

**No. 10-3548**

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**UNITED STATES COURT of APPEALS  
FOR THE THIRD CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**v.**

**REGENCY GRANDE NURSING & REHABILITATION CENTER  
Respondent**

---

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**TABLE OF CONTENTS**

<b>Headings</b>	<b>Page(s)</b>
Statement of Subject Matter and Appellate Jurisdiction .....	1
Statement of the Issues Presented.....	3
Statement of the Case .....	4
Statement of Facts.....	6
I. The Board’s Findings of Fact.....	6
A. The Company’s History with Local 300S and Local 1199; Employee Aida Basualto Supports Local 300S During the First Organizing Drive; Basualto’s Loyalty to Local 300S Wanes in 2009.....	6
B. The Organizing Drive Between Local 1199 and Local 300S Heats Up; Local 1199 Organizer Molina Becomes a Daily Presence at the Facility; Basualto Begins Collecting Cards for Local 1199; Basualto Begins Supporting Local 1199 .....	8
C. Following Directors Snyder’s and Reyes’ Observation of a Meeting Between Local 1199 Organizer Molina, Basualto, Figueroa and Other Employees, Reyes Interrogates Employee Figueroa.....	9
D. Former Local 300S Steward Rohde and Employee Meikle Post Flyers Criticizing Local 1199; Administrator Olszewski Tells Meikle to Stop Posting the Flyers; Neither Rohde or Meikle are Disciplined.....	11
E. On Election Day, Owner Gross Discharges Employee Basualto, and Director Reyes Interrogates Employee Valerie Madeina About Her Vote.....	12

**TABLE OF CONTENTS**

<b>Headings – cont’d</b>	<b>Page(s)</b>
II. The Board’s Conclusions and Order.....	14
Statement of Related Cases.....	15
Standard and Scope of Review.....	15
Summary of Argument.....	17
Argument.....	19
I. Member Becker Reasonably Determined that He had No Duty To Recuse Himself from this Case Based on Relevant and Ethical Standards.....	19
A. Introduction and Standard of Review.....	19
B. Background: Member Becker Has Announced Standards For Recusal Based on His Prior Employment that Go Beyond Federal Regulations and Are in Accordance with the Applicable Executive Order.....	20
C. Member Becker Reasonably Declined the Company’s Recusal Request.....	22
II. Substantial Evidence Supports the Board’s Finding that the Company Violated Section 8(a)(1) of the Act when its Housekeeping Director Interrogated Employees on Two Separate Occasions and Created the Impression of Surveillance.....	25
A. The Act Allows Employees to Engage in Section 7 Activity Free of Interference.....	25

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
B. The Company Violated Section 8(a)(1) of the Act When Housekeeping Director Reyes Interrogated Employees on Two Separate Occasions and Created the Impression of Surveillance.....	27
C. The Company’s Defenses Rely on Discredited Testimony and Misapply Board Law.....	30
III. Substantial Evidence Supports the Board’s Finding That The Company Violated Section 8(a)(3) of the Act When it Discharged Employee Aida Basualto in Retaliation for her Support of Local 1199.....	35
A. Standard and Scope of Review for Section 8(a)(3) Violations.....	35
B. The Company Unlawfully Discharged Basualto in Retaliation For Her Union Activity in Support of Local 1199.....	37
C. The Company’s Meritless Defenses Rely on Challenges to the Administrative Law Judge’s Credibility Resolutions, to Which This Court Defers.....	42
IV. The Board Acted within its Remedial Discretion In Ordering a Broad Cease-And-Desist Order Because the Company has Engaged in Persistent Attempts to Interfere with Its Employees’ Rights.....	45
A. Standard and Scope of Review for Remedial Orders.....	45

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
B. The Board’s Broad Order is Entitled to Enforcement Because the Company has Demonstrated Both a Proclivity to Violate the Act and a Fundamental Disregard for the Rights of Its Employees.....	46
Conclusion.....	50

## TABLE OF AUTHORITIES

<b>Supreme Court Cases</b>	<b>Page(s)</b>
<i>Consolidated Edison Co. of New York v. NLRB</i> , 305 U.S. 197 (1938) .....	16
<i>Fibreboard Paper Prods. Corp. v. NLRB</i> , 379 U.S. 203 (1964) .....	45
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488, 497 (1979) .....	16
<i>Metropolitan Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	35
<i>NLRB v. Express Publishing Co.</i> , 312 U.S. 426 (1941) .....	46, 47, 49
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) .....	45
<i>NLRB v. Regency Grande Nursing and Rehabilitation Center</i> , 265 F. App'x 74 (3d Cir. 2008).....	5, 6
<i>NLRB v. Transportation Management</i> , 462 U.S. 393 (1983) .....	35, 36
<i>New Process Steel, L.P. v. NLRB</i> , 130 S. Ct. 2635 (2010) .....	2
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941) .....	45
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984) .....	45, 48
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951) .....	15, 16

## TABLE OF AUTHORITIES

<b>Courts of Appeals Cases</b>	<b>Page(s)</b>
<i>Adolph Coors Co. v. FTC</i> , 497 F.2d 1178 (10th Cir. 1974) .....	23
<i>Allegheny Ludlum Corp. v. NLRB</i> , 301 F.3d 167 (3d Cir. 2002) .....	13
<i>Atlantic Limousine, Inc. v. NLRB</i> , 243 F.3d 711 (3d Cir. 2001) .....	17, 37, 45
<i>Avante at Boca Raton, Inc. v. NLRB</i> , 54 F. App'x 502 (D.C. Cir. 2002) .....	23-24
<i>Bronx Health Plan v. NLRB</i> , No. 98-1451, 203 F.3d 51 (D.C. Cir. Sept. 21, 1999) .....	23
<i>Graham Architectural Products v. NLRB</i> , 697 F.2d 534 (3d Cir. 1983) .....	27, 33
<i>Hanlon &amp; Wilson Co. v. NLRB</i> , 738 F.2d 606 (3d Cir. 1984) .....	26, 31
<i>Hedstrom Co. v. NLRB</i> , 629 F.2d 305 (3d Cir. 1980) .....	25, 26, 32
<i>Hotel Employees &amp; Rest. Employees Union, Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985) .....	26
<i>Hunter Douglas, Inc. v. NLRB</i> , 804 F.2d 808 (3d Cir. 1986) .....	27, 32-33, 35
<i>Metropolitan Council of NAACP Branches v. FCC</i> , 46 F.3d 1154 (D.C. Cir. 1995) .....	19, 25
<i>Multi-Ad Servs., Inc. v. NLRB</i> , 255 F.3d 363 (7th Cir. 2001) .....	28

## TABLE OF AUTHORITIES

<b>Courts of Appeals Cases – Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Ajax Tool Works, Inc.</i> , 713 F.2d 1307 (7th Cir. 1983) .....	28
<i>NLRB v. Armcor Indus., Inc.</i> , 535 F.2d 239 (3d Cir. 1976) .....	28
<i>NLRB v. Armour &amp; Co.</i> , 154 F.2d 570 (10th Cir. 1946) .....	49
<i>NLRB v. Brookshire Grocery Co.</i> , 919 F.2d 359 (5th Cir. 1990) .....	33
<i>NLRB v. Buitoni Foods Corp.</i> , 298 F.2d 169 (3d Cir. 1962) .....	36
<i>NLRB v. Computed Time Corp.</i> , 587 F.2d 790 (5th Cir. 1979) .....	26-27
<i>NLRB v. Eagle Material Handling, Inc.</i> , 558 F.2d 160 (3d Cir. 1977) .....	35
<i>NLRB v. FES, a Div. of Thermo Power</i> , 301 F.3d 83 (3d Cir. 2002) .....	30
<i>NLRB v. Gold Standard Enterprises, Inc.</i> , 679 F.2d 673 (7th Cir. 1982) .....	25
<i>NLRB v. Int'l. Brotherhood of Electrical Workers, Local Union No. 98</i> , 317 F. App'x 269 (3d Cir. 2009) .....	47
<i>NLRB v. Lee Hotel Corp.</i> , 13 F.3d 1347 (9th Cir. 1994) .....	17, 37
<i>NLRB v. Local 54, Hotel Employees &amp; Rest. Employees Int'l Union</i> , 887 F.2d 28 (3d Cir. 1989) .....	16
<i>NLRB v. Louisiana Mfg. Co.</i> , 374 F.2d 696 (8th Cir. 1967) .....	28, 30, 32

## TABLE OF AUTHORITIES

<b>Courts of Appeals Cases – Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Metropolitan Regional Council of Carpenters</i> , 316 F. App'x 150 (3d Cir. 2009) .....	47
<i>NLRB v. Ohio New &amp; Rebuilt Parts, Inc.</i> , 760 F.2d 1443 (6th Cir. 1985).....	25
<i>NLRB v. Omnitest Inspection Servs.</i> , 937 F.2d 112 (3d Cir. 1991) .....	36
<i>NLRB v. Richards</i> , 265 F.2d 855 (3d Cir. 1959).....	49
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988) .....	36
<i>NLRB v. U.S. Postal Service</i> , 486 F.3d 683 (10th Cir. 2007).....	48
<i>NLRB v. W.C. McQuaide, Inc.</i> , 552 F.2d 519 (3d Cir. 1977).....	16
<i>Painters Local 277 v. NLRB</i> , 717 F.2d 805 (3d Cir. 1983) .....	36
<i>Quick v. NLRB</i> , 245 F.3d 231 (3d Cir. 2001) .....	16, 45, 46
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966).....	42
<i>St. Anthony Hosp. v. U.S. Dept. of Health and Human Services</i> , 309 F.3d 680 (10th Cir. 2002).....	20
<i>St. George Warehouse, Inc. v. NLRB</i> , 420 F.3d 294 (3d Cir. 2005) .....	16
<i>Trimm Assocs., Inc. v. NLRB</i> , 351 F.3d 99 (3d Cir. 2003).....	15

## TABLE OF AUTHORITIES

<b>Courts of Appeals Cases – Cont'd</b>	<b>Page(s)</b>
<i>United States Steel Corp. v. NLRB</i> , 682 F.2d 98 (3d Cir. 1982) .....	26
<i>United Steelworkers of America v. Marshall</i> , 647 F.2d 1189 (D.C. Cir. 1980).....	25
<i>Yellow Freight System, Inc. v. NLRB</i> , 37 F.3d 128 (3d Cir. 1994) .....	13, 16
 <b>National Labor Relations Board Cases</b>	
<i>Regency Grande Nursing and Rehabilitation Center</i> , 354 NLRB No. 75 (2009).....	27
<i>Regency Grande Nursing and Rehabilitation Center</i> , 355 NLRB No. 109 (2010) .....	2
<i>D.J. Electrical Contracting</i> , 303 NLRB 820 (1991).....	30
<i>Dobbs International Services</i> , 335 NLRB 972 (2001).....	39
<i>Dyn-Corp</i> , 343 NLRB 1197 (2004).....	33
<i>Five Star Manufacturing, Inc.</i> , 348 NLRB 1301 (2006) .....	47
<i>Flamingo Hilton-Laughlin</i> , 324 NLRB 72 (1997).....	40
<i>Flexsteel Industries</i> , 311 NLRB 257 (1993).....	29
<i>Hanes Hoisery, Inc.</i> , 219 NLRB 338 (1975).....	26

## TABLE OF AUTHORITIES

<b>National Labor Relations Board Cases – Cont'd</b>	<b>Page(s)</b>
<i>Hedaya Brothers, Inc.</i> , 277 NLRB 942 (1985).....	34
<i>Hickmott Foods</i> , 242 NLRB 1357 (1979).....	47, 49
<i>Hudson Wire Company</i> , 236 NLRB 1263 (1978).....	34
<i>Inter-disciplinary Advantage, Inc.</i> , 349 NLRB 480 (2007).....	28
<i>Keystone Pretzel Bakery, Inc.</i> , 242 NLRB 492 (1979).....	26, 32
<i>Pepsi-Cola Bottling Co. of Los Angeles</i> , 211 NLRB 870 (1974).....	34
<i>Raytheon Missile Sys. Div., Raytheon Co.</i> , 279 NLRB 245 (1986).....	29
<i>Regency Grande Nursing and Rehabilitation Center</i> , 347 NLRB 1143 (2006).....	4, 6, 49
<i>Register Guard</i> , 344 NLRB 1142 (2005).....	29
<i>Rossmore House</i> , 269 NLRB 1176 (1984).....	26
<i>Service Employees Local 121RN (Pomona Valley Hospital Medical Center)</i> , 355 NLRB No. 40 (2010).....	passim
<i>Springfield Air Center</i> , 311 NLRB 1151 (1993).....	39
<i>State Plaza, Inc.</i> , 347 NLRB 755 (2006).....	39

**TABLE OF AUTHORITIES**

<b>National Labor Relations Board Cases – Cont'd</b>	<b>Page(s)</b>
<i>United States Service Industries, Inc.</i> , 324 NLRB 834 (1997).....	39
<i>Wagner Wood Co.</i> , 148 NLRB 963 (1964).....	32
<i>Wright Line, a Div. of Wright Line, Inc.</i> , 251 NLRB 1083 (1980).....	36, 37
 <b>Federal Statutes</b>	
5 U.S.C. § 551 .....	20
29 U.S.C. § 151 .....	2
29 U.S.C. § 157 .....	25
29 U.S.C. § 158(a)(1) .....	35
29 U.S.C. § 158(a)(3) .....	35
29 U.S.C. § 159(d).....	44
29 U.S.C. § 160(c).....	45, 46
29 U.S.C. § 160(e).....	2, 3, 15
29 U.S.C. § 160(f) .....	2
 <b>Federal Regulations</b>	
5 C.F.R. § 2635.101(b)(14) .....	21
5 C.F.R. § 2635.101(b)(8) .....	20, 21
5 C.F.R. § 2635.502(a) .....	21
5 C.F.R. § 2635.502(b)(iv) .....	21

**TABLE OF AUTHORITIES**

<b>Other Authorities</b>	<b>Page(s)</b>
AFL-CIO, <i>Constitution</i> , “Article XX: Settlement of Internal Disputes” <a href="http://www.aflcio.org/aboutus/thisistheaficio/constitution/art20.cfm">http://www.aflcio.org/aboutus/thisistheaficio/constitution/art20.cfm</a> .....	22
Proclamation No. 13,490, 74 Fed. Reg. 15 (Jan. 21, 2009).....	21

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**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) for enforcement of its Order issued against Regency Grande Nursing and Rehabilitation Center (“the Company”).

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 151, 160 (a)) (“the Act”). The Board’s Decision, Order, and Certification of Representative, issued on August 23, 2010, and is reported at 355 NLRB No. 109 (2010).<sup>1</sup> The Board’s Order is a final order with respect to all parties under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). The Decision, Order, and Certification of Representative adopts and incorporates by reference the Board’s previous decision (JA 440-53), issued on September 3, 2009, and reported at 354 NLRB No. 75.

That prior decision was issued by a two-member quorum of the Board. The Company filed a petition in the D.C. Circuit for review of that order and the Board cross-applied for enforcement. The D.C. Circuit placed the case in abeyance. The Supreme Court, on June 17, 2010, issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that Chairman Liebman and Member Schaumber, acting as a two-member quorum of a three-member group delegated all the Board’s powers in December 2007, did not have authority to issue decisions when there were no other sitting Board members, as they did in the prior decision here. Shortly thereafter, the D.C. Circuit granted the Board’s motion to remand

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<sup>1</sup> “JA” references are to the printed joint appendix. “SJA” references are to the supplemental printed appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

based on *New Process*. A three-member panel of the Board then issued its August 23, 2010 decision that adopted and incorporated by reference the September 3, 2009 decision.

The Board filed its application for enforcement in this Court on August 25, 2010. That filing was timely because Section 10(e) of the Act (29 U.S.C. § 160(e)) places no time limits on the filing of an application for enforcement. This Court has jurisdiction over the application under Section 10(e) because the unfair labor practices occurred in Dover, New Jersey.

#### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether Member Becker's refusal to recuse himself from considering this case was consistent with relevant law and prevailing ethical standards. (JA 2; 464.)
2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when its director of housekeeping interrogated employees on two separate occasions and created the impression of surveillance. (JA 2; SJA 2.)
3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act when it discharged employee Aida Basualto in retaliation for her support of Service Employees International Union 1199, New Jersey Health Care Union. (JA 2; SJA 2.)

4. Whether the Board acted within its remedial discretion in ordering a broad cease and desist order because the Company has engaged in persistent attempts to interfere with its employees' protected rights. (JA 2; SJA 2.)

### **STATEMENT OF THE CASE**

This case involves another chapter in the Company's continuing history of unlawfully interfering with its employees' rights under the Act to choose their bargaining representative at the Company's Dover, New Jersey facility. In the previous chapter, the Board found that after the Company opened its Dover facility, it unlawfully recognized the United Food and Commercial Workers International Union, Local 300S ("Local 300S") when that union did not represent a majority of its employees; fraudulently concealed that recognition from the employees for over seven months; and, when the Service Employees International Union 1199, New Jersey Health Care Union ("Local 1199") began organizing company employees, unlawfully entered into a collective-bargaining agreement with Local 300S that included a union-security clause requiring employees to maintain union membership. *Regency Grande Nursing & Rehabilitation Center*, 347 NLRB 1143 (2006), ("*Regency Grande I*"), *enforced*, 265 F. App'x 74 (3d Cir. 2008). On February 20, 2008,<sup>2</sup> this Court enforced the Board's decision in *Regency Grande I*, agreeing that the Company violated Section 8(a)(1), (2), and (3)

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<sup>2</sup> All dates hereinafter occurred in 2008 unless otherwise noted.

of the Act, and holding that the Board did not abuse its discretion in declining to follow the arbitrator's decision that Local 300S represented a majority of company employees. As the Court observed, testimony from 74 out of 117 employees that they did not sign authorization cards for Local 300S made "majority support for that union mathematically impossible." 265 F. App'x at 75 n.3, 78.

Only days after this Court's decision, the Company again began interfering with its employees' rights during an organizing campaign and election battle that pitted Local 300S against Local 1199. Acting on two unfair labor practice charges filed by Local 1199, the Board's Regional Director issued a complaint alleging that the Company violated the Act by interrogating employees and creating an impression among employees that their activities were under surveillance on two occasions, once during the organizing campaign and once on election day; and by terminating employee Aida Basualto on the day of the election because of her activity in support of Local 1199. (JA 443.) After a hearing, the administrative law judge issued a decision and recommended order in which he found that the Company had violated the Act as alleged. (JA 2; 440.) The Company filed exceptions with the Board and, following remand of the original two-member Board order, moved for recusal of Members Pearce and Becker. (JA 2; 464.)

On August 23, 2010, the Board affirmed the judge's rulings, findings, and conclusions and adopted his recommended order to the extent and for the reasons

stated in the original, two-member Board decision, *Regency Grande*, 354 NLRB No. 75. Member Pearce recused himself, and took no part in considering this case. (JA 2 n.2.) Consistent with the principles set forth in *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40 (2010), Member Becker denied the Company's motion. (JA 2.)

## STATEMENT OF FACTS

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

#### **A. The Company's History with Local 300S and Local 1199; Employee Aida Basualto Supports Local 300S During the First Organizing Drive; Basualto's Loyalty to Local 300S Wanes in 2009**

The Company has a history of committing unfair labor practices against its employees at its Dover, New Jersey facility. (JA 441 n.10.) The Dover facility is one of four New Jersey nursing home and rehabilitation facilities owned and operated by David Gross. (JA 443; 202.) As fully set out in the Board's earlier decision, beginning in 2003, the Company—which had collective bargaining agreements with Local 1199 at two other facilities—unlawfully recognized Local 300S when it did not represent a majority of its employees, fraudulently concealed this recognition from its employees, and entered into a collective bargaining agreement with Local 300S after Local 1199 began organizing efforts. *Regency Grande I*, 347 NLRB at 1152-54. At that time, the Board ordered the Company to

cease and desist, in any like or related manner, from interfering, restraining, or coercing employees in the exercise of their Section 7 rights. (JA 442.)

During the first organizing drive in 2003, employee Aida Basualto was an active supporter of Local 300S. Basualto, a housekeeping aide, served as a shop steward along with employee Kathy Rohde until sometime in 2007. (JA 444; 135, 205.) Basualto also served on the negotiating committee for the 2007 collective-bargaining agreement, but resigned from the committee before the unlawful contract was signed on December 15, 2006. (JA 444; 45-46, 157-58, 234, 254.)

While the unfair labor practice case against Local 300S was being litigated, Local 1199 began to solicit employees at work. (JA 444; 61-64, 111-12.) In May and July 2007, Basualto, along with other employees, met with Rhina Molina, a senior Local 1199 organizer. (JA 444; 63, 112.) They discussed the unfair labor practice case involving the Company and Local 300S—in particular, when the Court would decide the case and what the results might be. (JA 444; 64.) They also discussed the benefits of being represented by Local 1199 instead of Local 300S. (JA 444; 64, 112-13.) Some of the employees signed union authorization cards favoring Local 1199 at those meetings, but Basualto did not sign an authorization card for a number of months. (JA 444; 64, 75.)

**B. The Organizing Drive Between Local 1199 and Local 300S Heats Up; Local 1199 Organizer Molina Becomes a Daily Presence at the Facility; Basualto Begins Collecting Cards for Local 1199; Basualto Begins Supporting Local 1199**

In February, the organizing drive began to heat up between the two unions. On February 20, this Court enforced the Board's 2006 Order against the Company. On or about February 22, Basualto was approached by Rohde, her former Local 300S co-steward, who asked her to sign a card for Local 300S. She learned from Rohde that Local 300S no longer represented the employees. (JA 112, 150.) Basualto refused to sign the card. (JA 444; 40, 103.) During the campaign, when Company owner Gross asked Basualto which union she was going to support, Basualto answered only that she wanted to keep a low profile. (JA 444; 209, 235.)

Around that time, Local 1199 organizer Molina became a daily presence at the facility, parking her car in front of or near the main entrance to the building and meeting with employees. Basualto threw her support behind Local 1199, signing a card in late February, and meeting with Molina nearly everyday. (JA 444; 64, 75, 76, 84-85, 114.) Basualto became one of several employees who distributed authorization cards on behalf of Local 1199. (JA 444; 66, 72-73, 83, 112, 114.) She distributed Local 1199's cards to the housekeeping, maintenance, kitchen, and activities departments. (JA 444; 114-15.) She returned approximately 20 cards to Molina or other Local 1199 organizers. (JA 444; 70, 114.) At Molina's request,

Basualto spoke on numerous occasions with certain employees on behalf of Local 1199 during breaks and lunchtime in the facility's dining room. (JA 444; 70.)

About one week later, Local 1199 filed a petition for a representation election involving "all full time and regular part-time nonprofessional employees at the Employer's facility." (JA 444; 32, 398.) Local 300S filed a similar petition shortly thereafter. (JA 444; 399.)

**C. Following Directors Snyder and Reyes' Observation of a Meeting Between Local 1199 Organizer Molina, Basualto, Figueroa and Other Employees, Reyes Interrogates Employee Figueroa**

On or about March 3, Basualto and four other housekeeping employees, including Manuela Figueroa, met Molina on the sidewalk near the rear exit of the facility to discuss the union campaign. (JA 446; 71-72, 116.) It was raining, and Basualto invited everyone to her home, located only two buildings away from the facility, to continue the conversation. (JA 446; 73, 110, 116.) All but one employee accepted Basualto's offer, and they went there to continue the conversation. (JA 446; 72, 116.) Basualto saw Kathy Snyder, the kitchen director, watching them from the building. (JA 446; 117.) In addition, Housekeeping Director Martin Reyes, who supervised all of these employees, observed the group's discussion. (JA 446; 264.)

The next day, in the facility's basement, Reyes asked housekeeping employee Figueroa why she had gone to Basualto's home. (JA 446; 172-74.) Figueroa asked Reyes why he was asking; Reyes made no response and left. (JA 446; 173-74.)

The same day, the facility's administrator, Joseph Olszewski, held the first of two meetings with approximately nine housekeeping employees to discuss "Health Insurance, Benefits and Union." (JA 446; 118, 433.) Maria Torres, the facility's receptionist, translated into Spanish and English during the meeting. (JA 446; 118.) At the meeting, Basualto spoke out, complaining that her supervisor had told her co-workers not to go to her house to meet with Local 1199 representatives. (JA 446; 305, 307, 433.) Olszewski admitted that he learned about Basualto's activity for Local 1199 at this meeting. (JA 304-06). The meeting minutes reflected that an employee complained about Reyes' questioning of Figueroa earlier that day. (JA 446; 305, 307, 433.) After the meeting, Olszewski discussed the matters raised at the meeting, including Basualto's comments, with Gross. (JA 446.)

Olszewski met again with the housekeeping staff on or around mid-March, and Torres again acted as a Spanish-language translator. (JA 446; 120.) About the same number of people attended, with the addition of Housekeeping Director Reyes. (JA 446; 120.) Olszewski assured the employees they had a right to support whichever union they wished. (JA 446; 119-21.) He also reported that he

discussed with Gross the matters raised at the prior meeting. (JA 446; 118-20, 306-08.) Gross, he said, had told him that employees would continue to receive the same benefits that they had received when Local 300S had represented them. (JA 446; 121.) Basualto spoke up, asking Olszewski why, if Gross was such a good man and provided all of these benefits, did the employees need a union? (JA 446; 121.) At that point, another employee sitting next to Basualto became upset, slammed her hand on the table, and asked, in Spanish, why then was Basualto making the employees sign cards for the union? (JA 446; 121-22.) Reyes translated the question for Olszewski. (JA 446.)

**D. Former Local 300S Steward Rohde and Employee Meikle Post Flyers Criticizing Local 1199; Administrator Olszewski Tells Meikle to Stop Posting the Flyers; Neither Rohde or Meikle are Disciplined**

The week prior to the election, former Local 300S shop steward and Certified Nursing Aide Rohde posted a flyer with a copy of her pay stub in the facility. (JA 447; 21, 33.) She crossed out her name, social security number, and department, but left the pay period, earnings, rate of pay, hours worked, and the applicable deductions visible. (JA 447; 33-35.) Under the copy of the pay stub was a handwritten note:

If we have 1199 as our UNION my union dues this pay period would be  $\$1305.62 \times \$.02 = \$26.11$ [.] Total for Jan. Feb. and March  $\$9,714.29 \times \$.02 = \$194.28$ . If we still had 300S my union dues this pay period would be  $\$20.00$ , Total for Jan, Feb, March  $\$60.00$ . The more I make the more 1199 will take!!

(JA 447; 33-35, 41, 412.)

During the week of the election, Rohde went on vacation. She asked employee Michelle Meikle, her roommate, to repost the pay-stub flyer if it was taken down. (JA 447, 449; 27, 41.) Meikle reposted the flyer three times after it was repeatedly taken down. (JA 447; 42, 225, 304.) Finally, Administrator Olszewski informed Meikle that she had been seen posting the notice and told her to stop. (JA 447; 41-42, 51-54, 229, 245.) He also notified employees that employee postings were not permitted without his permission. (JA 447; 41-42, 51-54, 229, 245.) Gross admitted that Olszewski told him that some employees had repeatedly posted a pro-Local 300S flyer in the week before the election. (JA 447; 224-25.) However, the Company took no action to discipline either Rohde or Meikle. (JA 447 & n.40; 29, 43.)

**E. On Election Day, Owner Gross Discharges Basualto,  
and Director Reyes Interrogates Employee Valerie Madeina  
About Her Vote**

The election was scheduled for April 10. When Basualto arrived to vote that morning, she encountered Gross. (JA 447; 127.) He told Basualto that, before she voted, Olszewski needed to speak with her about something important. He asked Basualto where she lived, and she pointed to her house, which was visible from where they were standing. (JA 447; 127-28.) Local 1199 organizer Molina's car was parked in Basualto's driveway because she had spent the previous night at

Basualto's home. (JA 447-48; 15, 127.) Gross then asked Basualto if she knew anything about a piece of paper that had been posted in the dining room. (JA 447; 128, 208.) Basualto said she knew about the paper that he was referring to, but denied posting it. (JA 448; 128, 208.) Gross accused Basualto of being the one who posted the notice in the dining room and said that those acts were the reason he did not want her at the facility. (JA 448; 128.) Then, without any further explanation of why he thought she was the one who posted the notices or any further investigation, he fired her. (JA 448; 128-30, 207.)

The same morning, as employee Maria Carraon (a well-known Local 1199 supporter) and employee Valeria Madeina (whose union sympathies were not well-known) left the facility after voting at 7:00 a.m., Reyes approached them and asked Madeina for which union she had voted. (JA 447; 186.) Madeina responded that she had voted for the better one. (JA 447; 186.) Reyes asked her if Local 300S was the better one, and Madeina responded, "Sure." (JA 447; 186-87.)

Following the election, which Local 1199 won, Olszewski told Gross that Rohde and Meikle had posted the pro-Local 300S flyer for which Gross had ostensibly discharged Basualto. (JA 441; 211, 219.) The Company never disciplined either Rohde or Meikle for posting the notices, and Gross unreasonably continued to hold Basualto responsible for posting the flyer. (JA 440, 447-48; 38,

227-28.) Gross did not reinstate Basualto until four months later, and only then, by his own admission, to limit his company's backpay liability. (JA 2; 211-12.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Chairman Liebman, and Members Schaumber and Becker) affirmed the judge's rulings, findings, and conclusions and adopted his recommended order to the extent and for the reasons stated in the earlier two-member opinion, which it incorporated by reference. (JA 2.)

The Board concluded that the Company violated Section 8(a)(1) of the Act on March 4 when Reyes interrogated Figueroa about the meeting at Basualto's house and created the impression of surveillance; and on April 10, when Reyes interrogated employee Madeina as to how she had voted in the election. (JA 440.) The Board further concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging Basualto for her union activity in support of Local 1199. (JA 440-41.)

The Board ordered the Company to cease and desist from discharging or otherwise discriminating against any employee for supporting Local 1199 or any other union; coercively interrogating any employee about union support or union activities; creating the impression among employees that their union activities were under surveillance; and in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of

the Act. (JA 441.) Affirmatively, the Board ordered the Company to offer Basualto full reinstatement to her former job, to the extent that it had not done so, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her; remove from its files any reference to the unlawful discharge and notify Basualto in writing that it had been done and that the discharge would not be used against her in any way; and post copies of a remedial notice. (JA 441.)

### **STATEMENT OF RELATED CASES**

This case has not previously been before this Court. *NLRB v. Regency Grande Nursing and Rehabilitation Center*, Docket No. 10-3547, 3d Cir. (Board Case No. 22-CA-26231), involves the same parties. That case is before the Court on the Board's application to enforce its Order setting forth specific amounts that the Company owes its employees for unfair labor practices found in *Regency Grande I*.

### **STANDARD AND SCOPE OF REVIEW**

Generally, the Court's standard of review of Board orders is highly deferential. *Trimm Assocs., Inc. v. NLRB*, 351 F.3d 99, 102 (3d Cir. 2003). The Court must "accept the Board's factual determinations and reasonable inferences derived from [those] determinations if they are supported by substantial evidence" from the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*,

340 U.S. 474, 493 (1951); *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002). Substantial evidence is “such relevant evidence that a reasonable mind would consider adequate to support a conclusion.” *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 217 (1938); *Yellow Freight System, Inc. v. NLRB*, 37 F.3d 128, 130 (3d Cir. 1994). If there is substantial evidence to support the Board’s decision, the Court must not disturb that decision, even though it might “have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.

The Board’s conclusions of law are entitled to great deference, and must be upheld if based upon a reasonably defensible construction of the Act, *NLRB v. Local 54, Hotel Employees & Rest. Employees Int’l Union*, 887 F.2d 28, 30 (3d Cir. 1989). *See also Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

This Court will not substitute its own credibility finding for those of the administrative law judge. *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir. 2005). As long as he considers all relevant factors and sufficiently explains his resolutions, “the final determination of credibility rests with the Administrative Law Judge.” *Id.* (quoting *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 526 n.14 (3d Cir. 1977)). The administrative law judge’s credibility determinations “should not be reversed unless inherently incredible or patently

unreasonable.” *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994)).

### **SUMMARY OF ARGUMENT**

The Company’s challenges to enforcement of the Board’s Order fail for three reasons. First, Member Becker properly refused to recuse himself from participating in this case where no rule, regulation, or ethical standard requires his recusal. Second, the Board’s unfair labor practice findings are supported by substantial evidence, while none of the defenses presented by the Company have merit. Third, the Board acted within its discretion in remedying these violations of the Act with a broad order where the Company has engaged in persistent attempts, through varying means, to deprive its employees of their rights under Section 7 of the Act.

Agency officials are presumed objective and capable of judging a particular controversy fairly on the basis of its own circumstances, a strong and firm presumption that is not easily overcome. Under prevailing applicable ethical standards, regulations, and rules, neither the Company’s contention that Member Becker participated in an AFL-CIO “art. XX” dispute resolution proceeding involving Local 1199 and Local 300S in 2003, nor its argument, made for the first time before this Court, that Member Becker represented Local 1199 in two cases—the most recent of which was decided eight years ago—warrants Member Becker’s

recusal. Member Becker did not participate in, or have knowledge of the referenced “art. XX” proceedings, and he has not represented Local 1199 in the past two years.

Turning to the merits of the case, substantial evidence supports the Board’s findings that Housekeeping Director Reyes unlawfully interrogated two employees, and created the impression of surveillance, all in violation of Section 8(a)(1) of the Act, because a reasonable employee would have found the interactions coercive. Substantial evidence also supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act when it discharged Basualto. The General Counsel met its burden of establishing that the decision to discharge Basualto was motivated by her union activity, and the Board reasonably rejected the Company’s pretextual rationale for discharging Basualto. In contrast, the Company’s various defenses before this Court are without merit, and largely consist of urging the Court to take the extraordinary step of disregarding the credited evidence. That step — which this Court will take only when credibility determinations are “inherently incredible or patently unreasonable” — is unwarranted here because the Board’s credibility findings are reasonably grounded in the evidence.

Finally, the Board acted within its discretion in remedying these unfair labor practices. Not only did the Board find that the Company violated Section 8(a)(1),

(2), and (3) in the 2006 case, but only a few weeks after this Court enforced that order, the Company started on the instant course of unlawful conduct. Because the Company has demonstrated both a proclivity to violate the Act and a fundamental disregard for the rights of its employees, the Board's broad order is entitled to enforcement.

## ARGUMENT

### **I. MEMBER BECKER REASONABLY DETERMINED THAT HE HAD NO DUTY TO RECUSE HIMSELF FROM THIS CASE BASED ON RELEVANT LEGAL AND ETHICAL STANDARDS**

#### **A. Introduction and Standard of Review**

The Company asks the Court to deny enforcement to the Board's Order because Member Becker refused to recuse himself from this case based on his past employment with the Service Employees International Union ("SEIU"). In *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 5 (2010) ("*Pomona Valley*"), Member Becker explained the principles he would apply in evaluating recusal requests based on his prior representation of labor organizations that might appear before the Board. Applying those principles here, Member Becker properly participated in this case, and the Court should respect that principled decision, under the "deferential, abuse of discretion standard" courts use to review such judgments. *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164 (D.C. Cir. 1995).

**B. Background: Member Becker Has Announced Standards for Recusal Based on His Prior Employment that Go Beyond Federal Regulations and Are in Accordance with the Applicable Executive Order**

Prior to his appointment to the Board, Member Becker served as counsel to the SEIU. He resigned that position on April 4, 2010, before he was sworn in as a Board Member. *Pomona Valley*, 355 NLRB No. 40, slip op. at 9. In *Pomona Valley*, Member Becker decided that, during his first 2 years as a Board Member, he will recuse himself from all cases in which the SEIU is a party. As Member Becker explained, *id.* at 5, he based that decision on both longstanding federal ethics law and an executive order President Obama issued with even tighter restrictions than previously existed under federal law.

Specifically, Member Becker first applied regulations that the Office of Government Ethics issued to ensure that agencies engage in the impartial decision-making, free of bias, to which the Constitution's Due Process Clause and the Administrative Procedure Act entitle the public.<sup>3</sup> Relevant to Member Becker's analysis, the regulations specifically prohibit executive branch employees from participating in any matter where "a person with whom he has a covered

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<sup>3</sup> See 5 C.F.R. § 2635.101(b)(8); Sections 556(b), 557, Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (2006); *St. Anthony Hosp. v. U.S. Dept. of Health and Human Services*, 309 F.3d 680, 711 (10th Cir. 2002).

relationship is or represents a party.” 5 C.F.R. § 2635.502(a). An employee has a “covered relationship” with any person he worked for in the past year.

5 C.F.R. § 2635.502(b)(iv). These regulations, prohibiting decisionmakers from sitting on cases involving parties they represented in the prior year, complement the government’s broader rules requiring employees to “act impartially and not give preferential treatment to any private organization,” 5 C.F.R. § 2635.101(b)(8), and to “avoid any actions creating the appearance that they are violating the law,” 5 C.F.R. § 2635.101(b)(14).

Member Becker also applied President Obama’s Executive Order 13490, entitled “Ethics Commitments by Executive Branch Personnel,” which, as noted, goes even further than federal regulations to avoid conflicts of interest by executive branch employees. Pursuant to the Executive Order, every executive branch appointee must pledge not to participate in any matter involving any person the appointee has worked for in the past *two* years. Exec. Order No. 13,490 (Jan. 21, 2009). Thus, following both the regulations and President Obama’s executive order, Member Becker will not participate in any case involving the SEIU for his first two years as a Board member.

Member Becker also applied the same regulations and executive order to cases in which a party is one of SEIU’s more than 150 affiliated locals—“separate

and distinct legal entities” whose autonomy is guaranteed by federal law.<sup>4</sup>

Consequently, he explained, he would recuse himself from cases involving such local unions if he had actually represented the local during the two years before he became a Board Member, or if an employee of his former employer, e.g., in-house counsel at the SEIU itself, represented the local union. *Pomona Valley*, 355 NLRB No. 40, slip op. at 9.

### **C. Member Becker Reasonably Declined the Company’s Recusal Request**

Here, Member Becker appropriately denied the Company’s request for recusal, which was based solely on Member Becker’s asserted participation in a 2003 arbitration over “raiding” charges involving SEIU 1199 and Local 300S, UFCW.<sup>5</sup> (JA 1 n.2, 466-67.) The Company claims (Br. 34) that Member Becker should have recused himself because the SEIU was party to that arbitration while he was, according to the Company, its “General Counsel.” In response to the motion, Member Becker stated that he “played no role in and has no knowledge

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<sup>4</sup> See *Pomona Valley*, 355 NLRB No. 40, slip op. at 9, and authorities cited. Member Becker further noted that “[a]lthough the relationship between international unions and affiliated local unions is often cooperative, it sometimes results in conflict between the distinct organizations.” *Id.* (citations omitted).

<sup>5</sup> The alleged proceeding apparently refers to a mediation system set up in Article XX of the AFL-CIO constitution to deal with internal jurisdictional disputes between international unions. AFL-CIO, Constitution, Article XX: Settlement of Internal Disputes (Dec. 29, 2010, 8:52 AM), <http://www.aflcio.org/aboutus/thisistheaflcio/constitution/art20.cfm>.

of” that proceeding. (JA 1 n.2.) He also noted that although he served as counsel to the SEIU prior to coming to the Board, he never served as its general counsel.<sup>6</sup> Member Becker therefore denied the Company’s motion, finding that his participation in this case was consistent with the principles he set forth in *Pomona Valley*, 355 NLRB No. 40, slip op. at 14. (JA 1 n.2.) In the end, all that the Company has to rely upon is baseless speculation that Member Becker *must have* been “privy” to the SEIU’s participation in the Article XX proceedings (Br. 34-35)—yet, such baseless speculation provides no basis for disqualification. *See Adolph Coors Co. v. FTC*, 497 F.2d 1178, 1189 (10th Cir. 1974) (no reason why agency attorney should have been disqualified where, in an affidavit in the record, he stated that upon leaving the FTC’s staff, he did not discuss the merits of the case with any of the Commissioners or the Commission’s trial staff).

Before this Court, the Company argues for the first time (Br. 32-33 & n.10) that Member Becker’s representation of the local involved here, SEIU 1199 in a 1999 case and a 2002 case,<sup>7</sup> also required his recusal. Even if the Company had

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<sup>6</sup> More specifically, Member Becker has explained that he held the position of Associate General Counsel to the SEIU, and that except for a brief period of time in 2005 and 2006, he did so on a part-time basis. *Pomona Valley*, 355 NLRB No. 40, slip op. at 10.

<sup>7</sup> *See The Bronx Health Plan v. NLRB*, No. 98-1451, 203 F.3d 51 (D.C. Cir. Sept. 21, 1999) (unpublished) (Member Becker served as counsel to Local 1199 as intervenor in a successorship case); *Avante at Boca Raton, Inc. v. NLRB*,

given Member Becker an opportunity to address these cases, however, the argument would fail to withstand scrutiny. As noted, under even the most stringent ethical guidelines, recusal is only required where the agency official has represented a party within two years. Yet, Member Becker's representation of Local 1199 (or its predecessors) in the Company's two cited cases occurred *eight* years ago. Moreover, no appearance of partiality is likely here, because the two cited cases are geographically and substantively unrelated to the instant proceeding: one was a successorship case arising from New York City, while the other involved an employer's refusal to bargain and provide information to a Florida division of Local 1199. *See* 5 C.F.R. § 2635.101(b)(8), (14). As such, Member Becker's recusal from this case is not required.

In sum, Member Becker's decision not to recuse himself complies with longstanding federal ethics guidelines and President Obama's ethics pledge, and is entitled to deference from this Court. He thoughtfully considered the applicable regulations and determined that recusal in this case was unnecessary, and the Company has given this Court no reason to question that decision. As explained by the D.C. Circuit, an official's decision not to recuse will be set aside "only where he has 'demonstrably made up [his] mind about important and specific

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54 F. App'x 502 (D.C. Cir. 2002) (Member Becker served as counsel to Local 1199 as intervenor in a refusal to bargain and to provide requested relevant information case).

factual questions and [is] impervious to contrary evidence.” *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980)). The Company has failed to overcome the “strong and firm presumption,” *NLRB v. Ohio New & Rebuilt Parts, Inc.*, 760 F.2d 1443, 1450 (6th Cir. 1985), that Member Becker decided this case without bias.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT WHEN ITS HOUSEKEEPING DIRECTOR INTERROGATED EMPLOYEES ON TWO SEPARATE OCCASIONS AND CREATED THE IMPRESSION OF SURVEILLANCE**

**A. The Act Allows Employees to Engage in Section 7 Activity Free of Interference**

Section 7 of the Act (29 U.S.C. § 157) grants employees the “right to self-organization, to form, join, or assist labor organizations . . . and to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . .” Section 8(a)(1) of the Act implements that right by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights.

An employer violates Section 8(a)(1) of the Act by coercively interrogating its employees about their union activities or sentiments. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980) (*en banc*); *NLRB v. Gold Standard Enters., Inc.*, 679 F.2d 673, 676 (7th Cir. 1982). The test for evaluating the legality of an

interrogation is whether, under the totality of the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with the employees' exercise of statutorily protected rights. *Hedstrom*, 629 F.2d at 314-15; *Rossmore House*, 269 NLRB 1176, 1178 (1984), *enforced sub nom. Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006, 1007-09 (9th Cir. 1985). This test is objective, and the Board has long recognized that "the test of interference, restraint, and coercion under Section 8(a)(1) does not turn on Respondent's motive, courtesy, or gentleness, or on whether Respondent succeeded or failed." *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492, 492 (1979) (quoting *Hanes Hosiery Inc.*, 219 NLRB 338 (1975)). *See id.* (although the remark was made in a jocular fashion and the employee took it as a joke, statement nevertheless coercive where a company president stated to an employee, "Here is your check, union steward").

Further, conduct that gives the impression of surveillance violates Section 8(a)(1) if it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 613 (3d Cir. 1984) (citing *United States Steel Corp. v. NLRB*, 682 F.2d 98, 103 (3d Cir. 1982)). "Surveillance violates the Act 'because it indicates an employer's opposition to unionization' and leads employees to think they are 'under the threat of economic coercion [or] retaliation . . .'" *United States Steel Corp.*, 682 F.2d at 101-02 (quoting *NLRB v. Computed Time Corp.*, 587 F.2d 790, 794 (5th Cir.

1979)). As with interrogation, there need not be any actual interference or coercion for an employer's actions to cross the line. *Id.*

**B. The Company Violated Section 8(a)(1) of the Act When Housekeeping Director Reyes Interrogated Employees on Two Separate Occasions and Created the Impression of Surveillance**

During an active organizing campaign that pitted the Company's preferred union, Local 300S, against Local 1199, the Director of Housekeeping interrogated two of his supervisees, and created the impression of surveillance among employees. In *Graham Architectural Products v. NLRB*, 697 F.2d 534, 537 (3d Cir. 1983), this Court established a standard for determining when an employer's questioning becomes coercive and therefore violates Section 8(a)(1) of the Act. An interrogation is unlawful when it "suggests to the employees that the employer may take action against them because of their pro-Union sympathies...[a]lthough the Board need not show that the employer's interrogation actually had any coercive effect, the questioning must reasonably have tended to coerce under the circumstances." *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 816 (3d Cir. 1986) (quoting *Graham Architectural Prods.*, 697 F.2d at 537) (internal quotation marks omitted). The coercive context of Housekeeping Director Reyes' employee interrogations during the organizing campaign is clear: Reyes, who was their direct supervisor, saw Basualto, Figueroa, and other housekeeping employees talking to Local 1199 organizer Molina outside the facility on or about March 3. (JA 446;

262, 264.) The following day, he approached Figueroa at work in the basement of the facility and asked her why she had gone to Basualto's home. Reyes conducted the interrogation on Company property, and he offered Figueroa no valid purpose for the question. Nor did he offer her any assurances against reprisal. Rather than responding truthfully, Figueroa asked Reyes to explain why he wanted to know. Given that Reyes was Figueroa's supervisor,<sup>8</sup> who questioned her union activity, without offering justification for the question<sup>9</sup> or protection from retaliation,<sup>10</sup> and who received a tentative, skeptical response,<sup>11</sup> the Board reasonably found that Reyes' interrogation of Figueroa tended to interfere with protected activity in violation of the Act.

Moreover, the Board properly found that Reyes' asking Figueroa about her meeting with coworkers and a union representative created an impression that the Company was surveilling employees' union activity. In evaluating whether a

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<sup>8</sup> See *Multi-Ad Servs., Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001) (substantial evidence supported Board's finding that the interrogation was coercive where it was conducted by managers with the authority to fire employee).

<sup>9</sup> *Inter-disciplinary Advantage, Inc.*, 349 NLRB 480, 504 (2007) (nursing home supervisor interrogated employees about the content of discussions at employee meetings without any legitimate reason).

<sup>10</sup> *NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696, 701 (8th Cir. 1967) (coercive effect of an interrogation can be neutralized by explaining that it is not intended to interfere with the right to organize).

<sup>11</sup> See *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1314 (7th Cir. 1983) (that employee lied in response to questioning indicates a fear of reprisal).

statement unlawfully creates an impression of surveillance, the test is “whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance.” *Register Guard*, 344 NLRB 1142, 1145 (2005), and *Flexsteel Indus.*, 311 NLRB 257 (1993). Here, the only thing an employee in Figueroa’s shoes could assume is that she was under surveillance. Indeed, the Board has long held that the type of probing, inquisitive, and focused questioning seen here has a reasonable tendency to give the impression of surveillance, particularly where the employee being questioned, like Figueroa, was not an open, active union supporter at the time of the questioning. *Raytheon Missile Sys. Div., Raytheon Co.*, 279 NLRB 245, 246 (1986).

Further, ample credited evidence supports the Board’s finding that Director Reyes coercively interrogated housekeeping employee Madeina about her vote on election day. Immediately after Madeina, whose union sympathies were unknown, cast her ballot in the April 10 election, Reyes approached her and employee Maria Carraon, a well-known supporter of Local 1199, as they left the polling area. He asked Madeina for which union she had voted. Madeina responded only that she had voted for the better one. (JA 447; 186.) When Reyes persisted, asking her if Local 300S was the better one, Madeina answered, “Sure.” (JA 447; 186-87.) In reference to employer interrogations regarding how an employee voted in a union representation election, the Eighth Circuit has explained:

The ballot is supposedly secret and the employer normally has no right to privately interrogate each employee as to how he or his fellow workers...voted in a certification election. The usual connotation of a probing for this information is that those who “voted wrong” will be singled out for special treatment. This does not accord employees their statutory rights to freely organize without fear of reprisals or intimidation . . . .

*Louisiana Mfg. Co.*, 374 F.2d at 701 (supervisor unlawfully interrogated employees by asking them how they planned to vote). Such questioning therefore violates Section 8(a)(1) of the Act. *See D.J. Elec. Contracting*, 303 NLRB 820, 826 (1991) (employer unlawfully interrogated employees by asking them how they voted in the election), *enforced*, 983 F.2d 1066 (6th Cir. 1993) (*per curiam*).

### **C. The Company’s Defenses Rely on Discredited Testimony and Misapply Board Law**

The Company raises a variety of meritless arguments that are founded on discredited testimony, evince an apparent misunderstanding of the Board’s objective test for coercive interrogations, and rely on inapplicable precedent. First, in seeking to convince the Court that Reyes did not unlawfully interrogate employees or create an impression of surveillance, the Company asks this Court to ignore the administrative law judge’s credibility determinations. However, it is this Court’s settled rule that “[c]redibility decisions rest with the administrative law judge as long as he considers all relevant factors and sufficiently explains his resolutions.” *NLRB v. FES, a Div. of Thermo Power*, 301 F.3d 83, 90 (3d Cir.

2002) (citing *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 612-13 (3d Cir. 1984)).

Here, the administrative law judge did just that. Although Reyes testified that he did not see employees enter Basualto's house with a union representative, the administrative law judge found that Reyes personally observed Basulato and Figueroa with Local 1199 organizer Molina (JA 440 n.6, 446 n.35; 170-74, 263–65) because Reyes offered only a “hedging response” when asked who else was present and he could not explain how else he obtained the information. Further, in discrediting Reyes' testimony that he did not ask employee Madeina for which union she had voted and instead crediting employee Carraon's testimony that he did, the administrative law judge considered Reyes' “vague and hedging” testimony and his “vague assertion” that the Company instructed supervisors not to speak to employees about the election. (JA 447 n.45.) Moreover, although it may “seem crazy” (Br. 38) to opposing counsel that Reyes would violate the order that was allegedly given to managers, in fact, there was no finding that any such order was ever actually issued. (JA 447 n.45.)

Further, the Company's attacks on the alleged errors in the administrative law judge's application of prevailing Board law reflect a flawed understanding of that law. Contrary to the Company's assertions (Br. 38 and 41), it is irrelevant what supervisor Reyes' intentions were when he interrogated Figueroa. *Keystone*

*Pretzel Bakery*, 242 NLRB 492, 492 (1979). Rather, the established Board rule is clear—whether an interrogation rises to the level of violating the Act is viewed objectively, from the view of a reasonable employee, *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314-15 (3d Cir. 1980), not from the intent of the interrogator.

The Company’s unsupported assertion (Br. 41) that even if Reyes questioned Madeira about her vote, it does not constitute an unlawful interrogation, is simply wrong. Rather, an interrogation is “offensive [when it involves] the questioning of employees as to how they and their fellow employees voted in a certification election.” *Louisiana Mfg. Co.*, 374 F.2d at 701 (supervisor who was openly hostile toward union asked employees how they intended to vote) (citing *NLRB v. Pennwoven, Inc.*, 194 F.2d 521 n.1 (3d Cir. 1952) and *Wagner-Wood Co.*, 148 NLRB 963, 965 (1964)).

Moreover, the Company’s characterization of Reyes’ interrogations of Figueroa and Madeina as “innocuous, friendly, teasing banter” (Br. 38) and “informal, festive, open, non-threatening banter” (Br. 41) is not borne out by the record. It is unlikely that a reasonable employee, being approached by her boss and asked about her actions during an organizing campaign or how she voted in a union-representation election, would consider the questioning “festive” or “non-threatening banter.” *See Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 817 (3d Cir.

1986) (repeated confidential questioning where supervisor had no legitimate purpose for the questions “unlikely to be taken as ‘casual’ by the employee”).

Likewise, contrary to the Company’s assertions (Br. 25, 26), the Board’s objective standard for evaluating whether an interrogation is unlawful does not examine whether any employee claimed that they were actually coerced. *Graham Architectural Prods. Corp.*, 697 F.2d at 538. Thus, there is no support for the Company’s suggestions (Br. 25, 26, 30, 46) that the General Counsel was required to have Madeina or Figueroa (the employees Reyes interrogated) testify to being coerced to establish a violation of the Act. As noted, the test here is whether the employer’s questions, threats, or statements tend to be coercive, not whether any given employee was, in fact, coerced. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 365 (5th Cir. 1990). The Company is equally mistaken in its contention (Br. 42) that Reyes’ conduct was insulated because he did not directly refer to a union, or union organizing, when he interrogated Figueroa. *Dyn-Corp*, 343 NLRB 1197, 1210 (2004) (supervisor’s question to pro-union employee regarding where his “medals of honor” were was a reference to the employee’s “Vote Yes” button, and thus an unlawful interrogation), *enforced*, 233 F. App’x 419, 429 (6th Cir. 2007).

Finally, the authorities cited (Br. 39-41) by the Company do not require the Court to overturn the Board because the purpose for which the Company offers

them—that is, whether an interrogation is unlawful depends on the circumstances—is not in dispute. There is no disagreement as to the law there. Rather, the disagreement lies with the Company’s choice to disregard the credited evidence in order to draw parallels with those three factually inapposite cases. The facts in the cited cases relied on by the Company are clearly distinguishable from those here. *Pepsi-Cola Bottling Co. of Los Angeles*, 211 NLRB 870, 872 (1974), involved an “isolated and innocuous inquiry,” where a supervisor asked an employee with whom he was on a first-name basis his sentiments on the union while they were riding in a car together away from the plant. And although *Hudson Wire Company*, 236 NLRB 1263, 1265 (1978), *enforced*, 592 F.2d 1188 (5th Cir. 1979), concerned multiple interrogations by low-level supervisors, it involved “friendly” and “casual” conversations that “occurred in and around the plant during chance encounters.” In contrast, here, the first interrogation occurred in the facility’s basement, after Reyes saw employees meeting in the throes of a hotly contested representation election, and the second occurred immediately after an employee voted in that election. (JA 446, 448; 186, 264.) In *Hedaya Brothers, Inc.*, 277 NLRB 942, 955 (1985), the administrative law judge credited the exculpatory testimony of the supervisor alleged to have interrogated an employee, whereas here, the judge did not credit Reyes, (JA 447). In sum, the Company has offered no reason to reject the Board’s findings of unlawful interrogation and

creating the impression of surveillance, and the Court should enforce these aspects of the Board's Order.

### **III. SUSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) OF THE ACT WHEN IT DISCHARGED EMPLOYEE AIDA BASUALTO IN RETALIATION FOR HER SUPPORT OF LOCAL 1199**

#### **A. Standard and Scope of Review for Section 8(a)(3) Violations**

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization . . . ."

29 U.S.C. § 158(a)(3). Accordingly, an employer violates Section 8(a)(3) and (1)<sup>12</sup> of the Act by discharging an employee because of her union activity. *NLRB v. Transportation Mgmt.*, 462 U.S. 393, 398 (1983); *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 809 (3d Cir. 1986).

Cases arising under Section 8(a)(3) turn on whether the employer's action was motivated by the employee's union activity. *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 169-70 (3d Cir. 1977). In such cases, if substantial evidence supports the Board's finding that antiunion considerations were a

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<sup>12</sup> An employer who violates Section 8(a)(3) also commits a "derivative" violation of Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights under the Act. 29 U.S.C. § 158(a)(1). See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983) ("Although §§ 8(a)(1) and (a)(3) are not coterminous, a violation of § 8(a)(3) constitutes a derivative violation of § 8(a)(1)").

“motivating factor” in a discharge, the Board’s conclusion must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer’s affirmative defense that the employee would have been fired even in the absence of protected activity. *See Transportation Mgmt.*, 462 U.S. at 397, 401-03; *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 122 (3d Cir. 1991); *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

To that end, the Board need not accept at face value the employer’s explanation for a discharge if the evidence and the reasonable inferences drawn therefrom indicate that the discharge was motivated by union animus. *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962). An employer fails to prove its affirmative defense where, as here, the record shows that the employer’s stated justification for the adverse action is but a “pretext to mask discrimination.” *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988). If the Board finds that the reason advanced by the employer did not exist, or that the employer did not in fact rely upon that reason, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee’s protected activity. *Painters Local 277 v. NLRB*, 717 F.2d 805, 812 (3d Cir. 1983); *Wright Line*, 251 NLRB at 1084.

The Court reviews the Board's factual determinations and the reasonable inferences derived from those facts under a substantial evidence standard, as described above (pp. 15-17). This Court will not substitute its own credibility determinations but will accept the administrative law judge's credibility determinations unless they are "inherently incredible or patently unreasonable." *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (quoting *NLRB v. Lee Hotel Corp.*, 13 F.3d 1347, 1351 (9th Cir. 1994) (internal quotation marks omitted)).

**B. The Company Unlawfully Discharged Basualto in Retaliation for Her Union Activity in Support of Local 1199**

Substantial credited evidence supports the Board's finding that the Company violated the Act when it discharged Basualto for her union activities. There is ample evidence that Basualto engaged in activities in support of Local 1199 during the organizing drive, supporting that union in the weeks preceding the election—she met daily with Local 1199 organizer Molina at the facility; she signed a Local 1199 authorization card; she distributed and received authorization cards from other employees on behalf of Local 1199; she spoke on numerous occasions with employees in support of Local 1199; and she spoke out at company meetings. Indeed, Local 1199 organizer Molina even spent the night before the election at Basualto's home, leaving her car in Basualto's driveway—a few houses from the facility—on election day. (JA 444; 15, 127.)

The credited evidence also established that the Company had knowledge of Basualto's union activities. Both directors Snyder and Reyes saw Basualto and other employees meet with Molina outside the facility after work on or about March 3. (JA 440, 446; 71-72, 116.) Facility Administrator Olszewski learned of Basualto's activities for Local 1199 during two March housekeeping staff meetings, first when Basualto complained about Reyes' questioning of Figueroa, and again when another employee asked why Basualto was making the employees sign cards for the union. (JA 446; 121-22.) Despite Reyes' denials, the judge credited testimony that Reyes translated the employee's question about Basualto's collection of cards for Olszewski. (JA 440 n.2, 446 n.38.)

Administrator Olszewski and Director Reyes' knowledge of Basualto's activities on behalf of Local 1199 was properly imputed to Gross. As the judge noted, Gross was an "actively-involved" owner who was well-aware of the organizing campaign. (JA 448.) Indeed, during the organizing drive, he asked Basualto—a former shop steward for Gross' preferred Local 300S—which union she was supporting. (JA 444.) Her non-answer, that she was "keeping a low profile" likely served as an early signal to him. (JA 444.) Additionally, his supervisors and the facility administrator were aware of Basualto's activities. (JA 448.) As discussed, the Director of Housekeeping observed Basualto and other employees meeting during the campaign, and interrogated one (Figueroa)

about it. (JA 448.) Further, the facility administrator heard Basualto complain about Reyes' treatment of this employee at the March 4 staff meeting. (JA 448.) That complaint was included in the meeting minutes, and Olszewski discussed the meeting with Gross. (JA 448.) Similarly, at another company meeting in mid-March, Olszewski and Reyes heard another employee's outburst about Basualto collecting union authorization cards. (JA 448.) Under these circumstances, the Board properly imputed knowledge to Gross. (JA 448.) *See State Plaza, Inc.*, 347 NLRB 755, 756 (2006); *Dobbs Intl. Servs.*, 335 NLRB 972, 973 (2001); *Springfield Air Center*, 311 NLRB 1151, 1151 (1993).

The Board next reasonably found that the Company had animus against Local 1199 based on the series of interrogations committed by Housekeeping Director Reyes in this case and its past conduct unlawfully supporting Local 300S. (JA 440 n.9.) First, as shown above, Reyes' unlawful questioning of employees about union activities and the impression of surveillance that it created are proof of the Company's animus against Local 1199. *United States Serv. Indus., Inc.*, 324 NLRB 834, 836 (1997) (employer's union animus demonstrated by its agent's statements and by the numerous unfair labor practices it committed in this and three previous cases).

Further, as found by the Board in 2006, the Company showed this animus towards Local 1199 by its unlawful conduct in support of Local 300S. As the

Board reiterated, it is not unlawful for an employer to prefer one union over another.<sup>13</sup> (JA 440.) However, the Company did more than have a preference for one union over another; it engaged in unlawful conduct in support of that preference. Thus, in 2003, the Company unlawfully recognized Local 300S when it did not represent a majority of the employees, and then it fraudulently concealed that recognition from the employees for over seven months. (JA 441.) And, when Local 1199 began an organizing campaign, the Company unlawfully entered into a collective-bargaining agreement with Local 300S containing a union-security clause and dues-checkoff provisions. (JA 441.) Shortly after this Court's enforcement of the Board's order, the Company embarked on a new series of unlawful conduct, interrogating employees about their choice of union. (JA 441; 173.) Thus, the Board's finding of the Company's animus towards Local 1199 was reasonable and amply supported by the evidence.

Finally, the Company's pretextual reasons for discharging Basualto only confirm Gross' animus towards Local 1199—and towards Basualto for switching her support from Local 300S and supporting Local 1199. The reasons given by Gross for summarily firing Basualto on election day for allegedly posting the pay-stub notice were both at odds with the credited evidence and internally

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<sup>13</sup> See *Flamingo Hilton-Laughlin*, 324 NLRB 72, 72 n.1 (1997), *enforced as modified*, 148 F.3d 1166 (D.C. Cir. 1998).

inconsistent. As discussed above, the evidence demonstrates that by early March company management was well aware that Basualto was actively supporting Local 1199 and that knowledge was properly imputed to Gross. Moreover, the credited evidence shows that in the days before the election, Olszewski alerted Gross that employees Rohde and Meikle had posted the pro-Local 300S flyer (JA 448; 211, 219), but the Company never disciplined either of them. Further, if, as Gross claimed, he believed that Basualto was keeping a “low profile” and he knew Rohde was on vacation during the week before the election, it is incredible that he did not investigate further. (JA 444, 447; 223-24.) Indeed as the judge noted (JA 448 n.52), in light of the fact that “there was enough information on the pay stub to indicate that it did not contain Basualto’s payroll information, it is even more incredible that Gross would have been more concerned about enforcing a notice posting policy than with the public disclosure of another employee’s confidential information.” (JA 448.) And, even after Olszewski told Gross on election day that it was Rohde and Meikle who were responsible for the posting, not Basualto, Gross unreasonably continued to hold Basualto responsible. (JA 440, 447-48; 227-28.) Gross did not reinstate Basualto until 4 months after he discharged her, and only then, admittedly, to limit the Company’s backpay liability. (JA 2; 211-12.)

In these circumstances, the administrative law judge properly observed that Gross’ “assertion of a pretextual reason for Basualto’s discharge[]strongly supports

an inference of discriminatory motivation.” (JA 449.) As the Ninth Circuit once explained,

If the [administrative law judge] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

*Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Thus, substantial evidence supports the Board’s decision that the Company terminated Basualto to punish her for supporting Local 1199.

**C. The Company’s Meritless Defenses Rely on Challenges to the Administrative Law Judge’s Credibility Resolutions, To Which This Court Defers**

The Company makes various arguments challenging testimony that the Board did *not* rely on (Br. 46, 49, 50); attempts to re-litigate the already-enforced 2006 unfair labor practice case (Br. 48); and offers several *post hoc* (Br. 46-47, 51) rationalizations for the Company’s unlawful conduct. Disregarding these irrelevant arguments, however, the Company’s main defense—that it had no knowledge of Basualto’s activities in support of Local 1199 (Br. 46-48)—is directly contradicted by the credited testimony. Because it is well-established that this Court will not substitute its own credibility determinations for those of the administrative law judge, but will accept the administrative law judge’s credibility determinations unless they are “inherently incredible or patently unreasonable,”

*Atlantic Limousine, Inc.*, 243 F.3d at 718-19, this Court should reject the Company's claims.

First, the Company argues that the administrative law judge erred in determining both that Olszewski conveyed (Br. 46-48) the substance of the March 4 meeting to Gross—whereby Gross acquired knowledge of Basualto's support for Local 1199—and that Reyes translated (Br. 16) to Olszewski the mid-March exchange between Basualto and her fellow housekeeping employee regarding Basualto's collection of Local 1199 authorization cards. As noted above (pp. 37-38), however, those findings are well-supported in the record and the Company has not demonstrated that they are inherently incredible or patently unreasonable.

*Atlantic Limousine*, 243 F.3d at 718-19.

The Company next argues (Br. 44, 51) that Gross discharged Basualto because he believed that she violated Company rules by posting flyers in support of Local 300S without permission. Here again, the credited testimony supports the Board's conclusion that the Company's proffered reason was pretext, and the real reason for Basualto's discharge was discrimination based on her activities in support of Local 1199. (JA 441.) As fully discussed above, Olszewski alerted Gross earlier that other employees posted the previous flyers, those employees were never disciplined, and Gross never investigated whether Basualto posted the fliers before summarily firing her. That it "seems crazy" (Br. 51) to opposing

counsel that the Company would wait six weeks after discovering Basualto's loyalties to unlawfully discharge her is immaterial.

The Company's arguments (Br. 48-49) that the administrative law judge improperly relied on certain evidence in finding an unfair labor practice misreads the Board's decision. As discussed above, the Board expressly did not rely on the administrative law judge's reasoning that the Company's preference for Local 300S was evidence of animus toward Local 1199. (JA 441.) Rather, the Board explained, it was not the Company's mere preference for Local 300S, but, as exemplified in the 2006 proceeding, its unlawful conduct in support of that preference that demonstrates its animus. (JA 440.) The Board also found it unnecessary to rely on company administrator Olszewski's comments to employees in support of Local 300S the day before the election, because these facts were not testified to until after Company counsel voluntarily left the hearing<sup>14</sup>—thus, the Company won on that point before the Board, and pressing the issue here achieves nothing. (JA 441 n.9.) In sum, because the Board reasonably found that the General Counsel established each element of its case, and none of the Company's defenses have merit, the Board's Order with respect to this violation is entitled to enforcement.

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<sup>14</sup> Both parties agree (Br. 1) that because the Board's Order is not based on findings made in the underlying representation proceedings (Board Case Nos. 22-RC-12889, and 22-RC-12895), that portion of the record in the proceedings below is not before the Court. 29 U.S.C. § 159(d).

#### **IV. THE BOARD ACTED WITHIN ITS REMEDIAL DISCRETION IN ORDERING A BROAD CEASE-AND-DESIST ORDER BECAUSE THE COMPANY HAS ENGAGED IN PERSISTENT ATTEMPTS TO INTERFERE WITH ITS EMPLOYEES' PROTECTED RIGHTS**

##### **A. Standard and Scope of Review for Remedial Orders**

Section 10(c) of the Act “vest[s] in the [Board] the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984). *Accord Quick v. NLRB*, 245 F.3d 231, 254 (3d Cir. 2001). This is so “because the relation of remedy to policy is peculiarly a matter for administrative competence.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Therefore, “courts must not enter the allowable area of the Board’s discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.” *Id.*

In devising remedies, the Board “draws on a fund of knowledge and expertise all its own,” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 n.32 (1969)), and on its “enlightenment gained by experience,” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). *See also, Quick*, 245 F.3d at 254. Consequently, courts of appeals “should not substitute their judgment for that of the [Board] in determining how best to undo the effects of unfair labor practices.” *Sure-Tan*, 467 U.S. at 899. The Board’s “choice of remedy must be given special respect by reviewing courts, and must not be disturbed unless it can

be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Quick*, 245 F.3d at 254 (internal quotation marks omitted).

**B. The Board’s Broad Order is Entitled to Enforcement Because the Company has Demonstrated Both a Proclivity to Violate the Act and a Fundamental Disregard for the Rights of Its Employees**

The Board’s remedial order is consistent with its statutory mandate allowing it to develop remedies that are responsive to the violations found. As the Board found, the Company’s conduct, in this and the previous case, demonstrated that it had “engaged in persistent attempts, by varying methods, to interfere with its employees’ protected statutory rights.” (JA 441 n.10.) Accordingly, the Board found that a broad remedial order enjoining the Company from future violations of the Act was necessary.

The Board’s statutory mandate expressly allows it to issue a remedial “order requiring such person [as committed the unfair labor practice] to cease and desist from the unfair labor practice” and to take other affirmative action to effectuate the policies of the Act. 29 U.S.C. § 160(c). The breadth of a remedial order “must depend upon the circumstances of each case.” *NLRB v. Express Pbl’g Co.*, 312 U.S. 426, 436 (1941). While a traditional narrow cease-and desist order requires the respondent to cease and desist from violating the Act “in any like or related manner,” a broad order requires the respondent to cease and desist from violating

the Act “in any other manner.” *See Hickmott Foods*, 242 NLRB 1357, 1357 (1979). A Board order that enjoins violations other than those found by the Board is permissible and within the Board’s discretion when it appears that the enjoined violations “bear some resemblance to that which the [party] has committed or that danger of their commission in the future is to be anticipated from the course of [its] conduct in the past.” *Express Pbl’g Co.*, 312 U.S. at 437.

Applying these principles, the Board has developed a test for gauging the appropriateness of such an order. Broad orders are warranted where “a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for . . . fundamental statutory rights.” *Hickmott Foods*, 242 NLRB at 1357. The totality of the circumstances must provide “an objective basis for enjoining a reasonably anticipated future threat.” *Five Star Mfg., Inc.*, 348 NLRB 1301, 1301 (2006), *enforced*, 278 F. App’x 697 (8th Cir. 2008). As recently as 2009, this Court has enforced such broad remedial orders. *See, e.g. NLRB v. Int’l. Bhd. of Elec. Workers, Local Union No. 98*, 317 F. App’x 269 (3d Cir. 2009) (broad order was appropriate where union repeatedly committed unfair labor practices), *enforcing* 350 NLRB 1104 (2007). *NLRB v. Metro. Reg’l Council of Carpenters*, 316 F. App’x 150 (3d Cir. 2009) (a broad order was necessary because the past conduct of the union has indicated that it would “likely continue to push the boundaries and

find yet undiscovered ways to violate [the Act]”), *enforcing* 351 NLRB 1007 (2007).

Here, the Board is entitled to a cease-and-desist order that broadly enjoins the Company from violating the Act. The Board found, based on the credited evidence, that the Company has demonstrated a proclivity to violate the Act. (JA 441.) In its decision, the Board noted that in 2006 it ordered the Company to cease and desist from recognizing Local 300S as the exclusive collective-bargaining representative of the facility’s employees and to cease and desist from entering into, maintaining, or enforcing a collective-bargaining agreement containing union-security and dues-check off provisions with Local 300S, unless and until such time as Local 300S was certified by the Board to represent a majority of employees in the appropriate bargaining unit. (JA 441.) Yet, immediately after this Court enforced that Board order (relating to the Company’s violations of Section 8(a)(1),(2), and (3) of the Act), and the unions started organizing campaigns, the Company began the unlawful conduct that the Board found here violated Sections 8(a)(1) and (3) of the Act. (JA 440-41, 444.) Thus, there was sufficient evidence from which the Board could have determined that the Company’s repeated violations of different sections of the Act over the course of several years demonstrated “an attitude of opposition to the purposes of the Act” through its “persistent attempts by varying means to interfere with employee

rights.” *NLRB v. U.S. Postal Service*, 486 F.3d 683, 690 (10th Cir. 2007) (citing *NLRB v. Armour & Co.*, 154 F.2d 570, 578 (10th Cir. 1946)).

The Company argues (Br. 54) that *Hickmott Foods* is inapposite here because, in that case, the Board first issued an order to the employer to cease violating the Act in any like or related manner prior to ordering it to cease violating the Act in any other manner. In fact, the circumstances of this case parallel those of *Hickmott*. Contrary to the Company’s representations (Br. 55), in 2006, the Board specifically ordered it to cease violating not one, but *three*, sections of the Act. *Regency Grande I*, 347 NLRB at 1143 (violations of Section 8(a)(1), (2), and (3)). Within weeks of the Court’s enforcement of that order, the Company again repeatedly infringed on its employees’ Section 7 rights by interrogating employees, creating the impression of surveillance, and unlawfully discharging Basualto in retaliation for her protected pro-Local 1199 activities.<sup>15</sup> (JA 441.) Under these circumstances, where the Company’s past course of conduct gives every indication that it will simply continue to find new ways to infringe upon its employees’ rights under the Act, a broad order is entirely appropriate and warranted. *See Express Pbl’g Co.*, 312 U.S. at 437. Indeed, because the Company has, over the course of

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<sup>15</sup> Nor does *NLRB v. Richards*, 265 F.2d 855 (3d Cir. 1959), cited by the Company (Br. 56), compel a different result in this case. In *Richards*, 265 F.2d at 861-62, the Board sought a broad order simply because the employer, in violating Section 8(a)(3), also derivatively violated Section 8(a)(1)—circumstances manifestly not present in the instant case.

several years and cases, engaged in “persistent attempts by varying means to interfere with employee rights,” a broad Order is necessary to protect the employees’ rights against future violations. (JA 441 n.10.)

### CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter judgment enforcing the Board’s Order in full.

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*National Labor Relations Board*  
December 2010









UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
Petitioner	)	
	)	
v.	)	No. 10-3548
	)	Board Case No. 22-CA-
	)	28331
REGENCY GRANDE NURSING & REHABILITATION CENTER	)	
	)	
Respondent	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2010, I electronically filed the Board's brief in the above-captioned case with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system, and ten (10) of copies by overnight mail. I certify foregoing document was served on opposing counsel of record through the CM/ECF system:

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Dated at Washington, DC  
this 30th day of December 2010