

Nos. 10-3359, 10-3615

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

and

LOCAL 108, LABORERS INTERNATIONAL UNION
OF NORTH AMERICA

Intervenor

v.

COUNTY WASTE OF ULSTER, LLC

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce and the cross-petition of County Waste of Ulster, LLC (“County Waste”) to review, a Decision and Order of the Board

that issued on August 10, 2010, and is reported at 355 NLRB No. 64. (A 178.)¹

Local 108, Laborers International Union of North America (“Local 108”) has intervened on behalf of the Board. The Board filed its application for enforcement on August 20, 2010, and County Waste filed its cross-petition for review on September 9, 2010. Both filings were timely; the Act imposes no time limit on such filings.

The Board had jurisdiction over the proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practices occurred in Montgomery and Kingston, New York. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that County Waste violated Section 8(a)(2) of the Act by allowing Local 124 to distribute a bonus to employees in order to influence them to vote for Local 124 instead of Local 108.

¹ “A” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Acting on a charge filed by Local 108 (A 62), the Board's General Counsel issued a complaint alleging in relevant part that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by allowing Local 124, R.A.I.S.E, IUJAT ("Local 124") to distribute a Christmas bonus to employees prior to an election to determine whether employees wished to be represented by Local 124 or by Local 108, or to have no union representation. (A 64-68.) Following a hearing, the administrative law judge found that County Waste violated Section 8(a)(2) by letting Local 124 distribute the bonus to influence employees' votes. (A 130.) County Waste and Local 124 filed exceptions. (A 149-77.) On February 2, 2009, the Board's two sitting members issued a Decision, Order and Direction of Second Election, which is reported at 353 NLRB 842, finding, in agreement with the judge, that County Waste violated Section 8(a)(2) of the Act by engaging in this conduct. (A 122.)

Thereafter, County Waste filed a petition to review the February 2, 2009 Decision and Order, and the Board filed a cross-application for enforcement. *See County Waste of Ulster, LLC v. NLRB*, Nos. 09-1038, 09-1646 (2d Cir. filed March 16, 2009). On November 23, 2009, following briefing, a panel consisting of Circuit Judges Feinberg, Walker, and Katzmann heard oral argument.

On June 24, 2010, the Board filed a motion to remand the case in light of the Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) ("*New Process*"), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. County Waste filed a response asking the Court to place certain conditions on the remand, including "order[ing] that the two [Board] members who participated in the decision not participate." On July 1, the Court issued a summary order granting the petition for review, denying the cross-application for enforcement, vacating the Board's February 2, 2009 Decision and Order, and remanding the case to the Board for further proceedings based on *New Process*. In its summary order, the Court did not place any conditions on the remand. On July 8, County Waste filed a petition for rehearing, again asking the Court to preclude Chairman Liebman and Member Schaumber from participating in the case on remand. The Court denied the petition for rehearing on July 27, and issued the mandate on August 6.

On August 10, 2010, a three-member panel of the Board issued the Decision, Order and Direction of Second Election that is now before the Court. In its Decision and Order, the Board affirmed the administrative law judge's findings and conclusions, and adopted his recommended order to the extent and for the

reasons stated in the February 2, 2009 Decision and Order, which the Board incorporated by reference. (A 178.)²

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. County Waste's Business; Operations at Its Montgomery Facility

County Waste contracts to remove trash and recycling from residences in the Montgomery and Kingston, New York areas. (A 125; 3-4, 9, 50.) It employs 20 to 30 drivers and helpers at its Montgomery facility, and another 10 drivers and helpers at its Kingston facility. (A 125; 10.) County Waste's president, Scott Earl, and its general manager, Ernie Palmer, are both members of this limited liability corporation. (A 125; 2, 49.)

The Montgomery facility opens at 3 a.m. when the drivers come in to get their trucks before going out on the road to complete their routes. (A 125; 5, 13.) During the workday, the only person who stays at the facility is a dispatcher, and no supervisor is present. (A 125; 13-14, 45.)

² On September 7, 2010, County Waste filed a motion for reconsideration, rehearing, and/or reopening of the record. (A 179-81.) In its motion, County Waste again protested Chairman Liebman's and Member Schaumber's participation in the case on remand. The Board denied the motion by order dated September 27, 2010, which is reported at 355 NLRB No. 193. (A 197.)

B. After Starting an Organizing Drive and Filing a Representation Petition, Local 108 Discovers that County Waste Has Already Recognized Local 124; the Board Issues a Complaint Alleging that County Waste's Recognition of Local 124 Violates Section 8(a)(2) of the Act; the Parties Settle the Allegation and Sign a Stipulated Election Agreement

In the winter or early spring of 2004, Local 108 began organizing at County Waste by speaking to employees in the company parking lot. (A 125.) After filing a representation petition on June 4, Local 108 found out that County Waste had already extended recognition to Local 124 and was raising, as a bar to an election, a contract executed between County Waste and Local 124. (A 125; 79, 88-119.) The contract ran from June 1, 2004, to May 31, 2007, and covered County Waste's drivers and helpers at its Montgomery and Kingston facilities. (A 125; 88, 106.)

Local 108 filed an unfair labor practice charge alleging that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by extending recognition to Local 124 because that union did not represent an uncoerced majority of employees. (A 125; 77.) The Board's Regional Director issued a complaint based on the charge. (A 124; 77-81.)

On November 21, 2005, County Waste, Local 108, and Local 124 settled the complaint allegations and executed a stipulated election agreement, which they signed on November 23. (A 125; 71-76, 84-85.) Under the terms of the settlement, County Waste agreed to withdraw recognition from Local 124 as of December 2, 2005, and the parties agreed to end their collective-bargaining

agreement as of the same date. (A 126; 72.) The election was scheduled for January 6, 2006. (A 129; 75, 85.)

C. In 2004, County Waste Does Not Give Bonuses; In 2005, a Week After Agreeing to the Settlement, County Waste Announces Bonuses, Which Local 124 Hands Out at the Montgomery Facility Along With a Letter to Employees Taking Credit for the Bonuses; Local 124 Prevails in the January Election

In previous years, under a standing practice, County Waste gave out Christmas bonuses at the end of the year. (A 125; 18.) In 2004, however, after entering into its collective-bargaining agreement with Local 124, County Waste did not pay bonuses. (A 125; 18-19, 40.) When employees complained in December, President Earl responded by instructing General Manager Palmer to tell employees that they should take the matter up with Local 124 because bonuses were not included in the contract. (A 126; 41-42, 50.)

Employees learned that they were going to receive a 2005 bonus on or around November 30, 2005, when Local 124 representatives came to the Montgomery facility and, inside the drivers' room, distributed envelopes to employees coming off their routes. (A 126, 130; 21, 27-28.) The envelopes contained bonus checks from County Waste that amounted to one week's pay for each employee. (A 126, 129; 27-29, 46-47, 51.) Although some employees may have received their checks via direct deposit, the envelopes contained a written notice from Local 124, also dated November 30, stating:

Enclosed please find your 2005 Holiday Bonus Check . . . As some of you know, Local 124 IUJAT had been negotiating for a bonus with the Employer for several months and finally obtained this benefit for you and your families. Several of you expressed concern that the bonus would be cancelled [due] to the coming election with Local 108, however, we have convinced the Company to honor the commitments it made to our members prior to Local 108's interference. We hope the coming campaign and election will not be too disruptive

(A 126; 52, 86.)

The election took place as scheduled on January 6, 2006. The tally of ballots showed that of the 35 eligible voters, 7 cast votes for Local 108 and 21 cast votes for Local 124. (A 124.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Schaumber and Pearce) issued its Decision, Order, and Direction of Second Election, finding, in agreement with the administrative law judge, that County Waste violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by assisting Local 124 by allowing it to distribute a Christmas bonus to employees on company time and premises in order to influence them to vote for Local 124 instead of Local 108. (A 122; 178.) The Board's Order requires County Waste to cease and desist from the violation found. (A 122.) Affirmatively, the Order requires County

Waste to post a remedial notice at its Montgomery and Kingston facilities. (A 122.) The Board also directed a second election among the unit employees.³

SUMMARY OF ARGUMENT

The right of employees to a free and fair election to choose a collective-bargaining representative is of paramount importance under the Act. When an employer weighs in on the side of one union over another, employees are deprived of that right. In this case, shortly before a scheduled election, County Waste allowed its favored union, Local 124, to distribute previously unannounced bonuses to employees at its facility while they were coming off their daily routes. County Waste also let Local 124 include with the bonuses a letter to employees extolling Local 124's self-identified role in obtaining the extra money, and denigrating Local 108 for allegedly "interfering" with the bonuses.

The Board reasonably found that by bestowing this favorable treatment on Local 124, County Waste unlawfully assisted that union in the election campaign. The timing and circumstances surrounding County Waste's action strongly support the Board's finding. In order to settle an unfair labor practice complaint allegation that it had previously violated Section 8(a)(2) of the Act by recognizing Local 124

³ This aspect of the Board's Order is not a "final order" within the meaning of Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and therefore is not subject to judicial review at this time. *See Bonwit Teller v. NLRB*, 197 F.2d 640, 642 n.1 (2d Cir. 1952); *Beverly Enters. v. NLRB*, 139 F.3d 135, 144 (2d Cir. 1998). *See also Boire v. Greyhound Corp.*, 376 U.S. 473, 476 (1964).

to avoid Local 108's organizing campaign, County Waste entered into a settlement agreeing to withdraw recognition from Local 124, and stipulating that an election would be held to ascertain employees' preferences. Yet, just a few days after agreeing to the settlement, and shortly before the election, County Waste put its thumb on the scale by permitting Local 124 to distribute Christmas bonuses at its facility during the workday, along with a letter taking credit for this unexpected largesse. On this record, the Board reasonably concluded that by permitting Local 124 to take these actions in order to influence the election outcome, County Waste unlawfully assisted Local 124.

Contrary to County Waste's contentions, substantial evidence supports the Board's finding that Local 124 distributed the bonuses to employees. General Manager Palmer admitted that he told the facility's dispatcher to give the checks to Local 124's representatives to hand out to employees. Thus, the Board's finding that County Waste gave Local 124 the opportunity to distribute the checks is supported by the testimony of a company official. Furthermore, Local 124's letter to employees, which accompanied the bonuses, stated on its face that the bonus checks were enclosed. Finally, County Waste was not privileged to treat Local 124 more favorably as an "incumbent" union. As the Board reasonably found, Local 124 ceased to hold that status as of November 23, when County Waste entered into

the Section 8(a)(2) complaint settlement agreeing to withdraw recognition from Local 124.

The Court should reject County Waste's ongoing attempt to avoid enforcement of the unfair labor practice order issued against it by impugning the Board's processes and panel composition on remand. County Waste misreads the Supreme Court's holding in *New Process* and relies on nothing more than conjecture in its failed attempt to rebut the presumption of regularity that attaches to administrative agency proceedings like the one that the Board conducted here on remand. County Waste also fails to show that the Board acted improperly by assigning the case on remand to the same Board members who participated in the original decision.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT COUNTY WASTE UNLAWFULLY ASSISTED LOCAL 124 IN VIOLATION OF SECTION 8(a)(2) OF THE ACT BY ALLOWING LOCAL 124 TO DISTRIBUTE BONUSES IN ORDER TO INFLUENCE EMPLOYEES' VOTES

A. Principles of Unlawful Employer Assistance to Unions

It has long been recognized that a fundamental purpose of the Act is to guarantee that a labor organization is "the free choice of the workers, and not a choice dictated by [their employer]." H. Rep. 1147, 74th Cong., 1st Sess., at 18

(1935), reprinted in 2 *NLRB, Legislative History of the National Labor Relations Act, 1935*, at 3067 (1949) (“*Leg. Hist. 1935*”). To that end, the Board and the courts have long recognized that Board-supervised elections provide the preferred method of implementing that guarantee. See *Linden Lumber Division v. NLRB*, 418 U.S. 301, 305-10 (1974).

Section 8(a)(2) of the Act (29 U.S.C § 158(a)(2)) makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” See also *Int’l Ladies’ Garment Workers’ Union v. NLRB (Bernhard-Altman)*, 366 U.S. 731, 738 (1961); *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 622-23 (2d Cir. 1994). Section 8(a)(2) reflects congressional recognition that such employer practices are “[t]he greatest obstacle[] to collective bargaining.” 78 Cong. Rec. 3443 (1934), reprinted in 1 *Leg. Hist. 1935*, at 15. Indeed, to conclude otherwise would improperly place in an employer’s “hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.” *Garment Workers (Bernhard-Altman)*, 366 U.S. at 738-39.

In cases involving violations of Section 8(a)(2), the Board need not find that the employer intended to aid the union unlawfully. *Id.* at 739. Likewise, the Board

does not inquire into the employees' subjective reactions to the employer's assistance. Rather, an employer's assistance to the union is unlawful if it has a tendency "to coerce employees in the exercise of their organizational rights." *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977). In making that determination, the Board reasonably "take[s] into account the economic dependence of the employees on their employers" *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Supreme Court long ago recognized that, in the case of rival unions, even "[s]light suggestions as to the employer's choice between unions may have telling effect" among employees. *Int'l Ass'n of Machinists v. NLRB*, 311 U.S. 72, 78 (1940).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). This Court will not overturn the Board's factual findings "unless no rational trier of fact could have arrived at the Board's conclusion." *Windsor Castle*, 13 F.3d at 623. Therefore, the Board's findings "'cannot lightly be overturned,' especially when these findings are based upon the Board's assessment of witness credibility."

NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982) (internal citations omitted).

B. The Board Reasonably Found that County Waste Unlawfully Assisted Local 124 by Allowing It To Distribute Bonuses to Employees During the Election Campaign in Order To Influence Them To Vote for Local 124 Instead of Local 108

The Board reasonably found that County Waste improperly acted to influence its employees to vote for Local 124 instead of Local 108 by permitting Local 124 to distribute bonus checks to employees on company time at its premises during an election campaign. (A 130.) As shown in the Statement of Facts, after Local 108 began an organizing campaign, County Waste recognized Local 124 and signed a collective-bargaining agreement, which prompted Local 108 to file a charge alleging that this action violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)). To settle the unfair labor practice complaint that followed, County Waste, on November 23, entered into a settlement agreement, requiring it to withdraw recognition from Local 124 as of December 2. At the same time, the parties stipulated that an election would be held on January 6. Yet, shortly after entering into the settlement agreement and election stipulation, County Waste authorized Local 124 to hand out newly-announced Christmas bonuses that were worth one week's pay—hardly a “trivial or insubstantial benefit,” as the Board noted. (A 129.) In these circumstances, the Board reasonably found that County Waste's action was “designed to influence the employees” in their votes on

election day. (A 130.) Further, by letting Local 124 distribute the bonuses—along with a letter taking credit for this sizeable and well-timed benefit that employees had not received the year before—County Waste effectively lent a hand to Local 124 in the upcoming election.

Where, as here, two unions are competing to represent employees, an employer may not assist one by means that are coercive or discriminatory. *See, e.g., Windsor Castle*, 13 F.3d at 623. In *Windsor Castle*, an employer unlawfully assisted a union by offering “sham” employment to the union’s organizers so that they could engage in employer-authorized organizing at the facility. *Id.* at 623. County Waste likewise unlawfully assisted Local 124 by providing that union with well-timed and privileged access to its employees, and the opportunity to hand out (and take credit for) a generous and unexpected benefit. The Board has consistently found such unequal access to constitute an unfair labor practice. *See id.; Duane Reade Inc.*, 338 NLRB 943, 944 (2003) (employer gave unlawful assistance by providing meeting space on company time to one union and by requiring employees to attend that union’s meetings, while denying equal access to a rival union), *enforced*, 99 F. App’x 240 (D.C. Cir. 2004). The Board reasonably found that County Waste unlawfully assisted Local 124 by allowing its representatives to take credit for County Waste’s largesse by distributing the bonus

checks during the workday at the facility, in order to influence the outcome of an upcoming election.

C. County Waste's Contentions Are Without Merit

Before this Court, County Waste's principal assertion (Br 20-25) is that Local 124 did not distribute the bonus checks. The Board relied on substantial evidence in the record to find otherwise. County Waste then asserts (Br 26-27) that it was somehow obligated to allow Local 124 to distribute the checks, another argument which is not supported by the record. Thus, having exhausted its arguments on the merits of the Board's decision, County Waste launches an unsupportable attack on the Board's procedure on remand from this Court. As the Board will show, County Waste cannot prevail on this point where the Board acted well within its purview as an administrative agency adjudicating a case.

1. The Board relied on substantial evidence in the record for its finding that County Waste allowed Local 124 to distribute the bonuses and County Waste's assertions and suppositions to the contrary are without merit

County Waste's argument that Local 124 did not distribute the bonuses fails in the face of the admission by a company official at the unfair labor practice hearing that he authorized Local 124 to distribute the bonus checks. Thus, General Manager Palmer, who was also a member of the corporation, testified that Dispatcher Carol Patula had called him to say that Local 124 representatives were at the facility, and that she wanted to know what to do about the bonuses. Palmer

told Patula to “let him hand them out.” (A 46.) Palmer was referring to Local 124 agent James Ferenzello’s handing out the bonuses. Thus, Palmer directly instructed his dispatcher to give Local 124 representatives the checks, and to let them present the checks to employees.

Given this admission, County Waste’s claim (Br 25) that it was “physically impossible” for Local 124 to have distributed the checks is puzzling at best. Moreover, nothing in Palmer’s exchange with the dispatcher, or elsewhere in the record, supports County Waste’s conjecture (Br 25) that Local 124 only distributed the checks after a few employees complained that they had not received a bonus. County Waste’s further assertion (Br 10) that Local 124 only gave out two or three checks relies on nothing more than Palmer’s “guess” (A 46) that just a few checks remained when the dispatcher called him. In any event, the Board reasonably found (A 130) that County Waste unlawfully assisted Local 124 irrespective of whether that union distributed checks to each and every employee.

Furthermore, County Waste fails to come to terms with the express wording of Local 124’s letter to employees, which states: “Enclosed please find your 2005 Holiday Bonus Check.” (A 86.) Thus, the letter on its face establishes that Local 124 distributed the bonus checks to employees. Although County Waste seeks (Br 22) to dismiss the letter as “campaign literature” that it did not have “anything to do with,” the administrative law judge reasonably inferred (A 130) that it endorsed

the letter.⁴ After all, the letter is dated November 30—around the date on which employees learned that they would receive a bonus and County Waste let Local 124 distribute the checks. It is also no coincidence that this occurred during a critical period; as shown, to settle an unfair labor practice complaint, County Waste had just agreed to withdraw recognition from Local 124, its preferred union, and Local 124 was facing an election challenge by Local 108. In sum, the letter's wording, together with General Manager Palmer's admission that he told his dispatcher to let Local 124 representatives distribute the bonuses, provides ample evidence to support the Board's finding that County Waste permitted Local 124, not only to hand out the bonuses, but also to give employees a letter taking credit for County Waste's largesse, all in order to influence the election outcome.

County Waste's reliance (Br 22) on employee Michael Schiavone's pay stubs, showing that his pay was directly deposited, does not undermine the Board's finding that County Waste unlawfully assisted Local 124. As Schiavone explained, although he has direct deposit, he still receives an envelope containing his pay stub at the facility, and at the end of November, when he returned to the facility after completing his route, he received an envelope from Local 124 that also included the November 30 letter. (A 28-29, 35.)

⁴ County Waste notes (Br 22) that unions may use campaign literature that misrepresents facts. However, the issue here is not the accuracy of Local 124's message but County Waste's complicity in funneling it to employees.

There is no merit to County Waste’s further assertion (Br 26) that it was “required” to let Local 124 distribute the bonuses in late November because that union technically remained the employees’ bargaining representative until December 2. County Waste neglects to consider that, in order to settle a complaint allegation that it had violated Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)) by recognizing Local 124, it entered into a settlement agreement on November 23, which required it to end its collective-bargaining relationship with Local 124 as of December 2. Accordingly, as the Board found (A 130), Local 124 lost “incumbent” status when County Waste signed the settlement agreement. In these circumstances, as the Board found (A 130), the favoritism that County Waste bestowed on Local 124 by letting it distribute the bonuses and letter was not privileged under *RCA del Caribe, Inc.*, 262 NLRB 963, 965 (1982), which held that the filing of a representation petition by an outside union did not require an employer to cease bargaining with an incumbent union. Thus, the Board explained (A 130), Local 124 “no longer had the legal advantage of non-neutrality that is permitted by *RCA del Caribe*,” and County Waste no longer had a “legally recognized” or “legitimate” reason to treat Local 124 differently than Local 108—yet it did so anyway.

Equally baseless is County Waste’s assertion (Br 26) that it would have violated the Act if it had not let Local 124 hand out the checks. In its failed

attempt to buttress that assertion, County Waste erroneously relies (Br 26) on inapposite cases noting an employer's duty to bargain on request with an incumbent union. As discussed above, however, Local 124 was no longer the incumbent union when the checks were distributed. Furthermore, there is no evidence in the record that Local 124 sought bargaining with County Waste over the issue of bonuses or their distribution, much less that some agreement was reached obligating County Waste in any way.

County Waste only confuses matters (Br 27) by attempting to draw a parallel between its situation and that of an employer who is faced with deciding whether to grant or withhold a raise during an election campaign. This analogy is wholly inapposite. As County Waste recognizes (Br 14), the question of whether it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by granting the bonuses is not before the Court.⁵ In any event, an employer can hardly claim that it is placed in an untenable position—that it would violate the Act whether or not it

⁵ As County Waste correctly notes (Br 14), the Board severed and remanded that issue. (A 122.) The Court can take judicial notice that, after the Board issued its Decision, Order, and Direction of Second Election, the Board's General Counsel and Local 108 jointly agreed to withdraw the Section 8(a)(1) allegation. On that basis, the administrative law judge, on May 1, 2009, issued a Supplemental Decision recommending dismissal of that allegation. In its September 27, 2010 Order Denying Motion, which is reported at 355 NLRB No. 193, the Board adopted and incorporated by reference the judge's Supplemental Decision.

gives bonuses—if it decides to alter its practice by granting bonuses in the midst of an election campaign.

In sum, the Board reasonably found that County Waste, by permitting Local 124 to hand out bonuses to employees along with a letter taking credit for that act of beneficence, improperly sought to influence its employees to vote for that union. This attempt to influence votes through preferential treatment was in derogation of the employees' right to a free and fair election without their employer's thumb on the scale and, therefore, violated Section 8(a)(2) of the Act.

2. The Board engaged in reasoned decisionmaking and County Waste's protestations to the contrary are without merit

County Waste argues (Br 28-31) that the Court should either remand this case or refuse to enforce the Board's August 10, 2010 Decision and Order because the Board allegedly acted "in derogation of" *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and engaged in a "sham" decision-making procedure. County Waste, however, fails to show that the Board contravened *New Process*, or that the Board's decision-making process was flawed in any way. County Waste's speculative claims regarding the Board's decision-making process are contrary to the presumption of regularity afforded to the administrative agency decision-making process, and provide no basis for denying enforcement here.

Contrary to County Waste's contention (Br 29), *New Process* does not impose any restrictions dictating how the Board should have processed this case on

remand. *New Process* holds only that Section 3(b) of the Act (29 U.S.C. § 153(b)) “requires that a delegee group maintain a membership of three in order to exercise the delegated authority of the Board.” 130 S. Ct. at 2644. County Waste has not and cannot point to anything in the decision that ventures beyond this holding because the Supreme Court simply did not address, much less decide, who those three members must be, or whether they must follow particular procedures on remand.

County Waste’s further attacks on the Board’s decision-making process cannot be squared with the settled principle that courts afford adjudicatory agencies like the Board a “presumption of regularity,” and will presume that public officials have properly discharged their decision-making duties absent “clear evidence to the contrary.” *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *see also Nat’l Ass’n of Motor Bus Owners v. FCC*, 460 F.2d 561, 566 (2d Cir. 1972) (“it is not the province of the courts to inquire into the *bona fides* of agency action or to label administrative determinations a facade”). As the Supreme Court explained in *United States v. Morgan*, federal courts are not to probe the mental processes of agency decisionmakers because “[j]ust as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.” 313 U.S. 409, 422 (1941) (it was error to permit the Secretary of Agriculture to be deposed regarding the process by which

he reached his decision, including the extent to which he studied the record and consulted with subordinates).

County Waste utterly fails to meet its heavy burden of rebutting this presumption of regularity. It offers nothing but conjecture in asserting (Br 29) that the Board conducted a “sham” review of the case on remand. To the contrary, the Board specifically noted in its August 10, 2010 Decision and Order that it had “considered the judge’s decision and the record in light of the exceptions and briefs,” and “decided to affirm the judge’s rulings, findings and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at 353 NLRB No. 89,” which the Board incorporated by reference. (A 178.) County Waste offers no factual support, much less any “clear evidence to the contrary,” as the Supreme Court requires, *Chemical Foundation*, 272 U.S. at 14-15, that would warrant disregarding this explanation or delving into the mental processes the Board followed in issuing its decision.

Contrary to County Waste’s further suggestion (Br 30), it is of no moment that the Board issued its August 10, 2010 Decision and Order four days after the Court issued the mandate remanding this case. The timing does not counter the presumption that the Board members appropriately considered this case and properly discharged their duties. As this Court has recognized, speed in issuing rulings, without more, does not demonstrate extraordinary circumstances justifying

an inquiry into the decision-making process. *See Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1144-45 (2d Cir. 1974) (where FDA Commissioner issued new regulations 13 days after taking office, Court rejected claim that it was impossible for him to have reviewed and considered over 1,000 exceptions filed in opposition to the proposed regulations). *See also NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938) (“bare allegation” that Board failed to read transcript or examine exhibits is not a viable allegation of denial of due process). County Waste relies on nothing more than its own speculation in suggesting (Br 30) that “it appears that there may not even have been a review of the case on remand at all.”

Contrary to County Waste’s suggestion (Br 29), Chairman Liebman and Member Schaumber’s participation in this case before and after remand hardly constitutes “clear evidence,” *Chemical Foundation*, 272 U.S. at 14, that would show a failure on the Board’s part to fairly and adequately consider the record before issuing its decision. Indeed, the Supreme Court recognized this principle long ago in *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229-30 (1947), by rejecting an attack on the Board’s processes where the Board had assigned a case on remand to the same trial examiner, and the Board, in turn, issued virtually the same order as it had the first time.

Nor has the Court issued any ruling that would have prevented Chairman Liebman and Member Schaumber from participating in the decision on remand. It is settled that even a reversal on appeal does not preclude an adjudicator from deciding the same question a second time around. *Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (citing *FTC v. Cement Inst.*, 333 U.S. 683, 702-03 (1948); *Donnelly Garment Co.*, 330 U.S. at 236-37). Indeed, the Court at least implicitly recognized and applied this principle on two occasions: first, in the Court’s summary order, which did not adopt County Waste’s request that the Court direct the Board to assign this case to a new panel on remand; and second, in the Court’s order denying County Waste’s petition for rehearing—a petition that repeated County Waste’s baseless demand for a new Board panel.

Nor does County Waste help itself by complaining (Br 30-31) about the manner in which the Board addressed the August 9, 2010 letter in which County Waste again complained about Chairman Liebman and Member Schaumber participating in the remanded case. (A 182-85.) As the Board explained in its August 10, 2010 Decision and Order, by including them on the panel, the Board was simply following its “general practice in cases remanded from the courts of appeals,” and was “acting for reasons of administrative economy in assigning the case to the members who participated in the original decision.” (A 178 n.3.) As the Board further noted, the other Board members who were not assigned to the

panel also “had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.” (*Id.*)

Not satisfied with this explanation, County Waste repeated its complaint in a motion for reconsideration, rehearing and/or reopening of the record that it filed with the Board on September 7, 2010. (A 179-81.) In its September 27, 2010 Order denying that motion, the Board again explained that it did consider County Waste’s August 9, 2010 request for a new panel. As the Board noted in that Order, in footnote 3 of its August 10, 2010 Decision and Order, it had “specifically addressed this issue.” (A 197 n.3.) Thus, the Board has made it clear that it twice considered but rejected County Waste’s requests for a new panel, based on its settled practice and for reasons of administrative economy. In these circumstances, County Waste utterly fails to establish any basis for its assertion (Br 29) that the Board engaged in a “sham” review process.

For all of these reasons, the Court should reject County Waste’s attempt to avoid enforcement of the unfair labor practice order issued against it. County Waste’s attacks on the Board’s processes for handling this case on remand are meritless.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court enter a judgment denying County Waste’s petition for review, and enforcing the Board’s Order in full.

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National Labor Relations Board

June 2011

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v.)	
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COUNTY WASTE OF ULSTER, LLC)	
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Respondent/Cross-Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,218 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 3rd day of June 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Board’s brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the CM/ECF system. All participants are registered CM/ECF users and service will be accomplished by the CM/ECF system on the following counsel:

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