹ *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984); *NLRB v. Katz’s Delicatessen*, 80 F.3d 755, 771 (2d Cir. 1996) (likening compliance proceedings to

that its March 11 letter constituted a valid offer of reinstatement that ended the backpay period.

2. Aparicio Garay

a. Substantial evidence supports the Board's finding of unlawful motive

Like Wencewicz, Garay was a known Local 3 supporter whom the Company harassed with repeated coercive interrogations. The Company's hostility towards Local 3 is uncontested. The Board found, as the Company asserted, that Garay called a company supervisor a "rat" twice in the presence of other employees. The Board, however, concluded that the Company would not have discharged Garay for those incidents absent his support for Local 3.

As described above (p. 13), Garay was an active Local 3 supporter. It is uncontested that Moskowitz repeatedly interrogated Garay about Local 3. Even after defeating Local 3 in the election, the Company still harassed Garay. In July, a couple of months after the election, supervisor Mata asked Garay whether he was a Local 3 member. When Garay tried to deny it, Mata insisted that he was. Exasperated with Mata's continued pursuit of the Local 3 issue, Garay asked Mata if he was a rat — clearly implying his view that Mata might be reporting his support of Local 3 to management. In late August, Garay publicized his union

the damages phase of a civil proceeding and finding premature an employer's objection to a Board order to make payments to union welfare and pension funds).

views with a long letter, circulated to coworkers and supervisors, explaining why he supported Local 3.

In September, Garay traveled to Panama for his father's funeral. He returned to work on September 22. On that day, while he spoke to coworker Gonzalez about Local 3, Mata approached them. Garay told Gonzalez, "watch out what you're saying because this guy's a rat."

Over a month later, on October 29, at Moskowitz's direction, supervisor Treccaricho discharged Garay without any explanation. Garay, however, deduced that the reason was his support for Local 3 and told Treccaricho, "What took you so long?" Prior to being discharged, the Company never disciplined Garay or otherwise notified him of any problems or concerns, including the rat-calling incidents.

The Company does not contest the findings regarding Garay's union activity or its knowledge of his support for Local 3. Because the Company does not contest the Board's finding that Mata's and Moskowitz's interrogations of Garay were unlawful, it cannot now attack the factual predicate for those violations. By not contesting those violations, the Company has conceded that the conversations occurred as the Board found.⁴⁰ Regardless, the Company's theory (CoBr 44) — that it was impossible for Mata to interrogate Garay in July because he allegedly

⁴⁰ See p. 22-23 & n.22.

was unaware of Garay's support for Local 3 — is unfounded. Interrogations can be used to ascertain, not merely confirm, an employee's union views. Further, the Company seems to assume (CoBr 44) that simply because Mata denied the conversation with Garay, it did not happen. As described (p. 28), the Board often is confronted with materially conflicting versions of the same incident and courts defer to its judgment in accepting one account over another.

b. Substantial evidence supports the Board's finding that the Company would not have terminated Garay for calling a supervisor a rat absent his support for Local 3

The Company asserts (CoBr 41-43, 45-50, 53), at length, that Garay twice called Mata a rat in front of other employees. Those efforts are wasted because the Board already has agreed and found (SPA15) that "Garay call[ed] Mata a rat at the jobsite and in the presence of other workers" The only issue then is whether the Company would have fired Garay for those incidents absent Garay's support for Local 3.

While the Company assails (CoBr 51-53) the Board for assuming managerial functions, the Board recognized (SPA15) that Garay's conduct "could ... have been a legitimate reason for discharging him." The Board, however, simply did not "believe that Moskowitz decided to discharge Garay because of this reason." (SPA15.) As explained above (pp. 26-27), the Board's discrediting of Moskowitz was not "hopelessly incredible."

Given the Company's treatment of other similar or more severe conduct, the Board concluded (SPA15) that Moskowitz would not have terminated Garay for the rat-calling incidents absent his support for Local 3. For example, the Company gave employee Reynold Caton a slew of warnings before eventually discharging him for screaming at a supervisor, making threatening gestures, and refusing to follow orders. (SPA15; A808-11, 833.) Indeed, while the Company gripes (CoBr 53-54) that Garay's conduct made it look unprofessional, it is hard to imagine that Garay's rat-calling episodes made the Company look any worse than Caton's urinating in a client's bathtub, which resulted in only a warning. (A810.) The Company's failure to give Garay any warnings before terminating him bolsters the violation.⁴¹ Moskowitz admitted (A485) that he never talked to Garay before firing him. The Company gave warnings to other employees for various infractions, but did not terminate them even where they racked up multiple warnings. (A812-17.)

Also, despite asserting (CoBr 50-51) that it had a record of discharging employees for insubordination, the Company cites no examples or other support

⁴¹ *S.E. Nichols*, 862 F.2d at 958 ("absence of discipline or warnings prior to the discharge suggests that the alleged dissatisfaction with performance was an afterthought").

for its bare claim.⁴² Indeed, in addition to the eventual discharge of Caton only after multiple warnings, the only documentary evidence involves the discharge of employee Ronald Hawson. That example, however, provides an inapt comparison because Hawson's offense was more serious in that he threatened violence — telling supervisor Estimable that he was going to throw him out the window — and used profanity. (SPA15; A834.)

Next, in another wasted effort, the Company attacks (CoBr 45-48) the Board's summary of the timing of the rat-calling incidents. As an initial matter, the Company's emphasis on *when* these discrete incidents occurred is of little import because, again, the Board found that Garay twice called Mata a rat in front of other employees. The timing of the incidents does not detract from the reasonableness of the Board's conclusion that the Company would not have terminated Garay for the rat-calling incidents absent his support for Local 3.

In any event, substantial evidence supports the Board's findings regarding the timing of events underlying Garay's discharge. The Company asserts (CoBr 46-47) that the first rat-calling incident occurred in October 2005 and was precipitated by Mata's report that Garay left early. Mata testified that, sometime in September to October, he told Moskowitz that Garay had left the jobsite 1 hour

⁴² The Company may not raise those issues in its reply brief. *See JP Morgan Chase Bank v. Altos Hornos de Mexico*, 412 F.3d 418, 428 (2d Cir. 2005) (“[A]rguments not made in an appellant's opening brief are waived.”).

early and that Moskowitz directed him to dock Garay's pay. (A409-11, SA285-86.) According to Mata and Moskowitz, Garay confronted Mata about having his pay docked, calling him a rat about 4 or 5 days to a week after the early departure. (A410-12, SA286-87.) Garay, however, recalled, very specifically, that he left at 4:20 p.m. (instead of 4:30) on August 11 and lost a half-hour's pay. (A285-88.)

Company payroll records support Garay's account of the timing of the early departure, but not that of Moskowitz and Mata. They show that for the week of August 13, Garay worked 31.5 hours and had 8 hours of sick leave for a total of 39.5 hours (SA195), which bolsters Garay's testimony that he lost a half-hour of pay in a 40-hour week for leaving early on August 11. The Company's reliance (CoBr 47) on October 15 payroll records (A771.6-771.7) does not further its cause in showing that the first rat-calling incident occurred in October, not August. That document shows that Garay was paid for 31.5 hours (a loss of 8.5 hours in a 40-hour week) and Gonzalez was paid for 39.5 hours (a loss of a half hour) for the week of October 15. If, as Mata and Moskowitz testified (A409-11, SA285-86), Mata found their jobsite shut down *one hour* early in October, Gonzalez and Garay would have had their pay docked equally by that amount.

Next, the Company asserts (CoBr 15) that the second rat-calling incident occurred within a couple of days of the first, which, based erroneously on the payroll records, it places at the week of October 15. Garay, however, vividly

remembered (A283-84) that the date was September 22, which was his first day working after his trip to Panama for his father's death. Mata placed the second rat-calling incident at "the next day or two" after the first, which he thought was sometime in September to October. (A409-15.) Moskowitz, who did not witness the second rat-calling incident, admitted that he was "not exactly sure" of its timing, saying that it was a "few days," "a week or so," or "two weeks" after the first. (SA286-88.) Thus, the Board reasonably credited Garay's specific recollection over the vague testimony from Mata and Moskowitz.⁴³

The documentary evidence regarding the second incident consists only of the writings of Mata and Moskowitz and does not clarify the timeline. First, Mata's memorandum (A832) dated October 25 and written at Moskowitz's direction stated that the second rat-calling incident occurred that day — 4 days before Garay's termination. Yet, in a submission to the state unemployment agency (A819), Moskowitz stated that the act leading to Garay's termination occurred 2 weeks before his termination. He also asserted that the Company had given Garay "numerous warnings to cease the misconduct." No such warnings

⁴³ See *NLRB v. L.B. Priester & Son, Inc.*, 669 F.2d 355, 365 (5th Cir. 1982) (judge's crediting of more specific testimony not "inherently unreasonable"); *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983) (crediting detailed, specific testimony over generalized testimony was reasonable).

exist. Thus, the Board reasonably concluded (SPA4-5, 14-15) that the record did not support the Company's version(s) of the rat-calling incidents.

Finally, in an effort to overturn the Board's crediting of Garay, the Company latches onto inconsequential differences in the testimony of Garay, Mata, and Gonzalez regarding the details of the second rat-calling incident (CoBr 43, 49). Contrary to the Company's claim (CoBr 49-50, 53-54), the testimony of Gonzalez and Garay was substantially similar. Garay agreed (A 283-84, 322-23, 325-36) that he called Mata a rat and that there were other tradesmen present. The Company incorrectly states (CoBr 16, 43) that Gonzalez testified that the conversation was in English. Gonzalez never said that (A185); Mata did (A414-15). The Company is wrong again when it states (CoBr 49) that Gonzalez testified that he had to "separate" Mata and Garay; he testified that he calmed *both* Garay and Mata (A 185). Regardless, any minor inconsistencies in the accounts of Garay and Gonzalez do not mandate reversal of the Board's decision.⁴⁴

Ultimately, whether the second rat-calling incident was in Spanish and how many other employees were present do not further the analysis of Garay's discharge. There is no issue as to what Garay did — all, including the Board, agree that Garay called Mata a rat in the presence of other employees. The

⁴⁴ *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 590-91 (8th Cir. 1997); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1356 n.9 (7th Cir. 1984).

violation thus turns only on whether the Company would have fired Garay for calling Mata a rat, absent his support for Local 3. As we have shown, the Board reasonably found that it would not.

D. The Company Unlawfully Denied Wage Increases to Jaroslaw Wencewicz, Joseph Hodge, and Gilberto Garay in Retaliation for Their Support for Local 3

Denying wage increases because of employees' union activities violates Section 8(a)(3) and (1) of the Act.⁴⁵ Here, the Company granted wage increases and made retroactive payments to employees in November and December 2004 and again in January, March, and June 2005. The Company granted increases and payments to all employees except for Local 3 supporters Wencewicz, Hodge, and Gonzalez.

The Company does not dispute that Wencewicz, Hodge, and Gonzalez were open supporters of Local 3 and that it was aware of that support. Likewise, it does not dispute its animus towards Local 3. As noted above (p. 23), the Court considers the contested issues against the background of numerous uncontested violations of the Act, all perpetrated in order to evade Local 3. In fact, the Company repeatedly interrogated Wencewicz and Hodge and subjected all three

⁴⁵ *Sam's Club v. NLRB*, 141 F.3d 653, 659-60 (6th Cir. 1998) (unlawful denial of wage increase in retaliation for protected activity).

discriminatees to threats related to Local 3. Further, the Company took the most severe measure possible against Wencewicz; it fired him for supporting Local 3.

The fact that the Company granted at least one raise, and often more, to every employee but these Local 3 supporters is powerful evidence that the Company's decisions were unlawfully motivated. Moskowitz, who committed the bulk of the unfair labor practices, had sole discretion over which employees received raises. Moreover, although the Company contends that the discriminatees' performance was sub-par, it never disciplined them or even discussed their supposed deficiencies with them.

The Company's defense as to why it denied raises to these Local 3 supporters hinges once again on Moskowitz's discredited testimony. The Company has failed to offer any compelling reason for the Court to reverse the Board's credibility findings; those determinations were not hopelessly incredible or flatly contradicted by documentary evidence.

Generally, Moskowitz testified (A466) that because his costs had increased, he had to be "selective" and "had to pick a handful" of employees who would receive raises. Moskowitz's "selectivity" resulted in raises for every employee except the three discriminatees.

More specifically, with respect to Wencewicz, the Company's claim (CoBr 24-25, 56) that he did not deserve a raise does not square with its defense of his

discharge. It contends (CoBr 24-25, 56), based on Moskowitz's testimony, that Wencewicz was unproductive, communicated poorly in English, failed to improve his skills, and damaged client property. Yet, it claims (CoBr 11-12) that when Wencewicz supposedly told the Company to leave him alone, it repeatedly asked this assertedly unproductive, unskilled, and careless employee to come back to work. Indeed, Mata could not keep his story straight regarding Wencewicz. He testified that Wencewicz was rough and inexperienced (A400-03), but later stated that Wencewicz was one of the more experienced employees and that he relied on Wencewicz to start jobs (A418-19).

Regarding the Company's claim (CoBr 56, 60) that Wencewicz's wage rate exceeded his skill level and classification, when Wencewicz complained to Moskowitz before the election that other employees with less experience had better positions, Moskowitz responded by (unlawfully) promising rate increases and other improvements for employees.⁴⁶ Then, Moskowitz asked if he was going to vote for Local 3. Wencewicz said yes. Apparently, that was the end of any rate increase for Wencewicz.

The Company's defenses regarding Hodge and Gonzalez also rest on discredited witness Moskowitz and lack any documentary support. The Company

⁴⁶ The Board dismissed the allegation regarding the reclassification of Wencewicz and Gonzalez because it found that they suffered no adverse impact in pay and benefits. (SPA17.)

claims (CoBr 19-20, 24) that Hodge made “grievous” mistakes and worked slowly and that he was already receiving a higher wage rate than most employees. Yet, the Company never warned or even advised Hodge of those supposed deficiencies. Further, the Company’s observation (CoBr 57) that because Hodge refused to join Local 363, he could not be classified pursuant to that contract, is irrelevant. There is no evidence, or even assertion, that the raises were tied to the Local 363 contract.

Similarly, despite asserting (CoBr 23) that Gonzalez was unproductive, had trouble communicating in English, and had inferior skills, the Company never discussed those concerns with him or disciplined him. Like Hodge, the Company’s reliance (CoBr 21, 56) on Gonzalez’s classification is a red herring. Again, the raises were not tied to the Local 363 contract or classifications; Moskowitz doled them out as he pleased. Tellingly, the only employees he determined did not merit raises were open Local 3 supporters. Garay, another open Local 3 supporter, had already been unlawfully fired by the time Moskowitz distributed raises. As the Company points out (CoBr 18, 21), the contract did not guarantee any raises; they were granted in Moskowitz’s sole discretion. Moreover, Moskowitz determined the employees’ classifications under the Local 363 contract so any reliance on those classifications to justify his decision to deny the raises to Local 3 supporters is circular reasoning.

To rationalize the lack of warnings to the purportedly deficient employees, the Company claims (CoBr 59 n.11) that it had no policy of issuing warnings to employees. The record, however, shows that whatever its policy, it had a practice of doing so. While Moskowitz characterized his company as a small one with no human resources department (A61-62, 68-69), the record included numerous examples of warnings issued to employees for a wide variety of reasons including productivity, attendance, and work errors (A808-17).

Next, the Company errs in claiming (CoBr 18-19, 57) that it also denied raises to two other employees — Herman Texeira and Miguel Urgiles — with no obvious ties to Local 3. Those two employees did receive raises, albeit not to the extent some others did. Specifically, Texeira received wage increases in September and December 2005. Urgiles received an increase in November 2004. (SA284.) In contrast, Wencewicz, Hodge, and Gonzalez did not get *any* of the raises or retroactive payments.

Thus, the record supports the Board's conclusion (SPA18) that there was a "substantial correlation between those individuals who actively supported Local 3 and the individuals who were denied pay increases" such that it was "more probable that these individuals were denied pay increases because of their sympathies and/or support for Local 3." Contrary to the Company's claim (CoBr 58-59), the Board's language does not indicate any uncertainty in the violation; it

indicates only that the Board drew an inference rather than having direct evidence of unlawful motive. That inference was well founded where the discriminatees were the only employees denied all raises and retroactive payments; the only explanation offered to contradict the force of that evidence came from witness Moskowitz, who was simply not believable.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT LOCAL 363 VIOLATED SECTION 8(b)(1)(A) AND (2) BY ACCEPTING RECOGNITION AND SIGNING A COLLECTIVE-BARGAINING AGREEMENT WHILE LOCAL 3'S ELECTION PETITION WAS PENDING AND BY THREATENING AN EMPLOYEE WITH DISCHARGE IF HE DID NOT JOIN LOCAL 363

A. Established Precedent Requires Strict Neutrality While an Election Case Is Pending

Board and in-circuit law is clear that, while an election petition is pending, an employer and non-incumbent union cannot enter into a collective-bargaining relationship via voluntary recognition.⁴⁷ As this Court stated, the “filing of an election petition with the NLRB raises a QCR [question concerning representation], mandating strict employer neutrality with respect to the unions competing to represent its employees.”⁴⁸

A union that accepts recognition and signs a collective-bargaining agreement while an election case is pending violates Section 8(b)(1)(A) of the Act.⁴⁹

Furthermore, by including in the contract a union-security clause compelling

⁴⁷ *NLRB. v. Katz's Delicatessen*, 80 F.3d 755, 768 (2d Cir. 1996) (employer may not recognize union while election petition is pending); *Wackenhut Corp.*, 287 NLRB 374, 376 (1987) (election petition remains in process when election objections are pending before the Board, precluding recognition); *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982) (once notified of a valid election petition, employer must refrain from recognizing rival union).

⁴⁸ *Katz's Delicatessen*, 80 F.3d at 768 (citing *Bruckner*, 262 NLRB at 957).

⁴⁹ 29 U.S.C. § 158(b)(1)(A); *Katz's Delicatessen*, 80 F.3d at 768-69; *Wackenhut*, 287 NLRB at 376.

employees to become members of, or pay dues to, an unlawfully recognized union, the employer violates Section 8(a)(3) and the union violates Section 8(b)(2) of the Act.⁵⁰

The Supreme Court and this Court defer to the Board's expertise in determining labor policy as long as it is rational and consistent with the Act.⁵¹ In assessing the reasonableness of the "*Bruckner* rule" requiring that employers and rival unions maintain a hands-off position while an election petition is pending, the Third Circuit explained that

[t]he *Bruckner* rule is a satisfactory accommodation of the sometimes conflicting policies of prompt recognition of majority collective bargaining representatives and of uncoerced free choice in the selection of such representatives....⁵²

The court added that the *Bruckner* rule has the additional advantage of providing clear guidance to employers.⁵³

This Court, in *Katz's Delicatessen*, also approved the Board's rules because they are "rooted in the Board's concern for maintaining stability in labor relations

⁵⁰ 29 U.S.C. § 158(a)(3) and 158(b)(2). See *Katz's Delicatessen*, 80 F.3d at 767.

⁵¹ *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 684 (2d Cir. 1990) ("Congress has entrusted the Board with primary responsibility for developing and applying national labor policy, and consequently, a Board rule is entitled to considerable deference so long as it is rational and consistent with the Act.").

⁵² *Haddon House Food Products, Inc. v. NLRB*, 764 F.2d 182, 187 (3d Cir. 1985).

⁵³ *Id.*

and preserving the integrity of the election process during a potentially disruptive period.”⁵⁴ In that case, this Court rejected arguments that the Board’s rules were overly technical and required adherence to them even where the unlawfully recognized union was the same one that filed the election petition, which it later withdrew.⁵⁵

As the Board noted in *Bruckner*, the requirement of a filed petition — which requires the support of at least 30 percent of the employees — before recognition will be prohibited eliminates the possibility that a union with very little support can block a rival from obtaining recognition.⁵⁶ Thus, the Board’s rule reasonably balances the interest in prompt recognition of a union against the goal of ensuring that the Board’s election process allows employees a free and uncoerced choice.⁵⁷

⁵⁴ 80 F.3d at 768.

⁵⁵ *Id.* at 769.

⁵⁶ 262 NLRB at 957.

⁵⁷ See *Haddon House Food Products*, 269 NLRB 338, 340 (1984), *enforced*, 764 F.2d 182 (3d Cir. 1985).

B. Local 363 Defied Established Board and Court Precedent; It Offers No Compelling Reason for the Court To Disregard Those Rules

Factually, it is undisputed that when Local 363 accepted recognition and executed the collective-bargaining agreement with the Company, Local 3's election case was still pending. Thus, Local 363 violated Section 8(b)(1)(A). Further, because the collective-bargaining agreement contained a union-security clause requiring employees to join Local 363 or else be discharged and a dues-checkoff provision to deduct union dues from employees' paychecks, Local 363 violated Section 8(b)(2) of the Act.⁵⁸

Local 363 again violated Section 8(b)(1)(A) by threatening employee Joseph Hodge that pursuant to the union-security clause, it would recommend that he be discharged unless he joined Local 363.⁵⁹ Local 363 offers no argument regarding that violation; it notes only that if the contract was lawful, its threat to Hodge was also lawful (UBr 4 &n.4).

Local 363 acknowledges (UBr 16 n.17) that the applicable Board rules have been accepted by this Court and others. Unable to dispute the fact that it flouted

⁵⁸ As described above (pp. 22-23), the Company does not contest the Board's findings that its recognition of, and contract with, Local 363 were unlawful.

⁵⁹ *Newspaper & Mail Deliverers' Union*, 337 NLRB 1102, 1107 (2002). *See also NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 622 (2d Cir. 1994).

established Board and in-circuit precedent, Local 363 urges the Court to overlook the clear rules requiring strict neutrality while an election petition is pending. As we show, it offers no compelling reason to do so. Local 363 goes further in attacking the Board's equally well-established "blocking charge" rule, the application of which is not subject to review by this Court. It then attempts to distract the Court from its obvious violations by attacking the Board's "dual card" and "recognition bar" rules — arguments doomed not only because they were never raised to the Board but also because they are irrelevant to the issues in this case.

1. Parties cannot circumvent Board processes because they do not want to wait for their resolution

Local 363 argues (UBr 16-20) that it should be allowed to enter into a collective-bargaining relationship with the Company because, in essence, there is no reason for it to wait for Local 3's election objections to be resolved. At the time of recognition, the election objections had been pending for approximately 6 months and were being held in abeyance pending the resolution of the unfair labor practices in the instant case.

In a case in a similar procedural posture, the Third Circuit refused to allow an employer and union to circumvent the Board's processes and enter into a

collective-bargaining relationship when an election case was pending.⁶⁰ There, a union filed an election petition in November 1975, but it was held in abeyance pending the resolution of unfair-labor-practice charges.⁶¹ The unfair-labor-practice case worked its way through Board processes, was enforced by the D.C. Circuit, and was pending before the Supreme Court when, in July 1981 — 5½ years later — the employer recognized another union and signed a collective-bargaining agreement.⁶² Following *Bruckner*, the court agreed with the Board that the employer and union violated the Act by entering into a bargaining relationship while the election case remained pending.⁶³

The result in this case should be no different. Employers and unions cannot skirt Board procedures simply because they are impatient. As the Board explained in *Haddon House*, “notwithstanding the passage of several years, it is paramount that resolution of the question concerning representation be resolved ultimately by the Board’s election processes rather than by an employer’s usurpation of this function by virtue of its own grant of recognition to one of two rival unions.”⁶⁴

⁶⁰ *Haddon House Food Products, Inc. v. NLRB*, 764 F.2d 182 (3d Cir. 1985).

⁶¹ *Id.* at 184.

⁶² *Id.* at 184-85.

⁶³ *Id.* at 186-87.

⁶⁴ 269 NLRB 338, 340 (1984), *enforced*, 764 F.2d 182 (3d Cir. 1985).

The Court should reject Local 363's suggestion (UBr 4-5, 6, 9-10, 19-20) that it was better for the employees to be represented by Local 363 than to be unrepresented.⁶⁵ Employers and unions cannot coerce employees into accepting a sweetheart union and then reap the fruit of their own misdeeds by claiming that it was all in the employees' best interests. As the Board in *Haddon House* explained, the application of the Board's rules

may result in a prolonged period during which employees may be without desired representation, the alternative—to permit a private conferral of recognition apart from the Board's representation processes once the petition has been placed in abeyance—would encourage delay in the administration of concurrent unfair labor practice proceedings, would encourage circumvention of the Board's election processes, and would erode substantially the viability of the Board's essential and longstanding 'blocking' policy customarily applied when unfair labor practice charges are filed concurrent with the filing of a representation petition.⁶⁶

The Court should not countenance Local 363's paternalistic argument that, in essence, the ends justify the means.

⁶⁵ See generally *Bishop v. NLRB*, 502 F.2d 1024, 1029 (5th Cir. 1974) ("it would surely controvert the spirit of the Act to allow the [respondent] to profit by his own wrongdoing").

⁶⁶ 269 NLRB at 341.

2. The Court lacks jurisdiction to consider the Board’s application of the blocking charge rule; the application of that rule was reasonable, particularly on these facts

Local 363’s quarrel with the Board’s processing of this case can be traced to the decision to hold the election case in abeyance pursuant to the “blocking charge” doctrine. A “blocking charge” is an unfair-labor-practice charge that alleges conduct that may interfere with the fairness of an election. Specifically, the Board’s casehandling manual for election cases explains that “[t]he Agency has a general policy of holding in abeyance the processing of [an election] petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted.”⁶⁷

As an initial matter, the Board’s decisions — including application of the blocking charge rule — in the election case are not reviewable.⁶⁸ The election case was not consolidated with the instant unfair-labor-practice case and is not before

⁶⁷ NLRB Casehandling Manual, Representation Proceedings, §11730 (2007), available at www.nlr.gov/publications/manuals.

⁶⁸ *Albertson’s, Inc. v. NLRB*, 161 F.3d 1231, 1239 (10th Cir. 1998) (recognizing that courts have approved blocking procedure and its application as properly within Board’s statutory authority to conduct representation elections and that those issues are unreviewable).

the Court. Yet, even if they had been consolidated, the Court still would not have jurisdiction over the election case because orders in an election case are not final.⁶⁹

In any event, Local 363's attack (UBr 5 n.6) on the Board's application of the blocking charge rule is unwarranted, particularly given the slew of preelection violations, now uncontested. The premise of the blocking charge rule is that the election cannot be fairly conducted in an atmosphere of unremedied unfair labor practices. Here, Local 3's objections to the election (A530-34) overlapped many of the unfair-labor-practice charges alleging preelection misconduct.

Those allegations, now proven and uncontested, included threats that if the employees elected Local 3, the Company would never sign a contract with that union and would shut down. The Company arranged for the employees to attend meetings with Local 363 representatives during paid working time. Moreover, Moskowitz and Local 363 representatives brazenly urged employees to vote against Local 3 so that Local 363 could come in to represent them through the back door. Under those circumstances, holding the election case in abeyance was the only reasonable option.

In claiming (UBr 6, 9, 11) that Local 3 is a minority union preventing employees from representation by another union, Local 363 completely ignores the

⁶⁹ *NLRB v. Monroe Tube Co., Inc.*, 545 F.2d 1320, 1329 (2d Cir. 1976) (Court could not review Board direction of new election in consolidated election and unfair-labor-practice case because direction was not final order).

numerous undisputed instances of preelection misconduct. Local 363's assumption that the election was a fair assessment of the employees' wishes is specious. The Company's (so-far successful) effort to evade Local 3 and bring in Local 363 through the back door cannot stand.⁷⁰

Local 363's attempt (UBr 7, 17) to mute the significance of the unfair labor practices by relying on the dismissal of allegations against related company BTZ is equally spurious. The BTZ allegations were dismissed on grounds not relevant to the Matros violations. Unlike Matros, BTZ's April 1, 2004 recognition of and contract with Local 363 predated Local 3's election petition and all of the Matros-related unfair labor practices. The Board found (SPA3) that, at the time of the BTZ-Local 363 recognition, the BTZ employees were an unrepresented *separate* bargaining unit available to be organized. That timing eliminated the impact of the violations on BTZ employees such that the BTZ-Local 363 recognition and contract were not tainted. The lawful BTZ-Local 363 recognition and contract therefore barred Local 3's petition for an election at BTZ.

Essentially, Local 363 beat Local 3 in the race to organize BTZ's employees. It obtained recognition and a contract on the very day that the BTZ employees became available by virtue of the IECA's dissolution. In the race for

⁷⁰ See *Bishop*, 502 F.2d at 1029 (“[i]n the absence of the ‘blocking charge’ rule, many of the NLRB’s sanctions against employers who are guilty of misconduct would lose all meaning”).

the Matros employees, however, Local 363 did not fare as well. It was unable to obtain recognition before Local 3 filed its petition for an election at Matros. Local 363 and the Company therefore were required to await the final results of that election case. They did not, which has led all the parties to this Court. Contrary to Local 363's suggestion (UBr 7, 17-18), the dismissal of the BTZ allegations does not immunize it against a finding of violations with the Matros recognition and contract.

Further, Local 363 wrongly lays the blame (UBr 19) for the passage of time on the Board.⁷¹ The holdup in processing the election case was triggered by Local 363's own misconduct and that of the Company. Had the Company and Local 363 not engaged in preelection misconduct, there would have been no need for election objections or unfair-labor-practice charges. The Board's regional office needed time to investigate allegations of continuing misconduct by the Company through 2005. Thereafter, both the Company and Local 363 fought every allegation before the judge and the Board.

Contrary to Local 363's related claim (UBr 5 n.6, 11), there is no evidence that Local 3 abused any Board processes in the election case. Its election

⁷¹ See *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 68 (2d Cir. 1992) (“when the remedies ordered by the Board involve damages and otherwise making parties whole, as opposed to requiring bargaining, delay is no reason to refuse enforcement”).

objections (A530-34) were hardly frivolous, notably where many of them overlap with the now-uncontested preelection violations of the Act.

Local 363's efforts to create precedent allowing recognition of a union while an election case is pending are short-sighted. The same Board rules that Local 363 protests have protected, or will protect, Local 363 against any rival unions when it files objections to an election. It is doubtful that Local 363 would simply acquiesce if the shoe were on the other foot with another union obtaining voluntary recognition while Local 363's election objections were pending.

3. Local 363 waived its dual-card and recognition-bar arguments by not raising them to the Board; those rules are irrelevant to this case

In attacking (UBr 12-14) the Board's dual-card and recognition-bar rules, Local 363 completely ignores the uncontested factual context of preelection misconduct and the procedural posture of unresolved election objections. First, Local 363 raised neither issue to the Board and therefore waived those arguments before the Court.

Next, the dual-card rule is irrelevant because there is no evidence that any employee signed cards seeking representation by both unions. And, in any event, the cards that Local 363 acquired *after* the election do not eliminate the need to fairly conclude the election case, particularly where it is uncontested that Local 363 was the beneficiary of unlawful assistance from the Company. It cannot now

rely on cards that likely were the product of the unfair labor practices. If Local 363 had sufficient cards before the election, it should have come forward at that time and intervened in the election.

Local 363 is even farther off the mark with its recognition-bar arguments. The recognition of Local 363 could not bar Local 3's election petition because it occurred months after the filing of the petition. Local 363's attack on those well-established but irrelevant rules is an attempt to divert the Court from the sound precedent and undisputed facts underlying its unlawful acceptance of recognition and the collective-bargaining agreement.

a. Dual-card rule

The Board's dual-card rule states that when an employee signs authorization cards for two unions, neither card is a valid indication of support for the unions, absent evidence establishing which union the employee intended to represent him.⁷² Local 363 claims (UBr 12-13) that the *Bruckner* rule requiring strict neutrality while an election case is pending does not adequately account for a situation in which employees sign cards for two different unions.

⁷² *Alliant Foodservice, Inc.*, 335 NLRB 695, 695 (2001).

First, Local 363 never raised a dual-card issue to the Board and the Board made no such findings. (SA289-310.) Thus, the Court lacks jurisdiction to consider the argument.⁷³

In any event, Local 363's argument is speculative and inapplicable on these facts. As Local 363 concedes (UBr 19), there is no evidence that any employee signed cards for both Local 3 and Local 363. Likewise, neither the Local 363 cards (SA1-33) nor any testimony shows that, by signing cards for Local 363 after the election, any employee repudiated his support for Local 3. Instead, what the evidence does show is that the Company threatened, coerced, and promised benefits to employees and also rendered assistance to Local 363, all in an attempt to discourage employees from supporting Local 3.

Thus, there is no evidence to support Local 363's assumption that cards signed for Local 363 after the election demonstrate legitimately shifting employee loyalties. Instead, the evidence supports a conclusion that the preelection misconduct likely eroded employee support for Local 3 and affected the election

⁷³ Section 10(e) of the Act (29 U.S.C. §160(e)) (“No objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *See also U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (“courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”).

results. The subsequent recognition of Local 363 in the context of an unresolved election case and unremedied misconduct cannot stand. This Court recognizes that where there is a pattern of unlawful assistance (uncontested here), any showing of majority support for a union obtained under such circumstances is tainted, and may not be relied upon for purposes of recognition.⁷⁴

Lastly, while there is no evidence of shifting loyalties in this case, contrary to Local 363's claim (UBr 13-15), the dual-card rule allows employees to reconsider their choice of union. The Board's approach of requiring evidence of the employees' intent rather than determining employees' representational choices based on guesswork is rational and consistent with the Act's goals of promoting employee free choice.⁷⁵

b. Recognition bar

Not yet done with attacking established Board rules, Local 363 raises (UBr 15 n.14, 16 n.17) yet another irrelevant doctrine: recognition bar. First, because Local 363 never raised the issue of recognition bar to the Board, the Court cannot

⁷⁴ *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 623 (2d Cir. 1994).

⁷⁵ *See Human Development Ass'n v. NLRB*, 937 F.2d 657, 665-68 (D.C. Cir. 1991) (rejecting argument that dual-card rule is inconsistent with *Bruckner*); *Bruckner*, 262 NLRB at 958 (observing that "authorization cards are less reliable as indications of employee preference" in rival union situations).

consider it now.⁷⁶ (SA289-310.) In any event, that doctrine is irrelevant to this case.

The Board's recognition-bar rule provides that a good-faith recognition, based on a union's demonstrated majority status, bars an election petition filed by an employee (to decertify the union) or a rival union for a reasonable amount of time.⁷⁷ Here, recognition bar does not apply because Local 3 filed its election petition *before* the Company recognized Local 363. Thus, the recognition of Local 363 could not bar Local 3's election petition. Moreover, as noted above (p. 61&n.74), this Court has found that (as here) there can be no *good-faith* recognition with unlawful assistance to the recognized union.

In an atmosphere of uncontested, unlawful assistance to Local 363 and other preelection misconduct, Local 363's more general gripe that the Board has a "paternalistic" attitude (UBr 15 n.14) towards employees' choice of union via recognition falls flat. Ensuring that employees' choice is free and uncoerced is one

⁷⁶ See p. 60, n.73.

⁷⁷ *Dana Corp.*, 351 NLRB 434, 434 (2007). Nothing in *Dana* "implicitly overruled" (UBr 16 n.17) *Bruckner* — another argument not raised to the Board. *Dana* held that recognition will not immediately bar an election petition; instead, employees must be given notice of the recognition and advised of their right to file within 45 days a petition to decertify the union or support a rival union's petition. If anything, *Dana* reaffirms both the vitality of voluntary recognition and the Board's confidence in the election process. *Dana*'s addition of a notice requirement is completely irrelevant to this case where Local 3's election petition *preceded* the (unlawful) recognition of Local 363.

of the Act's goals. The Board, with Supreme Court approval, therefore has long preferred elections as a gauge of employee support for a union.⁷⁸ Here, where a union had already invoked the Board's election procedure, it was rational and consistent with the Act for the Board to ensure that the process reached its conclusion and was done so fairly.⁷⁹ In any event, recognition is permitted when done at the appropriate time. However, when an election case remains unresolved, recognition is prohibited.

⁷⁸ See *Human Development Ass'n*, 937 F.2d at 665 (citing *Linden Lumber v. NLRB*, 419 U.S. 301, 304 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596, 602 (1969)).

⁷⁹ See generally *Empire State Sugar Co. v. NLRB*, 401 F.2d 559, 562 (2d Cir. 1968) ("The purpose of the election procedure is to obtain a free employee choice without the intervention of the employer in the selection of the representative of the employees. Temporary unavailability of the election procedure should not allow such employer intervention when other alternatives are available more consistent with the spirit of the Act.").

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court grant the Board's application for enforcement, deny the cross-petitions for review, and enter a judgment enforcing in full the Board's Order in this matter.

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September 24, 2009

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

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CONSTRUCTION CORP., BTZ ELECTRICAL
CORP., SINGLE EMPLOYERS; LOCAL 363,
UNITED ELECTRICAL WORKERS OF
AMERICA, IUJHAT

Respondent/Cross-Petitioners

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* Nos. 09-2249-ag (L),
* 09-2591-ag (XAP),
* 09-2885-ag (XAP)
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* Board Case No.
* 02-CA-36296
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 13,803 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 24th day of September, 2009

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by e-mail and first-class mail upon the following counsel at the addresses listed below:

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