

Nos. 10-1265 & 10-1419

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BENTONITE PERFORMANCE MINERALS, LLC,
A PRODUCT AND SERVICE LINE OF HALLIBURTON
ENERGY SERVICES, INC.**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL/UNITED
FOOD AND COMMERCIAL WORKERS UNION, CLC, LOCAL 353C**

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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HALLIBURTON ENERGY SERVICES, INC.)
)
Petitioner/Cross-Respondent) Nos. 10-1265
) 10-1419
)
v.) Board Case No.
) 27-CA-20596
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
INTERNATIONAL CHEMICAL WORKERS UNION)
COUNCIL/UNITED FOOD AND COMMERCIAL)
WORKERS UNION, CLC, LOCAL 353C)
)
Intervenor)

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:*** Bentonite Performance Minerals, LLC, a Product and Service Line of Halliburton Energy Services, Inc. (“Bentonite”) is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court; its General Counsel was a party before the Board. International Chemical Workers Union Council/United Food and Commercial

Workers Union, CLC, Local 353C (“the Union”) has intervened on the Board’s behalf.

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 August 23, 2010 (355 NLRB No. 104), which adopted and incorporated by reference its prior December 31, 2008 Decision and Order reported at 353 NLRB No. 75 (2008).

C. ***Related Cases:*** Following the Board’s December 31, 2008 Decision and Order, the Company petitioned the Fifth Circuit for review of the Board’s Order, and the Board cross applied for enforcement (Case No. 09-60034). The Company, the Board, and the Union, which had intervened on the Board’s behalf, fully briefed the case, and a panel of the Fifth Circuit heard oral argument. On June 17, 2010, before the Fifth Circuit issued a decision on the merits, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have the authority to issue decisions when there were no other sitting Board members. On June 22, 2010, the Fifth Circuit remanded the case to the Board in light of Supreme Court’s *New Process* decision. On August 23, 2010, a three-member panel of the Board issued the Decision and Order that is now before this Court.

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Dated at Washington, DC
this 29th day of July 2011

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GLOSSARY

Act	The National Labor Relations Act
Board	The National Labor Relations Board
Br.	The Opening Brief of Bentonite Performance Minerals, LLC, a Product and Service Line of Halliburton Energy Services, Inc.
Company	Bentonite Performance Minerals, LLC, a Product and Service Line of Halliburton Energy Services, Inc.
D&O	Decision and Order
Union	International Chemical Workers Union Council/United Food and Commercial Workers Union, CLC, Local 353C

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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 petition of Bentonite Performance Minerals, LLC, a Product and Service Line of Halliburton Energy Services, Inc. (“the Company”) to review and set aside, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board’s Decision and Order issued on August 23, 2010, and is reported at 355 NLRB No. 104. (A. 45.)¹

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) of the Act. The Court has jurisdiction over this case under the same sections of the Act.

The Company filed its petition for review on August 26, 2010. The Board filed its cross-application for enforcement on December 27, 2010. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders. International Chemical Workers Union

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.

Council/United Food and Commercial Workers Union, CLC, Local 353C (“the Union”) has intervened on the Board’s behalf.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its finding that after the Company withdrew recognition from the Union, it discouraged employees from attending a union meeting in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by proposing the idea of decertification petitions, and by soliciting, interrogating, and promising benefits to employees to sign the petitions.

3. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union based on petitions tainted by the Company’s unlawful conduct, and by unilaterally changing the employees’ terms and conditions of employment.

4. Whether the Court lacks jurisdiction to consider the Company’s attack on the Board’s remedial order.

APPLICABLE STATUTES

All applicable statutes are contained in an addendum to this brief.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that the Company had committed numerous unfair labor practices against its employees in an effort to unseat the Union as the employees bargaining representative, and then unlawfully withdrew recognition based on tainted petitions. (A. 30; 265-310.) A Board administrative law judge conducted a hearing and found the Company had committed the violations alleged in the complaint. (A. 30-44.) The Company filed exceptions to the administrative law judge's decision and recommended order. (A. 26; 8-25.) On December 31, 2008, a two-member Board issued its Decision and Order affirming, as modified, the judge's rulings, findings, and conclusions. (A. 26-30.)

Following the Board's December 31, 2008 Decision and Order, the Company petitioned the Fifth Circuit for review of the Board's Order, and the Board cross applied for enforcement (Case No. 09-60034). The Company, the Board, and the Union, which had intervened on the Board's behalf, fully briefed the case, and a panel of the Fifth Circuit heard oral argument. On June 17, 2010, before the Fifth Circuit issued a decision on the merits, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have the authority to issue decisions when

there were no other sitting Board members. On June 22, 2010, the Fifth Circuit remanded the case to the Board in light of Supreme Court's *New Process* decision. On August 23, 2010, a three-member panel of the Board issued the Decision and Order that is now before this Court. Because the Board's Decision and Order adopted and incorporated by reference the previous two-member Board decision (A. 45), the ensuing citations to the Board's Decision and Order will be only to the Board's 2008 Decision and Order.

Facts supporting the Board's findings are set forth below, followed by a summary of the Board's Conclusions and Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations

In 1998, the Company, a Delaware corporation, acquired a facility near Colony, Wyoming, where it mines and processes bentonite, a mineral used in petroleum extraction. (A. 30; 47 p. 11, 233 p. 1226, 282 par. 2, 303 par. 2.) The Union was certified in 1948 as the exclusive collective-bargaining representative of the employees in a production-and-maintenance bargaining unit at the Colony facility, then operated by a predecessor. (A. 30-31; 284 par. 5, 6, 303 par. 5, 6.) The most recent collective-bargaining contract was signed in October 2001, and was set to expire on October 21, 2007. (A. 31; 288 par. 14, 304 par. 14.) As of the

week of July 9, 2007, the Colony bargaining unit contained 69 employees. (A. 31; 378, 407.)

B. July 9: Company Officials Propose a Decertification Petition, and Then Interrogate an Employee, and Solicit Employees to Draft, Sign, and Circulate a Petition

1. Company officials propose a decertification petition

On Monday, July 9, the Company held a meeting of its Colony management—Senior Plant Manager Mike Houston, Plant Manager Danny Oaks, and Production Manager Ray Dell, and some advisors from elsewhere within the Company’s system, including company attorney Howard Linzy, to prepare for upcoming negotiations. Monica Thurman participated by phone. (A. 30-31; 234 pp. 1243-45, 239 p. 1269, 240 p. 1270, 241 p. 1277, 254 pp. 1365-66, 255 pp. 1367-69.)

During the meeting, a document was presented that compared employee benefits under the collective-bargaining agreement with the benefits of company employees who did not work under that agreement. (A. 31; 234 pp. 1243-44, 240 pp. 1270-71, 312-20.) Dell commented that he was aware that three employees—Dan McGinnis, John Preisner, and Brad Kirksey—were unhappy with the Union and wanted to get rid of it. (A. 31; 256 pp. 1371-73.) Thurman explained that “the employees could pass a petition, and that the petition needed to say something as simple as ‘I don’t want a union’ or ‘I don’t want the Union,’ and that on the

petition they needed to . . . sign their name, print their name, and mark the date.” (A. 31; 257 p. 1377.) As a result, the meeting participants changed their focus from the upcoming negotiations to discussing the “time frame” in which decertification could happen, and concluding that the timing “was right.” (A. 31; 234 p. 1245, 235 p. 1246, 243 p. 1282, 251 pp. 1327-28.) Dell told the group that he “felt that [McGinnis] would be a good person to approach to see if his sentiments were still the same,” and volunteered to speak to McGinnis. (A. 252 pp. 1331-32.)

At approximately 2 p.m., company officials at the meeting summoned Shift Supervisor Gerry Bergum, whose swing shift was scheduled to begin at 4 p.m. Plant Manager Oaks gave Bergum a copy of the benefit comparison chart. (A. 31; 220 p. 1172, 230 pp. 1214-15, 231 pp. 1219-21, 232 p. 1222, 240 pp. 1270-71, 256 pp. 1371-72.)

2. Shift Supervisor Bergum interrogates employee Preisner about the Union, proposes a decertification petition to Preisner, and solicits him to sign and to have other employees sign a petition

After Shift Supervisor Bergum started his 4 p.m. shift, he approached employee John Preisner who was unloading a truck. (A. 31; 59 pp. 70-71, 67 pp. 101-02, 241 p. 1275.) Preisner was not a union member, and had mentioned that he did not want the Union to others, but not to Bergum. (A. 63 pp. 86-88, 64 p. 89.) Bergum asked Preisner “what [he] felt about the Union.” (A. 31; 59 p. 71.)

Preisner replied, “I d[o]n’t care if it stayed or went” (A. 31; 59 p. 71.)

Bergum then asked Preisner “if [he] would sign a petition to get the Union out.”

(A. 31; 59 p. 71.) After Preisner answered affirmatively, Bergum told him “to write on the paper, ‘I do not want the Union,’” and to “sign it, date it, and print [his] name on it.” (A. 32; 59 p. 71-72, 365.) After Preisner signed, Bergum asked Preisner “if [he] could get anyone else to sign the [petition.]” (A. 31; 59 p. 72.)

After replying in the affirmative, Bergum told Preisner the names of four fellow employees not to speak to because they would probably not sign. (A. 32; 59 p. 72, 62 pp. 82-83.) At some point, Bergum showed Preisner the benefit comparison chart and told Preisner that he wanted the employees “to have everything that [the Company] has to offer.” (A. 31; 59 p. 72, 60 p. 73, 64 p. 91, 317-20.)

Thereafter, while walking with Preisner toward a training class, Bergum stopped to allow Preisner to solicit an employee, who proceeded to sign the petition. (A. 32; 59 p. 72, 60 pp. 75-76.) After conducting the training class, Bergum told the two employees who were with Preisner that Preisner wanted to talk to them about something. Preisner proceeded to solicit those employees to sign the decertification petition and showed them the comparison chart. Both employees signed the petition after Bergum answered questions about benefits. (A. 32; 60 p. 76, 61 pp. 77-80, 70 p. 116, 71 pp. 117-18, 120, 72 pp. 121-24, 73 p. 130, 75 pp. 147-48, 76 pp. 149-50, 77 pp. 153-56, 78 pp. 157-59, 79 pp. 170-72, 80

p. 173.) Later during his shift, Preisner gave a petition signed by him and the three other employees to Bergum. (A. 32; 61 p. 80.)

3. Production Manager Dell proposes a decertification petition to employee McGinnis and solicits him to sign and to have other employees sign a petition

Production Manager Dell left the company meeting at about 4 p.m. to meet employee Dan McGinnis, who was getting off shift. (A. 31, 32 n.7; 109 p. 351, 110 p. 352, 242 p. 1281, 243 pp. 1282-83.) In the parking lot, Dell called McGinnis over to his truck. (A. 32; 243 p. 1282.) Dell said, "I know how [you] felt about the Union the past several years, . . . if you . . . still feel that way, now is the time that you can do something about this." (A. 32; 243 pp. 1282-83.) When McGinnis asked what to do, Dell replied, "[you] could circulate a petition." (A. 32; 243 p. 1283.) McGinnis then asked what the petition should say, and Dell told him to put a heading on it saying he did not want the Union, to print his name, sign it and date it. (A. 32; 243 p. 1283.) McGinnis said "he'd think about it." (A. 32; 243 p. 1283.) He also advised Dell that he was scheduled to work on a drill crew the next day in Kaycee, Wyoming, located 2 to 3 hours away from the plant. (A. 32; 119 pp. 388-89, 243 p. 1284, 258 p. 1381.)

Product Manager Dell returned to the Company's meeting and reported the outcome of his conversation with McGinnis. (A. 32; 235 pp. 1246-47, 239 p. 1269, 243 p. 1284, 257 p. 1378, 258 p. 1379.) Plant Manager Oaks directed Dell

to call McGinnis and tell him not to go to Kaycee, Wyoming the next day, but to meet with Dell at his office instead. Dell then notified McGinnis of the schedule change and meeting. (A. 32; 111 p. 359, 112 p. 360, 132 p. 443, 133 p. 144, 243 p. 1285, 244 p. 1286, 258 pp. 1379-80.)

C. July 10: Company Supervisors Interrogate, Promise Benefits to, and Solicit Additional Employees To Sign and Circulate Decertification Petitions

1. Plant Manager Oaks and Production Manager Dell meet with employee McGinnis to discuss decertifying the Union and solicitation of other employees

As directed the night before, McGinnis reported to Dell's office at the Colony plant on Tuesday morning July 10. Plant Manager Oaks was also present. (A. 32; 112 p. 363, 113 p. 366.) Referencing their conversation from the prior evening, McGinnis asked "if I was going to go and talk to the people about whether they wanted the Union or not, what did I have to sell them with? What was there? You know, why would somebody just listen to me and say, yeah, I don't want the Union anymore?" (A. 32; 113 p. 367.) At that point either Dell or Oaks gave McGinnis a copy of the comparison chart. (A. 32; 114 pp. 368-70, 120 p. 395, 121 p. 396, 312-17.) In addition, while showing McGinnis a blank notebook, Dell told McGinnis that if he wanted to get rid of the Union he would "have to get signatures on this piece of paper saying that people—having them sign and date it, that they did not want the Union." (A. 32; 114 p. 370, 121 pp. 397-98.)

2. Senior Plant Manager Houston interrogates and promises benefits to employees Bierema and Holdhusen

At about 1 p.m., employee Ivan Bierema, the appointed lead of the drill crew, was at the field shop some distance away from the main plant. There he encountered McGinnis who showed him the comparison chart. (A.33; 134 pp. 449-50, 135 pp. 452-54, 138 p. 479, 139 p. 480.) About 1:30 p.m., Bierema and one of his crew members, Dick Holdhusen, drove to the plant in a pickup truck for a work-related errand. While sitting in the pickup, Senior Plant Manager Houston and Production Manager Dell approached Bierema on the driver's side. Dell then went to the passenger side where he spoke with Holdhusen at the same time Houston greeted Bierema. (A.33; 136 pp. 461-62.)

Houston asked Bierema and Holdhusen "if they had signed the paper." (A. 33, 42; 136 p. 463, 144 p. 514.) When they responded that they had not, Houston asked why not. (A. 33; 136 p. 463, 141 p. 492.) Bierema said, "I need to know what the dollar amount raise was before I sign[] anything." (A. 33; 136 p. 463.) Houston said that he could not say, but as a manager he had the "power to do stuff," and that "[i]t would be better around here," and "asked if [they] trusted him." (A. 33; 136 p. 463; 137 p. 464, 140 p. 491, 145 pp. 517-18.) Dell also mentioned a facility in Texas where employees received a wage increase after getting rid of their union. (A. 33; 145 p. 517.)

D. July 11: Company Officials Solicit More Employees To Sign Decertification Petitions

1. Plant Manager Oaks and Production Manager Dell hold another meeting with employee McGinnis who then agrees to sign and to solicit other employees to sign a decertification petition

On Wednesday July 11, employee McGinnis met again with both Plant Manager Oaks and Production Manager Dell to discuss McGinnis' concerns with current wages and benefits. (A. 341; 115 p. 372.) McGinnis agreed to begin soliciting signatures for a decertification petition, and Dell gave him a blank notebook to use to obtain signatures. (A. 34; 121 pp. 397-99, 130 pp. 434-35, 131 p. 436.) McGinnis then spent 2 to 3 hours in the plant attempting to persuade employees to sign the petition. He showed them the comparison chart, let them review it, and pointed out the advantages of the nonunion benefits. (A. 34; 115 pp. 372-75, 116 pp. 377-79, 117 p. 380, 122 pp. 401-03, 123 pp. 404-05, 131 pp. 436-39, 178 pp. 792-93.)

McGinnis then went back to the office and spoke with either Dell or Oaks who told him to go into the field, where some employees were about to take their break. As instructed, McGinnis went to the field to solicit those employees. (A. 34; 122 p. 403, 131 p. 439, 132 p. 140.) In addition to his signature, McGinnis collected four other signatures. (A. 34; 366.)

2. Plant Foreman Droppers solicits employees Zupan and Davis to sign a petition

At 4 p.m., at the end of a preshift meeting, employee Zackary Zupan asked Plant Foreman Lynn Droppers if there was a petition going around, as he had heard rumors from other employees. Droppers replied that he was aware that employee Jeff Westland was circulating such a petition and took Zupan to the warehouse where Droppers picked up a comparison chart sitting on a table and gave it to Zupan to read. (A. 36; 449 p. 30, 88 pp. 253-55, 89 pp. 256-57, 93 pp. 278-79, 94 pp. 280, 283, 95 p. 284, 96 p. 288, 102 p. 315, 103 p. 319, 241 p. 1275.) As Zupan looked at the comparison chart, he asked Droppers what they would get without the Union. Droppers said the employees would get a greater vacation benefit. (A. 36; 89 p. 258, 94 pp. 280-81, 283, 95 p. 284.) Zupan also asked why the Company could not give employees the benefits on the chart through negotiations. (A. 36; 89 p. 259.) Droppers answered, "Because it wasn't offered to [u]nion plants." When Zupan asked why not, Droppers replied: "They just don't" (A. 36; 89 p. 259, 92 p. 269, 96 p. 289.)

Droppers and Zupan then had a discussion concerning the number of union and nonunion plants the Company operated. (A. 36; 91 pp. 266-67, 92 p. 269.) Droppers said that if the employees got rid of the Union at the Colony plant the employees "would most likely receive everything on the comparison sheet"; "this is what the Company [is] offering." (A. 36; 92 p. 270, 94 pp. 281-82.) Zupan

declined Droppers' request that he sign the petition. (A. 36; 90 p. 260, 96 p. 291, 97 pp. 293-94.)

About 2 hours after his conversation with Zupan, Droppers spoke to employee Thomas Davis. Droppers told Davis that the Company was "trying" to get rid of the Union. (A. 36; 98 pp. 297-99, 100 p. 305, 101 p. 309.) Davis asked Droppers what the Company would give the employees, and what was going to change if the employees got rid of the Union. Droppers replied that he needed to get a copy of the paper from employee Westland so he could show it to Davis. When Droppers returned with the comparison chart, he explained to Davis that the short-term disability benefit was far better than anything in the union contract. (A. 36; 98 p. 299, 99 pp. 300-02, 101 p. 310, 102 p. 313.) Shortly after Droppers left, Westland approached Davis and asked him to sign his petition. (A. 36; 99 pp. 302-03.) Davis signed the petition. (A. 99 pp. 303, 100 p. 304.)

E. July 12: Company Officials Solicit Three More Employees To Sign a Decertification Petition

1. Production Manager Ray Dell solicits employee David Dell to sign a petition

During the week of July 9, employee David Dell, the brother of Production Manager Ray Dell, was on vacation in a remote area of Wyoming. On July 12, Ray Dell, knowing that his brother's sentiments had been both pro and con regarding the union, but lately antiunion, "took the liberty" of finding out if his

brother still felt the same way. In the middle of that morning, Ray reached David by phone and learned that he was willing to sign a disaffection petition. He instructed David “to get a piece of paper and put a header on it, print [his] name, sign it, date it, and get it back to [him].” David faxed a signed paper, as Ray suggested, to Ray at the Colony plant. The paper stated, “I agree with the idea of a non-union plant.” (A. 38; 249 p. 1321, 250 pp. 1322-24, 369.)

2. Senior Plant Manager Houston solicits employee DeKnikker to sign a petition

On July 12, employee Gregory DeKnikker was performing his work duties at the facility’s landfill located near the plant when Senior Plant Manager Houston drove up in his personal pickup truck. (A. 38; 80 p. 176, 81 pp. 177-79.) Houston said he had learned that DeKnikker was interested in looking at the comparison chart. Houston then placed the chart on the hood of his truck, allowing DeKnikker to look it over. Houston asked DeKnikker if any of the things on the chart interested him. The conversation turned to other matters, but later returned to the chart and DeKnikker told him that the benefits would “interest him” and that he was interested in signing. Houston obtained some paper from his truck and gave it to DeKnikker, who wrote on it, “I don’t want the Union.” DeKnikker then gave the paper back to Houston. (A. 38-39; 80 p. 176, 81 pp. 177-80, 82 pp. 181-94, 373.)

3. Production Manager Dell and Plant Manager Oaks solicit employee Callison to sign a petition

Employee Charles Callison was on vacation during the week of July 9. (A. 38 and n.13; 104 pp. 324-26, 407.) On July 12, he received a phone call from Production Manager Ray Dell. This was the first time Dell had called him at home. Dell told Callison about the petition to get rid of the Union and asked if Callison would sign it. (A. 38; 104 pp. 326-27, 108 p. 347.) After Callison agreed to sign, they discussed how he would get the petition to the plant (about 30 miles away from his house) and what language he should use. They agreed that Callison would use his personal fax machine and write “I do not support the Union.” (A. 38; 104 p. 327, 105 pp. 328-30, 106 pp. 332-33, 368.)

Later that night, at about 10:30 p.m., Callison received a call from Plant Manager Oaks. Oaks told Callison he wanted him to sign the petition again and date it. Oaks then drove to Callison’s home so he could acquire the re-signed version. (A. 38; 106 pp. 333-35, 107 p. 336, 108 pp. 344-45.)

F. July 13: The Company Withdraws Recognition from the Union, Unilaterally Changes Terms and Conditions of Employment, and Tells Employees Not To Attend a Union Meeting

On July 13, Plant Manager Oaks e-mailed and faxed a letter to the Union announcing that the Company was withdrawing recognition because the Union had lost majority status. (A. 39-40; 380.) A total of 42 employees had signed the various petitions. The names on the petitions included Preisner, McGinnis, and the

7 collected by them, and Callison, Dave Dell, and DeKnikker, who company officials had solicited. In addition, petitions from employees Brad Kirksey, Jeffrey Westland, and Martin Brosnahan contained 5, 10, and 15 names, respectively. (A. 35-38; 363-77.)

On July 16, a notice from Senior Plant Manager Houston and Plant Manager Oaks announced an across-the-board wage increase of \$1.25 per hour, and stated that the Company “will have more good news for [employees] in the very near future.” (A. 41; 382.) On July 19, Houston and Oaks posted a memo after learning of a scheduled union meeting. (A. 41; 384.) The memo advised the employees:

[T]he less you have to do with [union official Art Stevens] and the [U]nion, the better all of us are We are in the process of making good things happen. A wage increase announced Monday and more good things to come. In our opinion, Mr. Stevens had his chance and now we ask you to give us and [the Company] a chance If [Stevens] stirs up trouble then everything could come to a halt—more union outsiders could bother us, [the Company] would have to get its corporate people, lawyers could come from everywhere. And, we could find ourselves stopped dead in our tracks If you go to the meeting, that is your right and choice. For our part, our advice is: don’t go—that’s the best way to tell Mr. Stevens not to get in the way of progress.

(A. 41; 384.)

By letter dated July 19, Union Representative Stevens wrote to the Company and asked questions about the wage increase. His letter concluded by asking for the reasoning behind the “welcomed, but unprecedented wage increase this close to

our impending negotiations for a new collective bargaining agreement.” (A. 41; 289 par. 15(a), 305 par. 15, 384.) On July 23, Stevens asked for additional information about the Company’s wages and benefits. (A. 42; 289 par. 15(b), 305 par. 15, 388.)

At the union meeting, Stevens was able to persuade about 18 employees to sign a petition in favor of continued union representation. Two more employees also signed separately on July 18. Over the next few weeks, 20 employees added their names, for a total of 40. Of these 40, 14, including Preisner, had signed the disaffection petitions. (A. 41; 86 p. 223, 87 pp. 224-26, 97 pp. 292-93, 100 pp. 305-06, 321-34.)

In a July 25 letter to Stevens, Plant Manager Oaks reiterated that the Company no longer recognized the Union and stated that the Company would not supply the requested information. (A. 41; 395.) Regarding Stevens’ characterization of the wage increase as “unprecedented,” Oaks wrote:

You are absolutely correct when you say that the \$1.25 per hour wage increase was UNPRECEDENTED! To my knowledge, the wage increase was about 100% LARGER than any increase your union has ever negotiated for our employees in any one year. We have also just announced an unprecedented increase in the men’s vacation policy and will soon be meeting with them to explain that new benefit to each one of them. THESE ARE UNPRECEDENTED WAGE AND BENEFITS CHANGES WHICH OCCURRED DIRECTLY AS A RESULT OF THEIR DECISION TO GIVE US AND THEM A CHANCE TO SEE WHAT BEING UNION FREE COULD MEAN The men deserve a chance to see what we and

they can do together to make more progress and improvements. Do not stand in the way.

(A. 41; 395.)

The Company then notified employees of improved vacation benefits that were consistent with the benefits described in the comparison chart. The notice also stated that the Company would stop withholding union dues when the contract expired in October, and advised employees that, because Wyoming is a right-to-work state, the employees could resign their membership earlier if they chose by sending a resignation letter to the Union with a copy to the Company. (A. 41; 397.)

On August 10, Stevens asserted by letter that the Union continued to enjoy majority status and offered to prove it through a signature check by a neutral person. Oaks responded by letter of August 15 rejecting Stevens' offer and asserting that it had proven that the employees no longer wished representation by the Union. (A. 41; 290 par. 15(d), 305 par. 15, 405.)

The Company then made other changes including the termination of the 401(k) plan, which the Union had negotiated. The Company placed employees in a company retirement plan. (A. 41-42, 409-21.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Schaumber and Pearce) issued its Decision and Order, incorporating the reasoning

and findings of the Board's 2008 Decision and Order. In that earlier Decision and Order, the 2-member Board had found, in agreement with the administrative law judge, as modified, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively interrogating employees, coercively proposing the idea of a union decertification petition, soliciting employees to sign a petition, making promises of improved conditions if the Union was ousted, and interfering with the Union's right to communicate with the employees it represents. The Board also found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union, unilaterally changing terms and conditions of employment without first bargaining with the Union, and refusing to supply the Union with requested information. (A. 28.)

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 their statutory rights. (A. 28.) Affirmatively, the Order requires the Company to, upon the Union's request: recognize and bargain with the Union, rescind the unilateral changes, and restore the previous terms and conditions of employment. The Order also requires the Company to make employees whole for any losses suffered by them as a result of

those unilateral changes, to supply the Union with the requested information, and to post copies of a remedial notice. (A. 28-29.)

SUMMARY OF ARGUMENT

Faced with upcoming negotiations for a new collective-bargaining agreement, the Company decided that the time was ripe to get its employees to decertify the Union. The Company then acted on its decision by, among other things, proposing the idea of decertification petitions to employees, soliciting employees to sign and to have other employees sign petitions, interrogating employees and promising benefits to them, all in violation of Section 8(a)(1) of the Act. The Board reasonably determined that the antiunion petitions were tainted by that unlawful conduct, and therefore the Company's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act. Contrary to the Company, decertification petitions will be found tainted even if some employees approached were previously opposed to the Union. Moreover, the Board's finding of taint was not based primarily on the Company's use of a chart comparing union and non union benefits, but on its direct solicitation of numerous employees to decertify the Union.

The Company's attack on the Board's remedy—an affirmative bargaining order—is not before the Court. The Company's exceptions to the administrative law judge's decision were overly broad and did not specifically take issue with the

judge's recommendation of an affirmative bargaining order. This Court has repeatedly held that such general exceptions to a recommended remedy fail to preserve any dispute over the Board's issuance of a bargaining order.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDING THAT THE COMPANY UNLAWFULLY DISCOURAGED EMPLOYEES FROM ATTENDING A UNION MEETING IN VIOLATION OF SECTION 8(a)(1)

The Board is entitled to summary enforcement of the Board's finding that, after the Company withdrew recognition from the Union, it unlawfully discouraged employees from attending a union meeting. Specifically, the Company posted a memo that, among other things, reiterated that employees had just received a wage increase, and stressed that more good things were on the way, but warned employees that union "trouble" could stop the Company "dead in [its] tacks" and advised employees that not going to the union meeting would be the best way for them to "tell [the Union] not to get in the way of progress." (A. 41; 386.) Because there is no dispute that the Company did not raise this issue to the Board. (A. 26 n.2), the Company is now jurisdictionally barred from obtaining review of this finding. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259, 1263 (D.C. Cir. 1997). Therefore, the Board is entitled to summary enforcement of its uncontested

finding. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROPOSING THE IDEA OF DECERTIFICATION PETITIONS, INTERROGATING EMPLOYEES ABOUT THEIR UNION VIEWS, SOLICITING EMPLOYEES TO SIGN AND GET OTHER EMPLOYEES TO SIGN DECERTIFICATION PETITIONS, AND PROMISING BENEFITS TO EMPLOYEES TO SIGN PETITIONS

A. Applicable Principles and Standard of Review

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 the guarantee of Section 7 by making it an unfair labor practice for employers “to interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights.”

An employer provides unlawful assistance to a decertification effort, in violation of Section 8(a)(1) of the Act, by “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.” *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998), *enforced mem. sub nom. NLRB v R.T.*

Blankenship & Assocs., Inc., 210 F.3d 375 (7th Cir. 2000). *Accord V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276 (6th Cir. 1999); *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1435 (8th Cir. 1991); *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1233-36 (5th Cir. 1984). While an employer does not violate the Act by providing merely “ministerial aid,” the Board has explained that an employer’s “actions must occur in a ‘situational context free of coercive conduct.’ In short, the essential inquiry is whether ‘the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned.’” *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (quoting *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967)).

An employer also violates Section 8(a)(1) of the Act by interrogating its employees about their union activities. *See Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). When assessing the coercive tendency of an interrogation, the Board looks at, among other things, the background, and the nature of the information sought, the questioner’s identity, and the place and method of the interrogation. *Id.*

Likewise, an employer violates Section 8(a)(1) of the Act by promising benefits to employees if they reject the Union. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). This Court “‘recognize[s] the Board’s competence in the first instance to

judge the impact of utterances made in the context of the employer-employee relationship.” *Avecor, Inc.*, 931 F.2d at 931 (quoting *Gissel Packing*, 395 U.S. at 620).

The Board’s findings must be upheld if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); see *Universal Camera Corp v. NLRB*, 340 U.S. 474, 488 (1951); *Tribune Publishing Co. v. NLRB*, 564 F.3d 1330, 1332 (D.C. Cir. 2009).

B. The Company’s Unlawful Assistance and Coercive Conduct in the Decertification Campaign

The record amply supports the Board’s finding that the Company engaged in a wide range of unlawful conduct in its efforts to get employees to decertify the Union. Production Manager Dell and Shift Supervisor Bergum proposed the idea of a petition to employee McGinnis and Preisner respectively, and solicited them to sign and to have other employees sign decertification petitions. In addition Senior Plant Manager Houston interrogated and promised benefits to employees to sign a decertification petition, and numerous other high level company officials, including Plant Foreman Droppers, Production Manager Ray Dell, and Plant

Manager Oaks, directly solicited employees to sign the decertification petitions.²

As to the unlawful conduct directed at McGinnis, Production Manager Dell approached McGinnis after the July 9 company meeting in which managers decided that the timing “was right” to start a decertification petition based on the belief that a few employees, including McGinnis, opposed the Union. (A. 31; 234 p. 1245, 235 p. 1246, 243 p. 1282, 251 pp. 1327-28, 252 pp. 1331-32.) Although McGinnis had previously expressed reservations to Dell about the Union, Dell even “admit[ed] that he didn’t know for sure what McGinnis’ then-current sentiments concerning the Union actually were.” (A. 42.) Indeed, Dell told other company officials that he “felt that [McGinnis] would be a good person to approach to see if his sentiments were still the same” (A. 252 p. 1332), and he proceeded to approach McGinnis by asking “if” he was still against the Union (A. 32; 243 pp. 1282-83). After McGinnis hesitated to proceed with a petition, Dell and Plant Manager Oaks cancelled McGinnis’ scheduled work at a remote location and arranged for him to meet with them the next day at the Colony facility to further discuss a petition. Then, after McGinnis finally relented during a third meeting and agreed to circulate a petition, the Company gave him several hours to

² The Company suggests (Br. 8-11, 15-19) that it did not unlawfully threaten McGinnis or Preisner, and argues (Br. 53-54) that it did not promise benefits to them by showing them the comparison chart. There was no allegation, however, that the Company threatened them. The Board (A. 26 n.2) did not pass on whether the Company unlawfully promised benefits to them.

solicit employees and told him where to solicit them. In light of these facts, the Board was fully warranted in finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by unlawfully proposing the idea of a petition to McGinnis and soliciting him to sign and to circulate one.

Similarly, the evidence amply supports the Board's finding that Shift Supervisor Bergum unlawfully interrogated Preisner, proposed the idea of a petition to him, and solicited him to sign and to circulate a petition. Shift Supervisor Bergum approached Preisner while he was working, and asked Preisner "what [he] felt about the Union." (A. 31; 59 p. 71.) Preisner had never spoken to Bergum about his views toward the Union. After Preisner expressed indifference, not "car[ing] if it stayed or went" (A. 31; 59 p. 71), Bergum asked Preisner "if [he] would sign a petition to get the Union out" (A. 31; 59 p. 71), and told him what to write to create a petition (A. 31; 59 pp. 71-72, 365). In addition, Bergum asked Preisner if he could get other employees to sign a petition, and cautioned him not to speak to several named employees because they would not sign. (A. 32; 59 p. 72.) In these circumstances, Bergum engaged in far more than what the Company characterizes (Br. 49, 58) as a mere "discourse" about the Union with Preisner. Moreover, although the Company asserts in its Statement of Facts (Br.

15-17) that Bergum denied Preisner's version of events, the Company ignores that the judge, as upheld by the Board (A. 30 n.2), credited Preisner's testimony over Bergum's.³ And the Company has offered no argument that the administrative law judge's credibility determinations, as adopted by the Board (A. 30 n.2), are "hopelessly incredible, self-contradictory, or patently unsupportable." *UFCW Local 204 v. NLRB*, 447 F.3d 821, 824 (D.C. Cir. 2006) (quoting *Cadbury Beverages Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998)). Accordingly, the Company has no basis to rely on Bergum's testimony.

The record also amply supports the Board's finding that Senior Plant Manager Houston interrogated and promised benefits to employees Bierema and Holdhusen. Thus, Houston, a high ranking company official, approached Bierema and Holdhusen during work and asked if they had signed a petition. Thereafter, upon learning that they had not, he asked why they had not, and assured them that as a manager he had the "power to do stuff" and that "[i]t would be better around here." (A. 30 n.2, 33, 42; 136 p. 463, 137 p. 464, 140 p. 491.) In addition Houston asked if they trusted him, and mentioned another facility where employees received a wage increase after giving up their union. In these circumstances,

³ The Company even mischaracterizes its own discredited testimony. Thus, the Company, relying on Senior Plant Manager Houston's testimony (Br. 7, A. 256 pp. 1371-72, 258 p. 1382, 259 p. 1383), asserts that at its July 9 meeting, Bergum confirmed that Preisner had "recently" stated his opposition to the Union. To the contrary, in the cited testimony, Houston admitted to having had no idea when Preisner had made the alleged comments.

Houston's statements constituted an unlawful interrogation. In addition, Houston's comments also constituted an unlawful promise of a wage increase if employees got rid of the Union. As the Company essentially concedes (Br. 57-58), Houston did not set forth a "belief as to demonstrably possible consequences beyond his control[,]" but instead implied that he would "take action solely on his own initiative for reasons unrelated to economic necessities and known only to him." *NLRB v. Gissel Packing Co.*, 395 U.S. at 618. *Accord General Elec. Co. v. NLRB*, 117 F.3d 627, 630, 631 (D.C. Cir. 1997).

Finally, the record amply supports the Board's finding that various high-level company officials directly solicited other employees to sign the petitions.

Thus:

- Plant Foreman Droppers solicited employee Zupan to sign a petition when Droppers asked Zupan to sign a petition and told Zupan that employees could not receive the non-union benefits set forth in the comparison chart through negotiations;
- Plant Foreman Droppers solicited employee Davis to sign a petition when he told Davis that the Company "was trying to get rid of the Union," proceeded to show him the comparison chart, and then arranged for an employee to directly solicit him;

- Senior Plant Manager Houston solicited employee DeKnikker to sign a petition when he drove to DeKnikker's work site, showed him the comparison chart and then got paper from his truck so that DeKnikker could sign something saying that he did not want the Union;
- Production Manager Ray Dell solicited employees Callison and David Dell to sign a petition when he called them during their vacations;
- Plant Manager Oaks solicited employee Callison to sign a petition when he drove to Callison's house and asked him to re-sign the petition that he had earlier faxed to Production Manager Dell.

In sum, by figuring prominently in the encouragement and solicitation of signatures for decertification petitions, the Company's conduct violated Section 8(a)(1). *See V & S ProGalv*, 168 F.3d at 276-77; *Texaco, Inc.*, 722 F.2d at 1228-29, 1233-35. As the Board has previously explained, the Company's request for employee assistance in gathering signatures and its request to specific employees to sign would reasonably have a tendency to coerce and intimidate employees by "conveying the impression that [the employer] was monitoring the petition's course," and "put[s] the employees who were targets of [its] solicitations in the position of risking [the employer's] displeasure if they did not follow through on [its] requests for more signatures." *Transp. Equip. Servs., Inc.*, 293 NLRB 125, 133-34 (1989). *Accord V & S ProGalv*, 168 F.3d at 276.

In this regard, Section 8(c) of the Act, 29 U.S.C. § 158(c) does not, as the Company suggests (Br. 4, 26, 27, 47, 53), make lawful all employer assistance to a decertification effort. Section 8(c) of the Act merely provides that “[t]he expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). Section 8(c) does not insulate employer conduct which goes beyond voicing preference about employees’ union status. *See Texaco, Inc.*, 722 F.2d at 1231. Moreover, as this Court has recognized, employer speech that would otherwise appear to be within the scope of Section 8(c) may be unlawful under Section 8(a)(1) of the Act, because, as here, “the employer’s statements may reasonably be said to have tended to interfere with employees’ exercise of their Section 7 rights.” *Exxel/Atmos v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) (quoting *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992)). As the Supreme Court acknowledged in *Chamber of Commerce v. Brown*, while Section 8(c) “expressly precludes regulation of speech about unionization,” it does so “so long as the communications do not contain a threat of reprisal or force or promise of benefit.” 554 U.S. 60, 68 (2008) (quoting *Gissel Packing Co.*, 395 U.S. at 618).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION BASED ON PETITIONS TAINTED BY THE COMPANY'S UNLAWFUL CONDUCT, AND BY UNILATERALLY CHANGING THE EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT

A. An Employer May Not Lawfully Withdraw Recognition if the Employer Directly Participates and Assists in the Decertification Campaign

The principles governing an employer's withdrawal of recognition from an incumbent union are well settled. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5))⁴ requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. To promote the Act's policies of industrial stability and employee free choice, the Board presumes that, once chosen, a union retains its majority status. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785-87 (1996); *accord Highland Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007). The presumption of majority status is irrebuttable during the term of a collective-bargaining agreement, up to 3 years; after 3 years, or upon expiration of the collective-bargaining agreement, the presumption becomes rebuttable. *See Auciello Iron Works, Inc.*, 517 U.S. at 785-87; *Highland Hosp.*, 508 F.3d at 31.

⁴ Section 8(a)(5) makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005).

Consistent with these principles, the Board, in *Levitz Furniture Co.*, 333 NLRB 717, 720 (2001), held that an employer may lawfully withdraw recognition from an incumbent union, and defeat the rebuttable presumption of majority support, by showing that the union, in fact, lacked majority support at the time recognition was withdrawn. *See, e.g. Flying Food Group, Inc.*, 471 F.3d 178, 182 (D.C. Cir. 2006). As this Court has cautioned, however, ““an employer . . . withdraws recognition at its peril,”” because, if the employer fails to prove that the union had, in fact, lost majority support at the time the employer withdrew recognition, its withdrawal of recognition violates the Act. *Id.* (quoting *Levitz*, 333 NLRB at 725).

Generally, a petition signed by a majority of the employees stating that they no longer wish to be represented by the union will suffice to meet an employer’s burden, absent countervailing evidence. *See Levitz*, 333 NLRB at 725 n.49. But an employer who either unlawfully instigated the filing of a decertification petition or induced its filing by other unfair labor practices cannot rely on it as a basis to withdraw recognition. *See Caterair Int’l v. NLRB*, 22 F.3d 1114, 1120-21 (D.C. Cir. 1994) (remanded on other grounds); *see also V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 276-77, 280-82 (6th Cir. 1999); *Texaco Inc. v. NLRB*, 722 F.2d 1226, 1234-36 (5th Cir. 1984). Under those circumstances, the employer’s “withdrawal of recognition predicated on such a ‘tainted’ petition” is unlawful because “the

petition does not represent ‘the free and uncoerced act of the employees concerned.’” *NLRB v. United Union of Roofers, Waterproofers & Allied Workers, Union No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990) (quoting *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985)).

Further justifying its rule prohibiting an employer from relying on a decertification petition that it helped foment, the Board has explained that it is “unwilling to allow [an employer] to enjoy the fruits of its violations . . . , but rather shall hold it responsible for the predictable consequences of its misconduct, i.e., its employees’ rejection of [the union] as their bargaining representative.” *Hearst Corp.*, 281 NLRB 764, 765 (1986) *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988). Given those “predictable consequences,” the Board’s finding that an employer unlawfully participated or assisted in a decertification effort “is not predicated on a finding of actual coercive effect, but rather on the ‘tendency of such conduct to interfere with the free exercise of employee rights under the Act.’” *Id.* (quoting *Amason, Inc.*, 269 NLRB 750, 750 n.2 (1984), *enforced mem.*, 758 F.2d 648 (4th Cir. 1985)).

Because “an actual loss of majority status [is] an ‘affirmative defense’ to an unlawful withdrawal-of-recognition claim, it is the [employer] that ‘has the burden of establishing that defense’” by demonstrating that the petition was valid. *Flying Food Group, Inc.*, 471 F.3d at 184 (quoting *Levitz Furniture Co.*, 333 NLRB at

725); *cf. NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (noting that an employer bears the burden of proving that it had sufficient justification for withdrawing recognition from the union). Whether the employer met its burden is a question of fact, and the Board's finding must therefore be upheld if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Tribune Publ'g Co. v. NLRB*, 564 F.3d 1330, 1332 (D.C. Cir. 2009).

B. The Board Reasonably Determined that the Decertification Petitions Were Tainted by the Company's Unlawful Solicitations of Employees To Circulate and To Sign the Petitions And Its Other Coercive Conduct

Based on the Board's finding that the Company unlawfully assisted the decertification effort and engaged in other coercive conduct toward its employees, the Board reasonably determined (A. 26-28, 42-44) that the Company's conduct tainted the disaffection petitions. Accordingly, the Board concluded (A. 28, 44) that the petitions, though signed by a majority of the Company's employees—42 of 69— could not provide a valid basis for the Company's withdrawal of recognition, which therefore violated Section 8(a)(5) and (1) of the Act. The Board's findings are amply supported by substantial evidence, and fully consistent with Board and this Court's precedent.

As shown, the Company, believing that a few employees opposed the Union, changed its focus from preparing for contract negotiations to proposing the idea of a decertification petition to employees. In furtherance of that objective, the Company solicited, interrogated, and made promises to employees to support a petition, all in violation of Section 8(a)(1) of the Act.

Specifically, as discussed above (pp. 25-31), Senior Plant Manager Houston interrogated and promised benefits to employees Bierema and Holdhusen, and solicited employee DeKnikker to sign a petition; Plant Manager Oaks solicited employee Callison to sign a petition; Production Manager Dell unlawfully proposed the idea of a petition to employee McGinnis and solicited him to sign and to have others sign a petition, and unlawfully solicited employees Callison and David Dell to sign a petition; Plant Foreman Droppers solicited employees Zupan and Davis to sign a petition; and Shift Supervisor Bergum unlawfully interrogated, proposed the idea of a petition to employee Preisner, and solicited employee Preisner to sign and to have other employees sign a petition. On these facts, the Board reasonably found that the Company's withdrawal of recognition was unlawful because it had directly participated in and assisted the decertification effort.

Indeed, as the judge explained (A. 42), it is clear that Preisner and McGinnis would not have acted on their own, absent the Company's unlawful actions. The

Company does not claim that employee Preisner asked a company official how to get rid to the Union. Nevertheless, the Company seized on its belief that Preisner opposed the Union and interrogated him about the Union, urged him to sign a petition, and urged him to solicit other employees to sign one. Then, once Preisner agreed to solicit signatures, the Company told certain employees that Preisner wanted to talk to them, whereupon Preisner solicited them to sign. The Company also instructed Preisner to avoid certain employees whom it believed were prounion.

Similarly, to get McGinnis in the fold, the Company held three meetings with him. It even went so far as to cancel his scheduled work at a remote location, so that company officials could meet with him about soliciting other employees and so that, if he were to agree to solicit signatures, he would be in a work location where he would have the opportunity to solicit other employees. Not content to direct employees McGinnis and Preisner to collect signatures, the Company thereafter directly solicited numerous other employees, including Bierma, Holdhusen, Zupan, Davis, David Dell, DeKnikker, and Callison.

In sum, the Company's unlawful conduct demonstrates that it did more "than merely voice its opposition to the [u]nion or provide requested information." *Texaco, Inc.*, 722 F.2d at 1231. The Company's direct role in the decertification process therefore tainted the petitions, and made the Company's withdrawal of

recognition based on the petitions unlawful. *Id.* at 1231, 1234-36 (withdrawal unlawful where employer assisted in the petition’s circulation and encouraged employees to sign); *accord Caterair Int’l*, 22 F.3d at 1120-21 (withdrawal unlawful where employer had “pervasive influence over the decertification petition” through its circulation of the petition and its encouragement of employees to sign); *V & S ProGalv, Inc.*, 168 F.3d at 276-77, 280-82 (withdrawal unlawful where employer “initiat[ed] and solicit[ed] the employee drafting and circulation” of the decertification petition); *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1433-34 (8th Cir. 1991) (withdrawal unlawful where employer “actively supported the decertification effort” and solicited signatures).

B. The Company’s Arguments Regarding the Proper Standard and Taint Are Without Merit

The Company argues (Br. 26-27, 35-38, 46) that the Board erred by failing to apply the Board’s “causation” test articulated in *Master Slack Corp.*, 271 NLRB 78 (1984)⁵ to determine whether the unfair labor practices here tainted the

⁵ These four factors of the test are: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency of the unfair labor practices to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Master Slack*, 271 NLRB at 84. *Accord Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000) (remanded on other grounds).

petitions. This argument is not before this Court and, in any event, misconstrues settled case law.

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” The Supreme Court has interpreted Section 10(e) as depriving the Court of jurisdiction over objections not presented to the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord Highland Hosp. Corp. v. NLRB*, 508 F.3d 28, 31 (D.C. Cir. 2007). Here, the Company’s exceptions make no reference to *Master Slack* or its “causation” test. Indeed, the Company disclaimed reliance on that test in the brief it submitted to the Board in support of its exceptions. (Brief in support of exception p. 7 n.6.)⁶ Accordingly, the Court lacks jurisdiction to consider the Company’s challenge to the Board not applying *Master Slack* here.

In any event, the settled law, as shown above (pp. 37-38), holds that an employer may not lawfully withdraw recognition where it directly participated in and unlawfully assisted the decertification effort. In contrast, the employer in *Master Slack* did not participate in or encourage the decertification effort, but, instead, committed other unfair labor practices that may have coerced employees

⁶ The Board has lodged with this Court the Company’s brief in support of its exceptions.

to disavow the union. Accordingly, *Master Slack* addresses the completely different question of whether an employer committed unfair labor practices that “contributed to the erosion of support for the union,” thereby “tainting the [subsequent] decertification petition.” *Vincent Indus. Plastics, Inc.*, 209 F.3d 727, 738 (2000) (remanded on other grounds). In contrast, here, the Board found that the petitions themselves were directly tainted by the Company’s actual, simultaneous, and unlawful participation in the decertification effort that produced the petitions. Thus, contrary to the Company’s contention (Br. 33-34), no causal connection need be inferred between any prior, unremedied unfair labor practices and the decertification petition, as is typical in a *Master Slack* case.

Aside from belatedly urging a *Master Slack* analysis, the Company also contends (Br. 26-27, 36, 42-43, 50-55) that the Board’s finding of taint is based largely on the Company’s promise of benefits to numerous employees through the Company’s creation and use of the comparison chart of union and nonunion benefits. That claim is simply not true. The Board did not find the comparison chart, by itself, unlawful. The Board (A. 26 n.2), however, did rely on the Company’s use of the chart only in connection with comments made by Senior Plant Manager Houston to employees Bierema and Holdhusen. The Company essentially ignores the fact that the Board’s finding of unlawful taint also relied on

its direct participation and assistance in the decertification drive involving seven other employees. And none of this assistance involved a promise of benefits.⁷

Because the Company's actions here went well beyond simply responding to employee questions about how to get rid of the Union and the benefits provided to nonunion employees (Br. 59), the Company's reliance (Br. 16, 21-22, 30, 38-42) on *Bridgestone/Firestone Inc.*, 335 NLRB 941 (2001); *Indiana Cabinet Co.* 275 NLRB 1209 (1985) (Br. 30); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972 (D.C. Cir. 1998) (Br. 22, 47-50); and *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 179-83 (4th Cir. 2003) (Br. 21, 31, 32, 59), is unavailing. In those cases, the employer simply informed employee(s) about how to decertify a union, but, did not, as here, furnish information and actively encourage, promote, or assist employees in repudiating their collective-bargaining representative.

Thus, in *Bridgestone/Firestone*, the employer merely suggested language for a petition to an employee whom it reasonably believed had asked how to decertify a union. 335 NLRB at 941-42. In that context, the Board found that suggesting the language was not unlawful or sufficient to taint the petition. *Id.* Likewise, in *Indiana Cabinet*, the employer merely told two employees, who it understood did

⁷ The Board found (A. 26 n.2) "it unnecessary to pass on the judge's findings concerning additional promises of benefits to employees, as any such findings would be cumulative and would not affect the remedy." The Board's finding hardly demonstrates, as the Company claims (Br. 36), that the judge was "biased" or "prejudiced" for having found those additional violations.

not want a union, that they could try to decertify the union. 275 NLRB at 1210. In that context, the employer's actions neither had the tendency to coerce nor taint the petition, because the employer did not attempt to learn whether the employees would start a petition, and specifically told them that it could not provide any assistance. *Id.*

In *Exxel/Atmos* and *Transpersonnel*, this Court and the Fourth Circuit, respectively, simply disagreed with the Board as to whether employer conduct had a tendency to coerce. But the employer's conduct in those cases did not remotely approach the Company's conduct here. In *Exxel/Atmos*, this Court found that an employer who simply informed all of its employees at a meeting that it would bargain with a union unless it was decertified, and told them the process to do so, but took no other action, did not engage in coercive conduct. 147 F.2d at 976. Similarly, in *Transpersonnel*, the Fourth Circuit found, in disagreement with the Board, that an employer who withdrew recognition based on a petition and other independent evidence of employee disaffection, did not engage in activity that tainted the petition when it simply answered an employee question as to what the employees could do if they did not want the union, but did not circulate the petition or even know that the employees were circulating the petition until it was given to the employer. 349 F.3d at 180-83, 186-89. Here, there is simply no independent

evidence that a majority of employees opposed the Union apart from the decertification petitions which were infected by the Company's taint.

The Company also argues (Br. 31, 43) that the Board's finding of taint ignores the fact that some of the employees whom it solicited were previously dissatisfied with the Union. As this Court has recognized, however, an employer's unlawful assistance in the decertification effort can taint a petition even where some employees initially requested the employer's aid in decertifying the union, and where those, as well as other employees, solicited signatures. *See Caterair Int'l*, 22 F.3d at 1116, 1120-21. *Accord Birmingham Publ'g*, 262 F.2d 2, 5-6 (5th Cir. 1959). *See also, American Linen Supply Co.*, 945 F.2d 1428, 1433-34 (petition tainted where employer solicited at least one employee). Therefore, there is also no merit to the Company's suggestion (Br. 33, 43) that the signatures collected by Preisner and McGinnis are not tainted. Indeed, as shown above (pp. 36-37), the judge reasonably found that Preisner and McGinnis would not have initiated petitions absent the Company's unlawful actions. Thereafter, Preisner and McGinnis obtained signatures through the Company's assistance and direction. Accordingly, any signatures obtained by Preisner and McGinnis are also tainted.

Likewise, contrary to the Company's claims (Br. 33, 43), it is irrelevant even if some of the other solicitors and signers were unaware of the Company's unlawful actions. In *Hearst Corp.*, 281 NLRB 764 (1986), *enforced mem.*, 837

F.2d 1088 (5th Cir. 1988), the employer presented testimony from a majority of the employees who had signed the decertification petition that they were unaware of the employer’s unlawful actions. The Board held that, given the foreseeable consequences of unlawful assistance and employee coercion on a decertification effort, “[a]n employer that has engaged in [such] unlawful conduct . . . cannot expect to take advantage of the chance occurrence that some of its employees may be unaware of its actions.” *Hearst*, 281 NLRB at 765. As the Board in *Hearst* further explained, the “[e]mployer did not need to conduct a widespread, antiunion campaign involving statements to every employee, or even to a majority of the employees, in that unit. Instead, it needed only to cultivate that dissatisfaction by adopting the rifle-like, rather than shotgun-like, approach of concentrating its efforts on a few of the employees—sufficient in number to ensure that employee dissatisfaction would continue to flourish.” *Id.* at 782. Thus, it is hardly a mitigating factor that the Company here chose to target the employees it thought were opposed to the Union.⁸

⁸ Placing the Company’s unlawful actions in context, it was hardly unreasonable, as the Company alleges (Br. 36), for the judge to suggest that the Company was quickly acting on its stated desire to decertify the Union, and that the Company had no interest in informing employees about lawful, but slower, ways, they could seek to decertify the Union.

D. If The Court Affirms the Board’s Finding that the Company Unlawfully Withdrew Recognition, the Board Is Entitled to Summary Enforcement of Its Finding that the Company Changed Terms and Conditions of Employment and Failed To Comply with the Union’s Information Request

In its opening brief, the Company has failed to challenge the Board’s finding that, if it unlawfully withdrew recognition from the Union, then it acted unlawfully by changing terms and conditions employment without bargaining with the Union, and by refusing to comply with Union’s information requests. If the Court affirms the Board’s finding that the Company unlawfully withdrew recognition from the Union, the Company’s failure to challenge in its opening brief either of those subsequent unfair labor practices, means that the Company has waived such a challenge before the Court. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990). Accordingly, the Board would be entitled to summary enforcement of those portions of its Order.

IV. SECTION 10(e) OF THE ACT PRECLUDES THE COURT FROM CONSIDERING THE COMPANY’S CHALLENGE TO THE BOARD’S AFFIRMATIVE BARGAINING ORDER, BECAUSE THE COMPANY FAILED TO RAISE THAT OBJECTION BEFORE THE BOARD

As noted above (pp. 38-39) Section 10(e) of the Act deprives the Court of jurisdiction over objections not presented to the Board. This Court does “not require[] that the ground for the exception be stated explicitly in the written exceptions filed with the Board, [but it does] require[], at a minimum, that the

ground for the exception be ‘evident by the context in which [the exception] is raised.’” *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 417 (D.C. Cir. 1996) (citations omitted). Under that standard, the Company is precluded from contesting the affirmative bargaining order issued by the Board.

Here, the Company merely filed generalized exceptions to the administrative law judge’s “Remedy in its entirety” (Exception No. 83), and to the judge’s “Order in its entirety” (Exception No. 85). In virtually identical situations, this Court has consistently held that a generalized exception that failed to mount specific challenges to the Board’s affirmative bargaining order was insufficient to preserve a court challenge to that order. *See Highland Hosp. Corp. v. NLRB*, 508 F.3d 28, 32-33 (D.C. Cir. 2007) (exception to “excessive breadth of the remedy”); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (exception that union not “entitled to any remedy”); *Prime Services, Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001) (exception to remedy and to order “in [their] entirety”); *Quazite v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996) (exception to the remedial order “in its entirety”). *See also Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998) (rejecting employer’s claim that Board failed to justify the affirmative bargaining order, where employer never made the argument to the Board). As the Court has explained, such a “categorical denial does not place the Board on notice that its particular choice of remedy is under attack, much less that its failure to

explain that choice is also the subject of a challenge.” *Quazite*, 87 F.3d at 497. Accordingly, the Court concluded there—as it should here—that the employer’s failure to specifically raise its claims before the Board precluded it from raising those claims to the Court. *Id.* at 498.

Moreover, the Board’s *sua sponte* inclusion of a comprehensive and reasoned explanation for issuing an affirmative bargaining order under the facts of a particular case, consistent with this Court’s jurisprudence, does not either excuse the Company’s failure to except to the order with particularity or permit this Court to review the merits of the order. *See, e.g. Highland Hosp.*, 508 F.3d at 33; *Scepter*, 280 F.3d at 1057. *See generally, Int’l Union of Elec., Radio, & Machine Workers Local 900 v. NLRB*, 727 F.2d 1184, 1192 (D.C. Cir. 1984) (“[T]he fact that the Board has or has not discussed an issue raises no necessary inferences with respect to [S]ection 10(e).”).

In any event, contrary to the Company’s assertion (Br. 60), the Board weighed the factors set forth in *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), and determined that the imposition of an affirmative bargaining order was an appropriate remedy on the facts of this case. (A. 27-28, 45.) The Board’s analysis more than adequately meets this Court’s test.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

July 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BENTONITE PERFORMANCE MINERALS, LLC)
A PRODUCT AND SERVICE LINE OF)
HALLIBURTON ENERGY SERVICES, INC.)
)
Petitioner/Cross-Respondent) Nos. 10-1265
) 10-1419
)
v.) Board Case No.
) 27-CA-20596
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)
INTERNATIONAL CHEMICAL WORKERS UNION)
COUNCIL/UNITED FOOD AND COMMERCIAL)
WORKERS UNION, CLC, LOCAL 353C)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,343 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
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Dated at Washington, DC
this 29th day of July 2011

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

Sec. 7. [§ 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. [§ 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];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(c) [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. [§ 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.

(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 proceeding, 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 cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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.

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INTERNATIONAL CHEMICAL WORKERS)	
UNION COUNCIL/UNITED FOOD AND)	
COMMERCIAL WORKERS UNION, CLC,)	
LOCAL 353C)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 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 foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 29th day of July, 2011