FINAL BRIEF **ORAL ARGUMENT: SEPTEMBER 20, 2011**

Nos. 10-1317 & 10-1323

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC,
doing business as TRUMP MARINA HOTEL AND CASINO
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO
Intervenor for Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

USHA DHEENAN
Supervisory Attorney

GREG P. LAURO
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2948
(202) 273-2965

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC, d/b/a TRUMP MARINA HOTEL AND CASINO	*	
Petitioner	*	Nos. 10-1317, 10-1323
v.	*	Board Case No. 4-CA-35334
NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

A. ***Parties and Amici:*** Trump Marina Associates, LLC, d/b/a Trump Marina Hotel and Casino ("the Company") is the petitioner before the Court; the Company was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") is the intervenor before the Court; the Union was the charging party before the Board.

B. ***Ruling Under Review:*** This case involves the Company's petition to review, and the Board's application to enforce, a Decision and Order the Board issued on September 30, 2010 (355 NLRB No. 208), which adopted and

incorporated by reference with some modifications its prior decision reported at 353 NLRB 921 (2009). The Board found therein that the Company committed numerous unfair labor practices during a union-election campaign, including unlawfully interrogating, threatening, and suspending employees.

C. ***Related Cases:*** This case has previously been before this Court. On February 17, 2009, a two-member panel of the Board issued a Decision and Order in this case. *Trump Marina Associates, LLC,* 353 NLRB 921 (2009). The Company petitioned this Court for review of that Order on March 9, 2009, and the Board cross-applied for enforcement (Case Nos. 09-1097 & 09-1107). On June 10, 2009, the Court placed the case in abeyance pending further order. On June 17, 2010, while the case remained in abeyance, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that a Board delegee group must maintain at least three members to exercise the delegated authority of the Board. *Id*. at 2640–42. On July 12, 2010, the Board moved this Court to remand the case to the Board for further consideration in light of *New Process*. This Court remanded the case on September 20, 2010. On September 30, 2010, a three-member panel of the Board issued the Order described above that is now before the Court.

In a subsequent decision that was recently enforced by this Court (Nos. 10-1261 & 10-1286, May 27, 2011), the Board found that the Company committed

additional unfair labor practices after the election. *See Trump Marina Associates, LLC*, 355 NLRB No. 107 (2010), *incorporating by reference* 354 NLRB No. 123 (2009). There, the Company maintained and enforced overbroad work rules that unlawfully restricted its employees' rights under the Act, and interrogated Mario Spina, the discriminatee in this case, regarding his statements to the media about the Board's decision in the instant case. *See id.*

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
This 31st day of May 2011

TABLE OF CONTENTS

Headings **Page(s)**

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

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

TABLE OF AUTHORITIES

Cases **page(s)**

---

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

Cases **Page(s)**

---

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

Cases **Page(s)**

---

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

Cases **Page(s)**

---

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

Cases **Page(s)**

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

Statutes: **Page(s)**

GLOSSARY

1. A. ……...The parties' Joint Appendix

2. Act …….The National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)

2. Board …….The National Labor Relations Board

3. Br. ……..The Opening Brief of Trump Marina Associates, LLC to this Court

4. Company ……Trump Marina Associates, LLC, doing business as Trump Marina Hotel and Casino

5. Union ……...International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 10-1317 & 10-1323

TRUMP MARINA ASSOCIATES, LLC,
doing business as TRUMP MARINA HOTEL AND CASINO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Intervenor for Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Trump Marina Associates, LLC ("the Company") to review, and the application of the National Labor

Relations Board ("the Board") to enforce, a Board Order finding that the Company committed numerous unfair labor practices during a union-election campaign, including unlawfully interrogating, threatening, and suspending employees. The International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO ("the Union") intervened on behalf of the Board. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

Previously, a two-member panel of the Board issued a Decision and Order in this case on February 17, 2009. *Trump Marina Associates, LLC*, 353 NLRB 921 (2009). The Company petitioned this Court for review of that Order on March 9, 2009, and the Board cross-applied for enforcement (Case Nos. 09-1097 & 09-1107). On June 10, 2009, the Court placed the case in abeyance pending further order. On June 17, 2010, while the case remained in abeyance, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that a Board delegee group must maintain at least three members to exercise the delegated authority of the Board. *Id*. at 2640-42. On July 12, 2010, the Board moved this Court to remand the case to the Board for further

consideration in light of *New Process*. This Court remanded the case on September 20, 2010.

On September 30, 2010, a three-member panel of the Board issued the Order (355 NLRB No. 208, *see* A. 65) that is now before the Court, which adopted and incorporated by reference the February 17, 2009 Decision and Order with some modifications. (A. 26-64.)[1] That Order is final with respect to all parties. The Company filed its petition for review on October 7, 2010, and the Board filed its cross-application for enforcement on October 18, 2010. The petition and the cross-application are timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by:

- Interrogating its employees about their union activities or support;
- Threatening them that supervisors would no longer grant their requests for time off, approve schedule changes, or correct "no-call/no show" designations if they selected the Union to represent them;
- Threatening them that selecting union representation would be futile; and
- Threatening them with the loss of their jobs if they selected the Union.

[1] Record citations are to the Joint Appendix, and are abbreviated as set forth in the Glossary. When a record citation contains a semicolon, references preceding it are to the Board's findings, and references following it are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending and issuing disciplinary warnings to employee Mario Spina because of his union activities.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed numerous unfair labor practices during a union election campaign among its employees. The Board ordered a consolidated hearing on those charges in the unfair-labor-practice case and the Union's objections to company misconduct that tainted the results of the election, which the Union lost by a narrow margin, in the representation case. (A. 26-29; 7-11.) After a hearing, the administrative law judge found that the Company committed several of the alleged violations and dismissed the remainder. (A. 28-61.) The judge also found that those violations warranted remanding the election case to the Regional Director to conduct a new election, which has yet to be completed. (A. 61-63.) Finding no merit to the Company's exceptions to the judge's decision, the Board affirmed the judge's findings and recommended order as modified. (A. 26-28.)[2]

On appeal, the Company's challenges to the Board's unfair-labor-practice findings fail for the reasons described below (pp. 21-54). The representation case was severed and remanded; the Company's challenge to the Board's decision to set aside the election and order a new one fails because it is premature. This Court has "repeatedly held that the Board's decision to hold another election is not a 'final order'" under Section 10(f) of the Act, and, "[t]herefore, judicial review is not yet available." *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075, 1076 (D.C. Cir. 2001) (collecting cases). Thus, although the Company asks (Br. 42-46) this Court to set aside the portion of the Board's order requiring a new election, this Court has already held that it "cannot consider this issue now." *Id.*

---

[2] In a subsequent decision that was recently enforced by this Court (Nos. 10-1261 & 10-1286, May 27, 2011), the Board found that the Company continued to violate the Act after the election. There, the Company maintained and enforced overbroad work rules that unlawfully restricted its employees' rights under the Act, and interrogated Mario Spina, the discriminatee in this case, regarding his statements to the media about the Board's decision in the instant case.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations; Mario Spina's Role as a High-Profile Union Advocate During the Hotly Contested Organizing Campaign and Election

The Company operates a hotel and casino in Atlantic City, New Jersey, where it has approximately 400 employees who are dealers or perform related work (collectively referred to as "dealers" or "employees"). (A. 26, 29.) The Company's management hierarchy includes, among others, the following positions listed from bottom to top: part-time floor supervisor, full-time floor supervisor, pit boss/manager, assistant shift manager, shift manager, senior shift manager, casino manager, and vice president. (A. 135-36.)

On March 30, 2007, the Union filed a representation petition seeking to represent the Company's dealers.[3] (A. 26, 28; 215.) A hotly contested election campaign ensued, during which both the Union and the Company held several meetings with employees to explain their views. (A. 35, 37; 73, 201.) The Board conducted a representation election on May 11, 2007, which the Union lost by a narrow margin (183 to 175). (A. 26, 29; 218.)

Mario Spina, a company dealer for over 20 years, was regarded by management and his coworkers as a respectful employee with a "great" record.

[3] The unit included essentially all full-time and regular part-time dealers, dual-rate dealer/supervisors (employees whom the Company used as both dealers and supervisors), and race-book writers. (A. 29 n.3, 34 n.17; 216-17.)

(A. 60-61; 68, 90, 93-94, 108, 115, 124, 149, 189.) He was also well known to management as a high-profile union advocate who passed out union-authorization cards and campaign materials and answered employees' questions about the Union during break times. (A. 52, 59-61; 137-40.) In this capacity, he took "singular" responsibility for educating employees about the possible benefits of union representation, and served as a union observer during the May 11 election. His coworkers therefore viewed him as perhaps "the most important" person in the union-organization effort and their "go to guy" for information about selecting union representation. (A. 55, 59-61; 73, 101, 105.)

B. Shortly Before the Election, Supervisor Mike Ferrare Tells Mario Spina that the Company Will Not Negotiate with the Union

On or about April 19, Spina was dealing at a poker table when the sole patron asked him, "Are you guys going union?" (A. 27, 33; 142-44.) Spina tried to "shrug off" the query to keep the game moving, but the patron continued to explore the topic, and a back and forth discussion about the Union ensued. (*Id.*) Floor Supervisor Mike Ferrare, who had apparently overheard part of the conversation, then approached and declared that "management is not going to negotiate with [the Union] as far as anything." (A. 27, 33; 142, 156.) Spina responded that "it's all in the contract," which was his typical response to such statements. Undeterred by Spina's demurral, Ferrare reiterated that "management won't negotiate with you anyway." (*Id.*) Spina then asked Ferrare if he could

return to his customer who was being ignored, and Ferrare allowed him to do so. (*Id.*)

C. Supervisor Linda Sych Asks Employee Diane Rieck "Which Side She Was On" In the Upcoming Election

Near the end of April, about two weeks before the election, employee Diane Rieck was eating lunch in the employee breakroom when her direct superior, Floor Supervisor Linda Sych, approached and asked her "which side [she] was on?" (A. 36-37; 105-06.) Rieck replied that she was "for the union," and that Sych should "hold her breath" and not say anything else. Rieck then "got up and left" before Sych could further reply. (*Id.*)

Rieck had not previously disclosed her union sympathies to management. (*Id.*) Thus, Sych testified that, prior to soliciting this information, she did not know where Rieck stood on union issues. (A. 37; 212.) Sych had initiated similar discussions with other dealers, asking them if they needed to talk about the Union and offering her "help" in such matters. (A 37; 212-14.)

D. Assistant Shift Manager Jack Julian Warns Employees that if They Vote the Union In, He Would No Longer Be Able to Grant Their Scheduling Requests or Correct False "No Show" Designations, Which Could Subject Them to Discipline

In mid-to-late April, employee Kathy Perakovich asked Assistant Shift Manager Jack Julian to approve her request for a personal day off. Julian granted

the request, but told her that "if [the dealers] had a union," he "wouldn't be able" to grant such requests. (A 38; 75.)

Employee Dolores Summers had a similar encounter with Julian on April 26, when she asked him for time off to attend a family member's funeral. (A. 38; 101-03.) Coworkers had warned her to "watch herself" because management was coming to them and asking a lot of questions about the Union, and, as detailed below, pp. 12-14, the Company had recently suspended leading union advocate Mario Spina. (A 38; 102.) Accordingly, Summers asked Perakovich to join her in speaking with Julian, who then granted the requested time off. However, a coworker called Summers while she was away at the funeral to tell her that, despite having been granted the day off, the Company had marked her as a "no call/no show," an infraction that could result in discipline up to and including termination. (*Id*.) When Summers returned to work, she asked Perakovich to accompany her in asking Julian about the matter. Julian admitted that he had approved her absence and immediately made a phone call to correct the erroneous no-show designation. He then turned to Summers and remarked: "Do you see how I handled that? If you guys bring the Union in, I won't be able to handle that the way I did. No disrespect to you or your family." (A. 38; 103, 75-76.)

E. Supervisor Mangione Tells Employee Martinez that Employees Could Suffer Layoffs if They Vote for the Union

On April 21, between 5 and 6 p.m., Supervisor Mangione and dual-rate dealer[4] Angel Martinez were engaged in a discussion instituted by Martinez, who asked Mangione what would happen to dual-raters like himself if employees voted in the Union. Mangione responded that some people could get laid off or lose their jobs because the Company could not support making all dealers full-time employees. (A. 59-61 & n.103; 92, 144-48, 164, 169.)

F. When Spina Protests that Mangione's Job-Loss Remark Was Inappropriate, Mangione Responds Angrily, then Untruthfully Tells Management that Spina Had Sworn at Him

Spina, who was passing by on his way to the employee cafeteria, overheard Mangione's remark about job loss and told him that he should not say that because it was against Board rules. (A. 52-53, 59-61; 144-150, 164.) Mangione became upset and asked in a raised voice whether he had ever intimidated or disrespected Spina. Spina, speaking in a quieter tone to de-escalate the situation, replied that Mangione had not, but that his statement to Martinez was still inappropriate. When Mangione became increasingly irate and began scolding him, Spina simply stated that he was sorry that Mangione was upset and walked away. (A. 52; 144-50, 164.) Martinez was present for the entire Spina-Mangione conversation, and

employees Ted Taylor, John Dougherty, and Lori Ludovich each heard portions of it as they were heading to and from the nearby cafeteria.

(A. 53-55; 67-68, 92-93, 112-17, 125-27.)

Within about an hour, Mangione had reported to management that Spina called him an "asshole" during this conversation. However, other than Mangione, no one within earshot of the conversation heard Spina utter any profane remark. Thus, Spina, Martinez, Taylor, Dougherty, and Ludovich each testified that Spina never uttered a single profanity during the conversation. In fact, these and other employees, many of whom had known Spina for over 20 years, stated that they had never heard him use profanity. (A. 53-55; 67-68, 90, 94-95, 108, 112-17, 125, 133, 144-50.) The employees also agreed that Spina had acted "calmly" and like a "gentlemen" during the encounter and had not raised his voice.

(A. 54; 67, 93-94, 113, 146-50.)

Taylor, for example, explained that, as he was passing by on his way to the cafeteria, he only overheard Mangione say something to the effect that he did not appreciate what Spina had said. When Taylor returned from the cafeteria moments later, he saw Mangione standing alone, and he jokingly asked Mangione, "What's happening? Did Mario call you an asshole or something?" However, Taylor

---

[4] Dual-rate dealers, or dual-rate supervisors, were used by the Company as both dealers and supervisors, and they were eligible to vote in the election. (A. 34 n.17, 52 n.73; 216-17.)

explained that he made the remark "off the top of his head" in jest, as he often joked with Mangione, and not because of anything Spina might have said to Mangione. Thus, Taylor reiterated that he had not heard Spina swear during the discussion with Mangione. (A. 55; 112-13, 117-18.)

G. Despite the Lack of Corroboration of Mangione's Claim, the Company Immediately Suspends Spina for Swearing

The Company responded swiftly to Mangione's allegation that Spina called him an "asshole" on April 21. That same evening, it summoned Spina to Assistant Shift Manager Jack Julian's office, where Julian, Mangione, and high-level manager George Wilson were waiting for him. During this meeting, Spina denied having used profanity. Despite his denial, Julian "then and there" issued Spina a written suspension pending an investigation, which is the most severe discipline short of termination that the Company could issue an employee. While Spina was in shock over this sudden decision, he was handed an incident report to memorialize his version of events, and asked to surrender his employee badge and immediately leave the premises. Given his shock and the Company's directive that he depart immediately, Spina did not think to provide witness names in completing his portion of the incident report, though he did state therein that "other individuals [were] present" during the Spina-Mangione conversation. (A. 52-53; 150-54, 158, 160-62, 228-29.)

Julian testified that he had prepared the suspension document in advance of speaking with Spina because he already believed that Spina had been rude to Mangione. Further, although aware of Spina's reputation as a mild-mannered employee with a great record, Julian decided to issue the suspension before interviewing Taylor and Martinez because he believed the allegation was "too serious" to allow Spina to continue working, and he was concerned that Spina would repeat his misconduct. (A. 57 & n.95; 182, 187, 189.)

The next day, the Company called Taylor and Martinez away from work to separately interview them about this matter, and they each stated, just as they did at trial, that Spina had not used any profanity. (A. 53-55; 112-13, 117-18, 124-25.) Thus, Taylor, for example, twice[5] told the Company "the same thing" that he stated on the stand, namely, that he "had not heard [Spina] use profanity," and that Spina had not raised his voice during the conversation. (A. 55; 113, 117-18.) Likewise, Martinez, who emphatically replied "no, no, no," when asked during the trial if Spina had sworn at Mangione, told the Company during its investigation that he had not heard "any profanity." (A. 53 & n.81; 124-25.) Nonetheless, the

[5] Julian interviewed Taylor a second time to confirm Mangione's claim that Taylor had asked him whether Spina had called him an asshole. Taylor explained then, just as he did at the Board hearing, that he was just joking, that the remark was "off the top of his head" and had nothing to do with anything that Spina might have said to Mangione, and he once again reiterated his adamant denial of hearing Spina utter a single profanity. (A. 57; 117-18.)

Company determined that Mangione's allegations were true. Thus, when Spina reported to Shift Manager Karen Lew's office on April 27 as instructed, she issued him a written "time-served" suspension and "final warning," which cited not only his alleged swearing, but also accused him of exhibiting "overtly aggressive conduct." (A. 53; 230.) She did so even though she, like Julian, believed that Spina was a mild-mannered employee with a clean record. (A. 61; 189, 199, 203-04.) Notably, the disciplinary notice provided that any "further incidents of misconduct will result in termination." (A. 53; 230.)

H. On Election Day, Pit Boss Salvey Suggests that Edwards Should Read, and Share Her Thoughts About, Anti-Union Literature

On election day—May 11—dealer Janet Edwards was working in the gaming pit with about 10 other dealers. That day, Pit Boss Steve Salvey told her and several other dealers that, before voting, they should read a newspaper left on the nearby pit stand, which contained an anti-union advertisement.[6] (A. 37; 78-79, 81, 84-88, 224.) He told Edwards, for example, "Oh, you want to read the news." Edwards responded that she would not to do so because she "already knew" what was in the news. (A. 37; 78-79.) Nonetheless, Salvey "pressed" Edwards on the issue, this time asking her: "Do you want to read this? What do you think about

[6] The advertisement, a multi-page insert regarding the Union's recent election campaign at another casino, included a large picture of a court jester, and asserted in extra-large type that selecting the Union would mean, "NO PROGRESS, NO SECOND JOBS, NO ADDED BENEFITS." (A. 224 (capitalization in original).)

it?" Edwards replied that it was "propaganda." (A. 37; 79.) The newspaper had been in the pit stand since the vote started, and Salvey left it there for another 1-2 hours after suggesting that Edwards should read it. As the other dealers left the pit, Salvey asked between five and seven of them to read the newspaper. He then folded it up and handed it to another supervisor who took it away. (A. 37; 79, 84-88.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Becker and Hayes) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- Interrogating its employees about their union sympathies or support;
- Threatening them that supervisors would no longer grant their requests for time off, approve scheduling changes, or correct "no-call/no show" designations if they selected the Union to represent them; and
- Threatening them with the loss of their jobs if they selected the Union.

See Trump Marina Associates LLC, 355 NLRB No. 208 (2010) (A. 65 (adopting and incorporating by reference the findings and order described at A. 26-28).) Further, the Board agreed with the judge that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and issuing a final disciplinary warning to employee Mario Spina because of his union support and

activities. (A 26.) The Board also found, contrary to the judge's dismissal of the allegation, that the Company violated Section 8(a)(1) by threatening employees that selecting a union representative would be futile. (A. 27.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). (A. 27.) Affirmatively, the Order requires the Company to make Spina whole for any losses suffered as a result of its discrimination against him; rescind the unlawful suspension and warning it issued to him and expunge from its records all references to it; and post a remedial notice to employees. (A. 27-28.) Finally, in an aspect of the case not before the Court (*see* p. 5), the Order sets aside the election, and severs and remands the representation case to the Board's Regional Director to conduct a second election at the time she deems appropriate. (A. 28.)

STANDARDS OF REVIEW

In reviewing the Board's findings—such as its findings here that the Company unlawfully interrogated, threatened, and suspended its employees—this Court "must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Therefore, the Court's

review of the Board's findings "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*." *United States Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board's findings are "conclusive" if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, the Board's assessment of witness credibility is given great deference and must be adopted unless it is "hopelessly incredible" or "self-contradictory." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). The Court also will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

SUMMARY OF ARGUMENT

When its employees exercised their statutory rights by participating in a union-organizing campaign, the Company responded by committing a wide variety

of coercive acts, even on the day of the election. This included interrogating employees about their union sympathies, threatening them that unionization would lead to job loss and stricter rules enforcement, and warning them that it would be futile to select the Union because the Company would not bargain. It also targeted leading union advocate Mario Spina and suspended him based on fabricated claims of misconduct. The Board's findings that these were all unlawful acts are supported by substantial evidence and should therefore be affirmed.

I. The Company's interrogations and threats clearly violated Section 8(a)(1)'s bar on conduct that would reasonably tend to coerce employees in the exercise of their union-organizing rights. Contrary to the Company, such threats and coercive acts are not "protected" employer speech.

For example, just 2 weeks before employee Diane Rieck was set to vote by secret ballot on union representation, her supervisor, Linda Sych, interrupted her lunch break to ask her "which side she was on?" This question invaded Rieck's right to keep her union sympathies private and was made more coercive by Sych's failure to provide any assurances against reprisal, her pattern of questioning other employees about their union sympathies, and the Company's numerous other unlawful acts just before the election. These circumstances belie the Company's assertion that this was nothing more than an informal conversation among friends.

Supervisor Steven Salvey then unlawfully interrogated employee Janet Edwards on election day. His actions as a whole—he repeatedly asked Edwards to read and share her views about anti-union literature before voting that day, continued to press her after she declined to share her views, and repeated similar conduct with other employees—constituted unlawful interrogation. This finding is also supported by how Salvey, like Sych before him, interrogated employees against the backdrop of the Company's other violations. These facts disprove any claim that this was just an "informal" conversation or "trivial" incident. Nor is the interrogation lawful merely because Salvey failed to actually coerce Edwards into revealing her union sentiments; proof of actual or successful coercion is unnecessary.

Assistant Shift Manager Jack Julian similarly violated Section 8(a)(1) by threatening employees that the Company would no longer grant time off or correct scheduling errors that would subject employees to discipline "if you guys bring the Union in." Julian did far more than generally describe how unionization would change employer-employee relations; rather, he threatened employees that specific benefits would be lost and stricter enforcement of particular work rules would ensue if the employees unionized. As such, his statements were unlawful threats.

The Company also violated Section 8(a)(1) when Supervisor Mike Ferrare twice told Mario Spina that "management would not negotiate" with the Union.

Such statements are unlawful threats that it would be futile for employees to choose union representation. Contrary to the Company, Ferrare did not just express his ignorance of the bargaining process, but definitively told Spina that the Company would not bargain. Thus, neither Spina's status as an open union adherent nor his lack of adverse reaction negates the finding of a violation.

Finally, Supervisor Frank Mangione unlawfully threatened employees that unionization would lead to job loss or layoffs. Regardless of the exact words Mangione used—layoffs or job loss—his remarks are reasonably viewed as an unlawful threat of job loss. Contrary to the Company, such threats are not "protected speech" under Section 8(c). Moreover, his statements fail the objective-basis test for lawful predictions because they were, as the Company admits, based in "pure conjecture."

II. The Company violated Section 8(a)(3) by suspending and issuing disciplinary warnings to Mario Spina because of his protected union activities. It concedes that the Board's General Counsel met its burden of showing that Spina's protected union activities were a motivating factor. Thus, the Company's action is unlawful unless it proved that it would have taken the same action even absent those activities. It failed to do so. The Board found that the Company's purported justification for the discipline—that Spina had sworn at and behaved aggressively towards Mangione—was pretextual. Multiple witnesses to the alleged incident

told the Company that Spina did not use profanity or behave aggressively. Indeed, the so-called "lynchpin" of the Company's case, whose credibility the Company does not challenge, told management during its investigation that Spina did not behave inappropriately. Yet, the Company still issued Spina its harshest discipline short of termination. Thus, the Board's finding of pretext is supported by substantial evidence and reasonable credibility determinations and must therefore be affirmed.

ARGUMENT

The Company sought to discourage its employees' union activities from the start of the organizing campaign. It continued to commit a wide variety of unlawful acts through the very day of the election. This included interrogating employees about their union sympathies, threatening them with job loss and stricter enforcement of company rules, and telling them that selecting union representation would be futile because the Company would not bargain with the Union. It even suspended the employees' leading union advocate based on a pretextual infraction. There can be little doubt that the Board reasonably found each of the Company's acts of intimidation to be unlawful.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING AND THREATENING EMPLOYEES IN RESPONSE TO THE UNION'S ORGANIZING CAMPAIGN

A. An Employer Violates the Act by Engaging in Activity that Would Reasonably Tend to Coerce Employees' Exercise of Their Rights

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of animus or actual coercion is unnecessary. *Avecor*, 931 F.2d at 931-32; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

The employer's statements "must be judged by their likely import to [the] employees." *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978). *Accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (assessing the legality of employer statements based on whether employees

would "reasonably perceive" them as threats). The critical inquiry, then, is what an employee could reasonably have inferred from the employer's statements or actions when viewed in context. *See, e.g., Tasty Baking Co.*, 254 F.3d at 124-25 (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). Thus, in applying this standard, the Board considers "the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Accordingly, it is well settled that a coercive threat may be implied as well as stated expressly. *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). *Accord Tasty Baking Co.*, 254 F.2d at 124.

Consistent with Section 8(a)(1)'s bar on coercive conduct, Section 8(c) of the Act (29 U.S.C. § 158(c)) provides that an employer may state its opinion about unionization, but only if its statements do not contain an express or implied "threat of reprisal or force or promise of benefits." *See generally Gissel Packing Co.*, 395 U.S. at 618-20. Here, as shown below, the Board reasonably found in each instance that the Company's conduct involved coercion and threats in violation of Section 8(a)(1). Thus, there is no merit to the Company's conclusory assertions (mainly in its argument headings, Br. 23-24, 26, 28, 31) that its conduct was

nothing more than "protected speech." Moreover, none of the Company's unlawful statements were based on objective fact, which is necessary to the phrasing of protected speech. *Gissel Packing Co.*, 395 U.S. at 618-20. Finally, as shown (p. 17), a Board finding that an employer violated Section 8(a)(1) with coercive conduct must be sustained if supported by substantial evidence on the record as a whole.

B. The Company Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees about Their Union Views Shortly before They Were Set to Vote in the Representation Election

1. Interrogation Principles

An employer violates Section 8(a)(1) when it coercively interrogates its employees about their union activities or sentiments. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991). As with Section 8(a)(1) violations generally, the test is whether the employer's conduct reasonably tends to coerce, not whether the employee was in fact coerced. *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *enforced sub nom. Hotel Employees and Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Relevant factors that the Board will assess in making that determination include: the background of the employer's hostility to unionization; the interrogator's position in the hierarchy; the place, timing, and method of the interrogation; the nature of the information sought; whether a valid purpose for the questioning was communicated; and whether

assurances against reprisals were provided to the employee. *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). No one criterion is determinative; rather, these criteria serve only as a useful "starting point for assessing the totality of the circumstances." *Id.*

The Board's findings of unlawful interrogations are reviewed under the substantial evidence test discussed above at p. 17. Moreover, in reviewing such findings, this Court follows the Supreme Court's directive that it is for the Board to assess the impact of the employer's questions "in the first instance." *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987) (quoting *Gissel Packing Co.*, 395 U.S. at 620). Here, the Board reasonably found that the Company coercively interrogated two employees about their union views close in time to the hotly contested May 11 election.

2. The Company Unlawfully Interrogated Diane Rieck

Substantial evidence supports the Board's finding (A. 36-37) that Supervisor Linda Sych unlawfully interrogated employee Diane Rieck. At the end of April, only about two weeks before she was set to vote by secret ballot, Rieck was eating lunch in the employee break room when Sych, her direct superior, asked her point blank "which side she was on?" (A. 36-37; 105.) This obvious attempt to discover on "which side" Rieck might vote was even more coercive because she had not previously shared her views with management, and certainly not with Sych. (A.

37; 106.) Thus, as Sych herself conceded (A. 37; 212), she did not already know where Rieck "stood" on the Union. *See Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000) (interrogation coercively interfered with employee's right to "keep private his sentiments as to the Union").

Further, Sych admittedly had "no particular reason for questioning Rieck at that time" (A. 37), and she provided no assurances against reprisal, which also supports the finding of an unlawful interrogation. *See Perdue Farms*, 144 F.3d at 835 (failure to communicate legitimate reason for questioning or provide assurances supports finding of coercion). Moreover, the interrogation occurred against the backdrop of the Company's commission of numerous other violations just prior to the election (A. 26-27, 37-39, 59-61; pp. 28-53), as well as Sych's recent questioning of several other dealers with an eye towards determining their union sympathies (A. 37; 212-14). *See Southwire Co.*, 820 F.2d at 456-59 (interrogations were coercive given employer's hostility to unionization and its reprisals against union supporters); *NLRB v. Los Angeles New Hosp.*, 640 F.2d 1017, 1019-20 (9th Cir. 1981) (interrogation part of "pattern of coercive conduct tending to inhibit the exercise of Section 7 rights"). Accordingly, given the totality of these circumstances, Sych's interrogation was unlawful.

Thus, contrary to the Company (Br. 23), this was not an "informal" and "exceedingly brief" conversation between friends. Instead, it was an

uncomfortable encounter between an employee and her direct supervisor which the employee ended quickly before her superior could continue the questioning. As just shown, the circumstances demonstrate a reasonable tendency to coerce: Sych approached her direct supervisee, Rieck, solely to ask her "which side" she was on just two weeks before the election, without providing any assurances against reprisal.

The Company, moreover, errs in claiming that the "most significant" aspect of the interrogation (Br. 23) was Rieck's assertedly "dominant" reaction in answering and then cutting off the conversation. To the contrary, as shown, the applicable test is whether the employer's conduct reasonably tends to coerce, not whether the employee was in fact coerced. Accordingly, Rieck's truthful response regarding her support for the Union (Br. 22) is consistent with the Board's finding of an unlawful interrogation under the totality of the circumstances. Moreover, there is no basis to the Company's claim (Br. 23-24) that Rieck, Sych's subordinate, somehow "invert[ed]" their roles and "assumed the dominant position" when she abruptly ended the conversation. In fact, Rieck stated that she quickly walked away (*see* p. 8) before Sych could continue the interrogation, which suggests that she was not comfortable with the encounter.

In sum, the Company ignores how a reasonable employee in Rieck's position would view her direct supervisor's interrogation—made without any

particular reason or any assurances against reprisal—in light of its many contemporaneous violations in the weeks leading up to the election. At any rate, while the Company offers its own reading of Sych's interrogation, it clearly fails to show, as it must, that the Board's contrary view is unreasonable or unsupported by substantial evidence.

3. The Company Unlawfully Interrogated Janet Edwards

Substantial evidence also supports the Board's finding (A. 37-38) that Pit Boss Steven Salvey unlawfully interrogated employee Janet Edwards. On May 11, Edwards was working at a gaming table when Salvey approached and suggested that, before voting later that same day, she should read a newspaper on the nearby pit stand, which contained an anti-union advertisement. (A. 37; 224, 78-79, 81, 84-88.) When Edwards demurred and stated that she "already knew what was in the news," Salvey nonetheless "pressed" the issue, this time asking her: "do you want to read this?" and "what do you think about it?" (A. 37; 78-79.) Moreover, there were approximately 10 other dealers working in the area at the time, and, as they left the pit, Edwards heard Salvey ask about five to seven of them to read the newspaper. (A 37; 84-88.)

The Board reasonably concluded (A. 38) that Salvey's "actions as a whole"—he questioned Edwards about her union sympathies, continued to press this line of inquiry even after she declined to share her views, and repeated similar

conduct with other employees, all on the very day of the election—constituted unlawful interrogation. This finding is further supported by how Salvey, like Sych before him, interrogated employees against the backdrop of the Company's numerous other violations in the weeks leading up to election. These facts belie the Company's assertions that this was nothing more than what it believes was an "informal" (Br. 25), even "utterly trivial" (Br. 26), incident.

Undeterred, the Company errs in suggesting (Br. 24-25) that Edwards's purportedly "disdainful" reaction to the interrogation somehow bars a finding of coercion. The Company once again ignores how proof of actual coercion is unnecessary under the applicable tendency to coerce test. Further, the Company's characterization (*id.*) of Edwards's reaction is dubious. In fact, Edwards's actual reaction—she twice indicated her unwillingness to discuss union issues with her boss—hardly proves, as the Company apparently assumes, that she was completely unfazed by Salvey's election-day misconduct. Likewise, it is of no moment that Salvey may have failed (Br. 24), despite his repeated efforts, to induce Edwards into "revealing" her union sentiments, which she was, of course, entitled to keep from him. *See Vincent Indus. Plastics, Inc.*, 209 F.3d at 737. Thus, the Company is simply wrong to the extent it assumes that interrogations can only be unlawful where they successfully extract the desired information from their targets. Nor is it dispositive (Br. 25) that Salvey "merely suggested" that Edwards read anti-union

literature and share her views, but did not "really force" her to do so. Rather, for the reasons explained above, Salvey's inquiry about what Edwards thought about the anti-union advertisement in the context of his repeated, election-day suggestions to read it was coercive when viewed in light of the totality of the circumstances.

C. The Company Unlawfully Threatened Employees that It Would No Longer Grant Time Off, Approve Scheduling Changes, or Correct False "No Call/No Show" Designations If They Selected Union Representation

It is axiomatic that an employer violates Section 8(a)(1) "by threatening to penalize employees if they choose union representation." *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931-32 (D.C. Cir. 1991). Thus, while an employer may lawfully state that unionization could change employer-employee relations, it may not threaten that benefits will be lost, or that tighter enforcement of company rules will ensue, if employees select union representation. *See Avecor, Inc.*, 931 F.2d at 932 (unlawful threat that employer would "deal more strictly with rule breakers" if the union represented employees); *Southwest Regional Jt. Bd. v. NLRB*, 441 F.2d 1027, 1031-32 (D.C. Cir. 1970) (unlawful threat that choosing union representation would make it more difficult to obtain leaves of absence); *St. Vincent Hosp.*, 244 NLRB 84, 92 (1979) (unlawful threat that supervisors would alter current practices for scheduling shifts and granting time off). The Board reasonably found

(A. 38-39) that the Company engaged in such unlawful threats on two occasions in the weeks before the election.

Thus, the credited testimony was that, in mid-to-late April, Assistant Shift Manager Jack Julian twice told employees that he would no longer be able to grant time off, make scheduling changes, or correct errors in attendance records if they chose union representation. Specifically, in giving Kathy Perakovich a day off, he told her that he "wouldn't be able" to grant such requests if the dealers "had a union." His message—that choosing union representation would mean stricter enforcement of scheduling rules and less hope of receiving days off—was plainly an unlawful threat. *See* cases cited at pp. 30-31 (finding unlawful threats of lost benefits and stricter enforcement of rules for receiving time off). Julian repeated that unlawful message the next week, when he corrected a false "no call/no show" designation on Dolores Summers's record, but explicitly warned her, in Perakovich's presence, that "If you guys bring the Union in, I won't be able to handle that the way I did." His threats were particularly salient given that an uncorrected no-show designation would subject Summers to discipline up to and including discharge. Moreover, he maximized the impact of his threats by delivering them a couple weeks before the employees were set to vote on union representation.

Julian's threats were even more coercive given the numerous other violations the Company committed in the weeks leading up to the election. *See* pp. 24-30, 35-53. Indeed, Summers had entered Julian's office with enough trepidation that she felt it necessary to bring a witness because the Company—and Julian in particular—had just suspended leading union advocate Mario Spina. *See* pp. 46-53 (discussing this unlawful action). Accordingly, not only would employees reasonably view Julian's remarks as threats, they would also believe that he would make good on them. In sum, both Julian's choice of words, and the manner and context in which he delivered them, demonstrate that his statements were unlawful threats.

The Company provides no grounds (Br. 28-30) for disturbing the Board's well-supported findings. It ignores the credited evidence in claiming (Br. 29) that Julian "did not discuss the policies that govern time-off, nor suggest that those policies would change." Rather, as shown, he did just that when, in the context of granting days off and correcting scheduling errors pursuant to extant procedures, he clearly warned employees that those results would change "if you guys bring the Union in."[7]

[7] These facts undermine the Company's related claim (Br. 30-31) that Julian did not actually "tell employees" that they could lose "existing benefits." That assertion is baseless given his explicit warnings. At any rate, proof of explicit threats is unnecessary because the employees would reasonably view his statements as threats. *See* cases cited at pp. 22-23.

Thus, there is no basis to the Company's view (Br. 28) that Julian's statements only explained the general consequences of unionization. The issue here is not generally communication or access between the employer and its employees. Rather, Julian effectively warned employees that the Company would end particular benefits or employment terms related to attendance and scheduling if the Union came in. Accordingly, the Company cannot rely (Br. 28-30) on plainly distinguishable cases where the employer did not threaten the loss of particular benefits, but only conveyed the common fact of industrial life that unionization alters employer-employee relations, including the loss of direct access to management. *See, e.g., Tri-Cast, Inc*, 274 NLRB 377, 377 (1985) (employer statement that it would "run things by the book" if union came in lawfully reflected the fact that unionization alters employer-employee relations); *Koons Ford of Annapolis, Inc.*, 282 NLRB 506, 506 (1986) (employer statement that "if the union got in he would no longer be able to talk directly to the employees but would have to go to the Union" lawfully observed that unionization would alter how employer and employees deal with each other).

The Company's other cited cases (Br. 29-30)[8] are likewise distinguished because they involve not threats, but employer statements to the effect that employees would go through their union representative to resolve workplace issues rather than deal directly with the employer. Again, that is not what Julian said—he said that management would end or alter its approval of days off and correction of no-show errors, not that the Union would be involved or handle those issues. Thus, as the Sixth Circuit aptly explained, cases like *Tri-Cast* and the others cited by the Company have no bearing on statements like Julian's, which "not only describe[] a change in the relationship between employer and employee in case of unionization, [but] also threaten[] workers with changes in work rule enforcement if they unionize." *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000).

Finally, there is no merit to the Company's other argument (Br. 29) that Julian was speaking only about how "his role" would change if the Union came in.

---

[8] *See Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993) (employer lawfully stated that if union prevailed, employees could no longer just "sit down" with the employer and resolve issues "like we used to," but would instead go through their union representatives); *Montgomery Ward & Co.*, 288 NLRB 126, 131 n.3 (1988) (lawful statement that employees could no longer come directly to management with problems if they unionized); *SMI Steel, Inc.*, 286 NLRB 274, 274 (1987) (lawful statement that employer's open-door policy would change once it had to deal directly with the union); *Bostitch Div. of Textron, Inc.*, 176 NLRB 377, 379 (1969) (lawful statement that unionized employees would no longer "settle with [management] personally" to resolve problems).

There was nothing in his comments or the record overall to indicate that changes to how Julian would handle schedules and attendance errors would be any different than how management would deal with these issues for other employees. In short, the logical import of his comments was that if the Union came in, employees would have more trouble with scheduling changes and clearing up errors in their attendance records.

D. The Company Unlawfully Threatened Employees that Selecting Union Representation Would Be Futile Because It "Would Not Negotiate" with the Union

The Board reasonably found that the Company further violated the Act when Supervisor Mike Ferrare twice told leading union advocate Mario Spina that "management would not negotiate" with the Union. (A. 27; 142-44.) It is settled that such statements are unlawful threats. *See Equipment Trucking Co.*, 336 NLRB 277, 283 (2001) (employer unlawfully threatened futility when it told employees that it would "never sign a contract"); *Garvey Marine, Inc.*, 328 NLRB 991, 1004, 1018 (1999) (employer's categorical statement that it "would not negotiate" with the union if it became the designated bargaining agent was an unlawful threat of futility), *enforced on other grounds,* 245 F.3d 819 (D.C. Cir. 2001); *Adams Wholesalers, Inc.*, 322 NLRB 313, 313 (1996) (unlawful threat not to bargain made during organizing campaign). *Accord Federated Logistics and Operators v. NLRB*, 400 F.3d 920, 925 (D.C. Cir. 2005) (unlawful threats that selecting the

union would be futile). Indeed, such threats not to bargain are "patently coercive," *Garvey Marine*, 328 NLRB at 1018, because they admonish employees that they would only exercise their Section 7 rights in vain as a collective-bargaining agreement will never be obtained. *See Equipment Trucking Co.*, 336 NLRB at 283 (citing *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992)).

A brief review of the credited facts confirms the coercive nature of Ferrare's statements. Ferrare interrupted Spina as he was addressing a customer's query about the upcoming election and declared in no uncertain terms that "management would not negotiate" with the Union "as to anything." (A. 27; 142-44, 156.) When Spina demurred that it was "all in the contract," Ferrare, if anything, hardened his stance and reiterated that "management won't negotiate with you anyway." (*Id.*) Ferrare's categorical statements that the Company would not negotiate with the Union if employees selected it as their bargaining agent were unlawful threats of futility under settled law. As with the Company's other violations, the impact of Ferrare's threats was enhanced by his delivering them close in time to the employees' vote on whether to select the Union. Accordingly, the Board explained that, pursuant to established Section 8(a)(1) principles, "neither Spina's status as an open union adherent nor the absence of any adverse reaction by Spina negated the reasonable objective tendency of Ferrare's

statements to threaten employees engaged in protected organizational activities." (A. 27; *see* cases cited at pp. 22-23.)

The Company bottoms its defense on its erroneous suggestion (Br. 26-27) that Board precedent holds that threats of futility—like Ferrare's—can only be unlawful if accompanied by "threats of physical injury, discharge," loss or delay of benefits, and the like. The Company's attempt (Br. 26-27) to place such limits on *Garvey Marine* and *Equipment Trucking* is unavailing. While the presence of other unfair labor practices in those cases may add to the coercive context, just as the Company's other violations did here, such is unnecessary to a threat of futility. Moreover, while wide dissemination (Br. 27) of the threat may increase the impact of the violation, it is not required to find a violation. It is also immaterial (*id.*) whether Ferrare was a low-level supervisor compared to the Vice President who made the threats in *Equipment Trucking*. Indeed, this Court has explained why threats by low-level supervisors can be particularly coercive, noting:

> A rough and ready point made by . . . the kind of supervisor who is really more naturally engaged in conversation with the workers, may be far more credible and influential so far as the ordinary worker is concerned than a necessarily more formal, structured and purposeful statement of a high-ranking executive.

Teamsters Local 171 v. NLRB, 863 F.2d 946, 953 (D.C. Cir. 1988) (citation omitted).

The Company's view is also contrary to established Section 8(a)(1) principles, which require no such evidence of ancillary misconduct. Rather, as shown, threats of futility are unlawful in their own right because of their reasonable tendency to coerce employees in the exercise of their organizational rights. *See* cases cited above at pp. 35-36. Moreover, the Company ignores how its numerous other threats and violations accompanied and increased the coerciveness of its threats of futility.

Unable to avoid the settled law, the Company next tries to avoid the facts, which belie its claim (Br. 27) that Ferrare's statements merely "conveyed [his] ignorance of the collective bargaining process." To the contrary, rather than expressing uncertainty, Ferrare definitively told Spina twice that "management would not negotiate" with the Union. Likewise, the Company gains nothing by parsing Spina's response that it was "all in the contract." Spina's account did not "lack[] sufficient coherence to support a violation." (Br. 27.) The key to the violation is what Ferrare said, not the logic of Spina's response where he was trying to end the uncomfortable conversation in the presence of a patron. Moreover, far from somehow absolving the Company, Spina's response simply led Ferrare to threaten him a second time, this time warning that "management won't negotiate with you anyway."

E. The Company Unlawfully Threatened Employees with Job Loss If They Selected Union Representation

1. An Employer Violates the Act When It Makes Statements Linking Job Loss to Union Activities

An employer violates Section 8(a)(1) by making threats that link unionization with job loss or layoffs. *See General Elec. Co. v. NLRB*, 117 F.3d 627, 635 (D.C. Cir. 1997) (unlawful threat of layoffs if the union won the election); *Alleghany Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1357, 1364-65 (D.C. Cir. 1997) (unlawful threat during organizing campaign that if it came to layoffs, union employees would be first); *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1176, 1178 (D.C. Cir. 1987) (unlawful threat that "who's ever behind this organizing is going to screw up a lot of jobs for a lot of people"). Such threats "serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

As discussed at p. 23, an employer may communicate its views on unionism to its employees, but only so long as its statements do not contain a threat of reprisal for engaging in protected activity. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). In particular, an employer's predictions of adverse consequences arising from unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable

consequences beyond his control." *Gissel Packing Co.*, 395 U.S. at 618; *accord General Elec. Co.*, 117 F.3d at 630-35. Under this rule, an employer's prediction will be unlawful "[i]f there is *any* indication that an employer may or may not take action solely on his own initiative," or for reasons "known only to him." *Gissel*, 395 U.S. at 618 (emphasis added).

The Supreme Court has explained that courts must strictly apply these criteria for lawful predictions to account for employees' tendency "to pick up intended implications of the[ir] employer that might be more readily dismissed by a more disinterested ear." *Id*. at 617. *See also Sims Food Liner, Inc. v. NLRB*, 495 F.2d 1131, 1137 (7th Cir. 1974) (given employees' economic dependence, burden is on employer to substantiate its prediction of adverse consequences in the event of unionization). Finally, courts defer to the Board's expertise in distinguishing between unlawful threats and lawful predictions. *Avecor Inc.*, 931 F.2d at 931; *see also Timsco Inc*, 819 F.2d at 1178 ("[T]he line between prediction and threat is a thin one, and in the field of labor relations that line is to be determined by context and the expertise of the Board.")

2. Substantial Evidence Supports the Board's Finding that Supervisor Mangione Unlawfully Threatened Employees That Unionization Would Result in Job Loss

The Board reasonably found that Supervisor Mangione's warnings that employees would suffer job loss or layoffs if they chose union representation were

unlawful threats, not lawful predictions protected by Section 8(c). (A. 30-31, 61 & n.103; 92, 144-47, 169.) This finding is well-supported by the credited evidence and should therefore be affirmed.

Mangione admitted (A. 56, 61; 169) telling employee Martinez that "some people could get laid off" when Martinez asked him what would happen to dual-rate employees if the Union were voted in. Spina testified that Mangione said, "You are all going to lose your jobs" (A. 52; 145), while Dougherty recalled that Mangione said, "if the Union gets in here, you don't have a job," (A. 54; 92). Thus, by any account, a reasonable employee would conclude that the Company linked a union election win with job loss.

As the Board explained (A. 61 & n.103)—regardless of the variation in witnesses' accounts of the exact words used[9]—Mangione's "remarks clearly conveyed a threat that dual raters would lose their jobs," and was, therefore, an unlawful threat under settled law. *See* cases cited at p. 39 (statements linking unionization with layoffs or job loss are unlawful). Moreover, Mangione's threats

[9] *See generally 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.") (internal citations omitted); *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (Board hearing officer is "'uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict'").

were especially coercive because they were made in the wake of the Company's numerous unfair labor practices in the period leading up to the election.

Accordingly, the Board rejected (A. 61) the Company's view (Br. 31-34) that Mangione's statements were lawful "expressions of his opinion" protected by Section 8(c) of the Act. As the Board explained (A. 30-31, 61), that section does not protect statements which, like Mangione's, involve a threat of reprisal. Further, Mangione's threats failed the Supreme Court's test for lawful predictions because they were neither "carefully phrased" based on objective facts nor grounded in "demonstrably probable consequences beyond [the Company's] control." *Gissel*, 395 U.S. at 617. Thus, as the Board noted (A. 61), Mangione's statement was conspicuously silent as to any objectively verifiable facts to support his view that unionization would result in job loss. For example, he provided no facts showing that the Company could not choose to offer full-time employment to all dual-rate employees.

Indeed, rather than based on any objective facts, the Company admits (Br. 34) that "Mangione's statement about what might happen was . . . pure conjecture," that he "really did not know" what effect unionization would have on the job status of dual rate employees, and that he was simply "speculating as to what management might decide." Obviously, providing employees with "pure conjecture" flunks the objectivity test for lawful prediction. Accordingly, the

Company cannot rely on cases (Br. 33) where the employer's statements were supported with objective facts, or where there was no credible evidence that the statements had even been made.[10] Moreover, the Company contradicts itself, claiming on one page (Br. 34) that his statements were "pure conjecture" unsupported by any objective basis for linking unionization with job loss, while claiming on another (Br. 33) that those same statements were "supported by objective facts" regarding the "legal" status of dual-rate employees under the Act.

Finally, the Company misconstrues the Board's credibility findings in claiming (Br. 32) that the Board "rejected" Spina's and Dougherty's testimony that Mangione had threatened job loss. To the contrary, the evidence supports the Board's conclusion (A. 61 & n.103) that Mangione "certainly conveyed that meaning" of job loss without passing on the exact wording. As shown above, by all accounts, Mangione linked the Union to job loss. In sum, the Company failed

[10] *See, e.g., Leyendecker Paving, Inc.*, 247 NLRB 28, 35 (1980) (discrediting the sole witness who claimed to hear the alleged threats); *Bayliner Marine Corp.*, 215 NLRB 12, 17-18 (1974) (finding lawful a company statement about layoffs phrased in terms of fact that the union's likely attempt to raise wages would in turn raise company costs, decrease its sales, and lower its employment needs); *Bostitch Div. of Textron, Inc.*, 176 NLRB 377, 379 (1969) (finding lawful a company statement phrased in terms of fact that union would want a "union shop," under which employees who did not pay union dues could suffer job loss).

to provide any grounds for overturning the Board's sound finding that Mangione's statement was an unlawful threat.[11]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY SUSPENDED AND DISCIPLINED SPINA FOR HIS PROTECTED UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination 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 the Act by discharging or taking other adverse employment actions against employees for engaging in union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).[12]

---

[11] The Company fares no better in relying (albeit only in its facts, Br. 10-11) on Martinez's testimony, which it misconstrues as "confirming that Mangione never threatened job loss." According to Martinez, Mangione said that if the Union were voted in, management would "get away" from the dual-rate position and clarified that it meant that management would eliminate the position. (A. 53 & n.80; 122-23.) The Board found (A. 60), based on Martinez's demeanor as a "clearly nervous and reluctant witness," that he "out of fear did not tell the whole of what happened." The Company offers no basis for overturning this reasonable credibility determination. Moreover, while Martinez did not recall Mangione using the exact words "everybody gets fired" (Br. 11), this does not rebut Mangione's, Spina's, and Taylor's credited testimony that Mangione used other terms that linked unionization with layoffs or job loss.

The legality of an employer's adverse actions depends on its motivation. If substantial evidence supports the Board's finding that union activities were a motivating factor in the discipline, the employer's action violates the Act unless the employer proves that it would have taken the same action even in the absence of those activities. *NLRB v. Transportation Management Corp.*, 462 U.S. at 395; *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Where the employer's proffered reason is shown to be a mere pretext, the employer has failed to meet its burden. *See Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 653 (D.C. Cir. 2003).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Id.* at 651. Such evidence includes the employer's knowledge of union activities,[13] hostility toward union activities as revealed by the commission of other unfair labor practices,[14] the timing of the adverse action,[15] and the employer's

---

[12] As discussed at pp. 22-23, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7" of the Act. A violation of Section 8(a)(3) of the Act therefore results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[13] *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

[14] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

reliance on implausible or shifting reasons for the action.[16] The Board's factual findings and reasonable inferences from those findings must be affirmed if supported by substantial evidence. Its credibility determinations—such as its finding that Supervisor Mangione was generally not a truthful witness—must be affirmed unless hopelessly incredible. *See* p. 17.

B. The Company Unlawfully Suspended and Disciplined Spina

The record fully supports the Board's findings (A. 60-61) that anti-union considerations were a motivating factor in the Company's decision to suspend leading union advocate Mario Spina, and that the Company failed to demonstrate that it would have taken that action absent those considerations. The Company does not appear to dispute (Br. 35) that the Board's General Counsel met its initial burden. Instead, it only takes issue (Br. 35-42) with the Board's finding that its justification for the discipline—that Spina had sworn at and behaved aggressively towards Mangione—was pretextual. As shown below, the Board's pretext finding is supported by substantial evidence and reasonable credibility determinations and must therefore be affirmed.

---

[15] *Tasty Baking Co.*, 254 F.3d at 126; *Davis Supermarkets*, 2 F.3d 1162, 1168 (D.C. Cir. 1993).

[16] *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995); *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 163 (1st Cir. 2005).

1. The General Counsel Proved that Anti-Union Considerations Were a Motivating Factor in Spina's Suspension

The Company essentially concedes that the Board's General Counsel met its initial burden of showing that anti-union considerations were a motivating factor in its decision to suspend Spina. Even so, a brief recitation of those considerations provides useful context for the pretext findings, which the Company does challenge. The Company does not dispute its knowledge of Spina's activities as a leading, if not the leading, union advocate. Its hostility to its employees' union activities is revealed by its commission of numerous Section 8(a)(1) violations shortly before the election, including threatening Spina that choosing union representation would be futile, and the timing of suspending him shortly before the election while it was still committing these other violations. *See, e.g.*, *Vincent Indus. Plastics*, 209 F.3d at 735-36 (fact that employee received discipline close in time to employer's other unlawful actions is strong evidence of unlawful motive for discipline). For example, while Assistant Shift Manager Jack Julian was issuing Spina's suspension, he was also threatening other employees that he would no longer approve their requests for days off if they chose union representation. Moreover, Spina's discipline arose in the context of his engaging in protected activity—that is, his protesting what he correctly believed was an unlawful threat by Mangione to eligible voter Martinez that employees could lose jobs if they

voted in the Union. Thus, the General Counsel demonstrated that anti-union considerations were a motivating factor in the Company's decision to suspend Spina.

2. The Board Reasonably Found that the Company's Proffered Justification for the Suspension—that Spina Had Sworn At and Behaved Aggressively Towards Mangione—Was Pretextual

Because the General Counsel met its burden, the Company's action is unlawful unless it proves that it would have taken the same action even absent Spina's protected union activities. It failed to do so. The Board reasonably found (A. 60-61) that the Company's claim that it suspended Spina for swearing at Mangione, not for his union activities, was pretextual. That finding is well supported by essential credibility determinations, which the Company fails to undermine.

The Company's defense is, of course, founded on Supervisor Mangione's claim that Spina had called him an "asshole." The Board discredited Mangione's assertion, however, and found that he was generally not a truthful witness, because "no one [else] within earshot of the Spina-Mangione conversation heard Spina utter a profane remark." (A. 60.) Thus, employees Spina, Taylor, Martinez, and every other witness who overheard the conversation, unequivocally denied that Spina uttered a single profanity. (A. 52-57; 67-68, 93-94, 112, 125, 144-50.) Indeed, further undermining Mangione's credibility, these witnesses uniformly

testified that they had never heard Spina swear at work and that it would be highly out of character for him to do so. (A. 52-57, 60; 67-68, 93-94, 112, 144-50.)

Mangione utterly "destroyed" his already damaged credibility (A. 60) when he proceeded to make other false claims about his and Spina's conduct. For example, he claimed that Spina had undergone a behavioral transformation since becoming an active union advocate, which adversely affected his work. As the judge noted, however, this claim "was not altogether credible" because Spina was uniformly regarded as a temperate, reliable, award-winning employee with a "great record." (A. 60; 68, 90, 95, 108, 115, 25, 144, 189, 199, 231-35.) Mangione then forfeited his final shred of credibility when he falsely claimed that he did not report Spina to management for repeatedly underpaying and overpaying customers because he had discretion to handle such matters on his own if only a small amount was involved. (A. 60; 176-77.) Yet, Mangione's own supervisor, Shift Manger Karen Lew, contradicted him and denied that any such policy existed, and unequivocally stated that all such infractions should have been reported to management. (A. 60; 206.) Indeed, failing to do so would itself be a serious violation of company policy. (*Id.*) Thus, given Mangione's mounting inconsistencies, the Board reasonably found (A. 60) that he had likely "made the whole charge [regarding profanity] up."

The Board also examined (A. 60) the conduct of the company managers who investigated the matter and issued the suspension—shift managers Julian and Lew—and found that they, too, had acted out of anti-union animus, and not a good-faith but mistaken (Br. 39) reliance on Mangione's false claim. Thus, despite of the lack of any corroboration, Julian and Lew hastily adopted Mangione's claim that Spina had sworn at him. They allowed the discipline to stand even after the alleged misconduct was denied by every other witness they spoke to and was contrary to Spina's established reputation. They also decided, in spite of the absence of any proof, that Spina had engaged in overtly aggressive behavior. Yet, both managers acknowledged that Spina was a generally mild-mannered employee with a great record and no prior complaints. (A. 60; 189, 199.) Accordingly, the evidence supports the Board's conclusion that these two witnesses, like Mangione, were not to be believed when they claimed to have suspended Spina for swearing.

Moreover, those managers had demonstrated their own anti-union bias. For example, around the time he decided to suspend Spina, Julian unlawfully threatened employees with the loss of days off and other scheduling benefits if they voted for the Union. *See* pp. 30-32 (detailing this violation). Accordingly, the Board concluded that the Company's sole defense—that it disciplined Spina for swearing and not for his union activities—"was pretextual, based on a willful

misrepresentation of a supervisor, and acted on not in good faith by Spina's managers, who were hostile to the union cause." (A. 61.)

In response, the Company raises three basic claims, all of which fail to prove, as it must, that the Board's pretext findings are unsupported by substantial evidence. First, the Company claims (Br. 37) the Board ignored evidence that supposedly "corroborates" Mangione's claim that Spina swore at him. Curiously, that evidence is the testimony of employee Taylor, the same witness who, as noted, expressly contradicted Mangione when he denied hearing any profanity, both at trial and during two company interviews. To be sure (Br. 37), Taylor acknowledged that, upon seeing Mangione standing alone after Spina had ended the conversation, he jokingly asked him, "what happened, did Mario call you an asshole or something?" However, where Taylor's credibility is not in dispute, the Board accepted Taylor's plausible explanation that he made his "asshole" comment in jest to Mangione, as he often did, and that he absolutely did not hear Spina swear. (A. 55; 112-13, 117-18.)

While describing Taylor as the "lynchpin" (Br. 37) of its decision to suspend Spina, the Company tries to rationalize the unfavorable part of his account—that Spina did not swear. It repeats (Br. 38) its managers' view that, contrary to the Board's findings and Taylor's credited denials, it was simply "too improbable to be coincidental" that Taylor would happen to pick the same profanity out of "the

entire English language." In fact, it is no great coincidence that Taylor would pick such a common profanity, particularly given how employees other than Spina and supervisors frequently used profanity in break areas. (A. 54, 61; 69, 71.) And, as the Board observed (A. 60), given the context of this case and particular incident, the likely link is that Mangione, who had not been truthful in claiming that Spina swore at him, simply seized on Taylor's jocular remark as an excuse to report Spina to management.

Second, the Company faults (Br. 36-37) the Board for considering testimony from witnesses who contradicted Mangione, but who did not speak to the Company during its investigation. The Company contends that this wrongly second-guesses its decision based on information it did not gather in its investigation. This claim is a red herring. In fact, there is no material difference between what was said at trial and in the Company's investigation regarding Mangione's charge of profanity. In both cases, every witness to speak to the matter denied Mangione's claim. For example, the Company heard Taylor, Spina and Martinez explain in person that Spina did not use profanity, but the Company chose to ignore them. Moreover, it is disingenuous for the Company to fault Spina for not previously providing it with the names of witnesses. It is the Company, not Spina, who chose not to further investigate the matter before imposing discipline. Moreover, Spina explained that, when he was suspended, he did not think to

specify the names of witnesses, because he was shocked by the Company's sudden decision and was asked to immediately leave company premises. Even so, Spina did inform the Company that other individuals were present. *See* p. 12.

Third, the Company wrongly relies (Br. 40-42) on its past practice in investigating other allegations of profanity and verbal abuse. Because it found that Mangione fabricated the profanity allegation and the Company's basis for suspending Spina was pretext, the Board did not rely (A. 60) on a disparate treatment finding related to the severity of the punishment imposed. Thus, it is of no moment (Br. 40-42) how the Company had responded to actual instances of profanity and abuse by other employees. Likewise, the Board did not rely (A. 61) on the Company's "shoddy" investigation in finding pretext.

In sum, the Company fails to demonstrate—as it must under the substantial evidence test—that the credited evidence compels the Board to accept its claim that it would have suspended Spina even in the absence of his protected activities. *See Vincent Indus. Plastics*, 209 F.3d at 376 (refusing to "second guess" the Board's finding that an employer's proffered explanations were not credible).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review, and enforcing the Board's Order in full.

UUs/USHA DHEENAN_____
USHA DHEENAN
Supervisory Attorney

s/GREG P. LAURO_____
GREG P. LAURO
Attorney
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2948
(202) 273-2965

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Acting Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board
May 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC, doing business as TRUMP MARINA HOTEL AND CASINO	*	
Petitioner	*	Nos. 10-1317, 10-1323
v.	*	
	*	Board Case No. 4-CA-35334
NATIONAL LABOR RELATIONS BOARD,	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,456 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of May, 2011

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Sec. 7. [Sec. 157.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Sec. 8(a). [Sec. 158(a).] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Sec. 8(c). [Sec. 158(a).] [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately

local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28.

10(f) [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TRUMP MARINA ASSOCIATES, LLC. doing business as TRUMP MARINA HOTEL AND CASINO	*	
Petitioner	*	Nos. 10-1317
	*	10-1323
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	4-CA-35334
Respondent	*	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENTWORKERS OF AMERICA, AFL-CIO	*	
Intervenor for Respondent	*	

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF:

Theodore M. Eisenberg, Esquire
Brian A. Caufield, Esquire
Fox Rothschild LLP
75 Eisenhower Parkway
Suite 200
Roseland, NJ 07068-1697

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 31st day of May, 2011