

Nos. 10-1398 & 10-1404

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

**WAYNEVIEW CARE CENTER AND
VICTORIA HEALTH CARE CENTER**

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

1199 SEIU UNITED HEALTHCARE WORKERS EAST

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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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WAYNEVIEW CARE CENTER AND)	
VICTORIA HEALTH CARE CENTER)	
)	Nos. 10-1398
Petitioners/Cross-Respondents)	10-1404
)	
v.)	Board Case No.
)	22-CA-26987
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
1199 SEIU UNITED HEALTHCARE)	
WORKERS EAST)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

Wayneview Care Center and Victoria Health Care Center (collectively “the Employer”) were the respondents before the National Labor Relations Board (“the Board”), and are the petitioners/cross-respondents in Case. Nos. 10-1398 and 10-1404. The Board is the respondent/cross-petitioner in these cases. The Board’s General Counsel was a party before the Board. The Charging party before the Board was 1199 SEIU Healthcare Workers East, formerly SEIU 1199 New Jersey Health Care Union (“the Union”).

B. Rulings Under Review

The ruling under review is a decision and order of the Board (Chairman Liebman and Members Becker and Hayes), in *Wayneview Care Center*, Case No. 22-CA-26987, et al., issued on November 18, 2010, and reported at 356 NLRB No. 30. This decision and order incorporates most of an earlier decision, on August 26, 2008, reported at 352 NLRB No. 1089, by two sitting members of the Board (then-Chairman Schaumber and Member Liebman) upholding an administrative law judge's findings that the Employer committed numerous violations of Section 8(a)(1),(3), and (5) of the Act.

C. Related Cases

After the Board's August 26, 2008 two-member panel decision, the Employer petitioned for review of the Board's Order in the D.C. Circuit. That case was previously before this Court as Case No. 08-1307. The Board subsequently filed a cross-application for enforcement. That case was previously before this Court as Case No. 08-1348. The D.C. Circuit put these cases in abeyance while the issue regarding the two-member panel's authority made its way to the Supreme Court for resolution.

The Court subsequently granted the Employer's petition for review, denied the Board's cross-application for enforcement, vacated the Board's original 2008 decision in light of the Supreme Court's decision in *New Process Steel L.P. v.*

NLRB, 130 S.Ct. 2635, 2640 (2010), and remanded the case for further proceedings before the Board.

On November 18, 2010, as discussed above, the Board (Chairman Liebman, and Members Becker and Hayes) issued the Decision and Order at issue here, adopting the Board's prior Decision and Order, and incorporating most of it by reference. *See* 356 NLRB No. 30 (2010).

The Employer filed the currently pending petition for review in the D.C. Circuit on November 23, 2010 (No. 10-1398). The Board filed the currently pending cross-application for enforcement on December 2, 2010. (No. 10-1404). The Union, who was the charging party before the Board, has intervened on the side of the Board.

Finally, Board Counsel are unaware of any related cases either pending in this Court or any other court.

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Dated at Washington, DC
this 1st day of September, 2011

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GLOSSARY

Act	National Labor Relations Act
Alcoff	Union Chief Negotiator, Larry Alcoff
Board	National Labor Relations Board
DelSordo	Victoria Administrator, Michael DelSordo
Board's Order	The Board's 2010 Decision and Order reported at <i>Wayneview Care Center</i> , 356 NLRB No. 30 (2010) which incorporates the Board's 2008 Decision and Order reported at <i>Wayneview Care Center</i> , 352 NLRB 1089 (2008)
Employer	Petitioners/Cross-Respondents, Victoria Health Care Center and Wayneview Care Center
Nolan	Wayneview Administrator, Margaret Nolan
Silva	Union President, Milly Silva
Tufariello	Vincent Tufariello, Employer's Chief Operating Officer
Union	Intervenor, 1199 SEIU United HealthCare Workers East
Victoria	The Petitioner/Cross-Respondent, Victoria Health Care Center
Wayneview	The Petitioner/Cross-Respondent, Wayneview Care Center

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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**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of Wayneview Care Center (“Wayneview”) and Victoria Health Care Center (“Victoria”) (collectively referred to as “the Employer”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order against the Employer.

The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”).

Previously, a two-member panel of the Board (then-Chairman Schaumber and Member Liebman) issued a Decision and Order in this case on August 26, 2008. *Wayneview Care Center*, 352 NLRB 1089 (2008) (“A.10-42”).¹ In its decision, the Board found that the Employer committed several violations of the Act. The Employer petitioned for review, and the Board filed a cross-application for enforcement, of the Board’s 2008 Decision and Order. This Court put both in abeyance.

On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, holding that under Section 3(b) of the Act (29 U.S.C. § 153(b)), a Board delegee group must maintain at least three members in order to exercise the delegated authority of the Board. *Id.* at 2640-42. Thereafter, this Court remanded this case for further proceedings consistent with the Supreme Court’s decision.

¹ “A” references are to the Joint Appendix. Because the Employer has reproduced four transcript pages in miniaturized form per single appendix page, references to the transcript of the unfair labor practice hearing are to the Appendix page, with the specific transcript page(s) at issue noted in the parentheses. References preceding a semicolon are to the Board’s findings; those following, to the supporting evidence.

On November 18, 2010, a three-member panel of the Board issued a Decision and Order, incorporating the Board's 2008 Decision and Order and adding some additional analysis. (A.43-45.) The Board's Decision and Order, reported at 356 NLRB No. 30, is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Employer filed its petition for review of the Board's Order on November 23, and the Board cross-applied for enforcement of its Order on December 2. The Court has jurisdiction over the Employer's petition and the Board's cross-application pursuant to Section 10(e) and (f) of the Act. Both were timely, as the Act imposes no time limit for such filings. Charging party before the Board, 1199 SEIU Healthcare Workers East, formerly SEIU 1199 New Jersey Health Care Union ("the Union"), has intervened on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order.
2. Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(5) and (1) of the Act by prematurely declaring impasse, threatening to implement, and then implementing new terms and conditions of employment prior to reaching a lawful impasse in collective-bargaining.
3. Whether substantial evidence supports the Board's finding that the Employer violated Section 8(a)(3), (5), and (1) of the Act by unlawfully locking out the employees at Victoria and Wayneview in the absence of a legitimate and substantial business justification, by failing to reinstate employees upon their unconditional offer to return to work, and by attempting to coerce the Union into accepting unilaterally implemented terms and conditions of employment.
4. Whether substantial evidence supports the Board's finding that Wayneview violated Section 8(a)(1) of the Act by unlawfully assisting employees in the solicitation of signatures to decertify the Union by promising employees a job and increased benefits if they signed.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

This unfair labor practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to a charge filed by the Union. (A.14.) Following an 11-day hearing, an administrative law judge issued a decision on July 26, 2007, finding that the Employer had violated Sections 8(a)(1),(3), and (5) of the Act (29 U.S.C. § 158(a)(1),(3), and (5)) by, among other things, prematurely declaring impasse and unlawfully locking out employees, failing to provide relevant bargaining information to the Union, threatening and disciplining employees for engaging in protected concerted activity, withdrawing benefits to employees because they engaged in a strike, making unlawful unilateral changes to the employees' terms and conditions of employment, and unlawfully assisting employees in trying to decertify their Union. (A.41.) The Employer filed limited exceptions to that decision. On August 26, 2008, a two-member panel of the Board issued a Decision and Order, affirming, with slight modifications, the judge's findings and conclusions regarding the unfair labor practices. (A.10-15.)

After the Supreme Court issued its decision in *New Process Steel*, this Court remanded the case for further proceedings consistent with the Supreme Court's decision. On November 18, 2010, a three-member panel of the Board issued the

Decision and Order currently before this Court, which incorporates by reference the Board's previous two-member panel decision. (A.43-45.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

Petitioners, Wayneview and Victoria, are two separate companies, sharing ownership, that operate nursing home facilities in New Jersey. (A.15; 303-304[(hh, 3) and (ff, 2)].) At both locations, the Union represents the certified nursing assistants, dietary employees, housekeeping, and laundry employees. Both Wayneview and Victoria were signatories to individual contracts with the Union due to expire on March 31, 2005. Briefly after the parties began negotiations for a successor contract, the parties agreed to extend the contract terms at each location to May 31, 2005. (A.16; 47(p.20),61-62(pp.93-94),255,256.)

B. Early Negotiations at Victoria and Wayneview

Around February 2005, the Union and the Employer began negotiations for successor contracts at Wayneview and Victoria. (A.16; 58(p.72), 199(p.884).) During the relevant period, the Employer's Chief Operating Officer, Vincent Tufariello, was the management spokesperson for the Employer at both facilities. Administrators from Wayneview and Victoria, Margaret Nolan and Michael DelSordo respectively, typically joined Tufariello on behalf of the Employer.

When negotiations began, Justin Foley, assistant to the Union's president, acted as chief spokesperson for the contract covering Wayneview. Odette Machado began as chief union spokesperson at Victoria, but after a few sessions, she transitioned completely out of the negotiations.² Foley became the Union's chief spokesperson covering both locations after negotiations were consolidated. (A.16; 47(p.21).) The Union brought employee representatives to the bargaining table, who assisted the chief negotiator and provided updates to employees back at the facilities. (A.16; 168(pp.671-72).)

During the initial bargaining sessions at both locations, in February and March 2005,³ the parties discussed the bargaining framework and trends in the healthcare industry, without exchanging any specific economic proposals. At both locations, the Union presented the first round of proposals in March. (A.16-17; 199(pp.885-86).) Milly Silva, the Union's president, set the Union's bargaining agenda with the help of Larry Alcott, a union employee who specialized in negotiations. (A.17; 76(pp.152-53).) The Union began by bargaining for improved rates of pay, health benefits, and pension funds; parity increases (increasing wages of the lowest paid employees); and decreasing the number of

² Thereafter, Odette Machado unsuccessfully ran for Union president, created a rival organization, and attempted to decertify and undermine the Union in various locations. (A.17-18; 210-12(pp.952-59).)

³ Unless otherwise stated, all dates refer to 2005.

“no-frills” employees (employees who had traditionally opted for higher wages in lieu of benefits, such as health insurance). (A.17; 302.)

Shortly after bargaining began, the parties agreed to consolidate negotiations for the two facilities. The first combined session took place on April 11, 2005, and Foley, the chief union negotiator, sought to incorporate similar language into each facility’s contract. For example, the Union withdrew its meals proposal at Victoria because there was no corresponding proposal at Wayneview. (A.19; 234(p.1103), 288.) Additionally, there were significant differences in paid time off (“PTO”) benefits between the two locations, and the Union sought to harmonize these provisions in each contract. There was a tentative agreement regarding PTO at Victoria, but the parties agreed to reopen the issue and put it back on the table. (A.19; 83(p.196),235(pp.1103-07),234(p.1104).)

On May 10, the Union presented its first full economic proposal. (A.19; 235(p.1107),302.) The Union proposed a three-year contract with the following terms: 8 paid holidays, 11 paid sick days and 3 paid personal days; a 4% increase in wages each year, and parity increases that would require new employees to receive minimum rates of \$10 to \$11 per hour depending on their classification; contributions to training, education, and legal funds; and an increase in the pension payments. Further, the Union presented proposals detailing two of its primary objectives: bringing the Employer into the Union’s health plan and reducing the

number of no-frills employees. The Union also proposed a decrease in work hours at Victoria, from 40 hours to 37.5 hours a week, while keeping the employees at their current rate of overall pay, which amounted to a separate 6% increase in wages. (A.19-20; 81(pp.188-89),302.)

Some of the language in its May 10 proposal was similar to language the Union had used in other contracts. One such contract, referred to as the “Tuchman agreement,” was a master agreement the Union had negotiated with other nursing home facilities around the state.⁴ (A.17,19; 110(pp.316-17),235-38(pp.1107-17), 241(p.1138),243-44(pp.1147-49).) Although parts of the Union’s initial proposal, such as the language and cost of the Union’s health plan, were similar to the Tuchman agreement, other parts did not mimic the Tuchman agreement. For instance, the wages proposed for Wayneview and Victoria were different, and the Union was demanding less PTO than in the Tuchman agreements. (A.20; 110(pp.316-17),235-38(pp.1107-17),243-44(pp.1147-49).)

After negotiations were consolidated, the parties discussed bargaining during at least two off-the-record meetings. (A.18-19; 80-81(pp.184-86),108-09(pp.309-14),219-20(pp.1024-26),229-30(pp.1069-73).) Alcott, who had become

⁴ The Tuchman master agreement had a “most favored nations” clause. The clause provided signatories with protection, by giving them the option to alter the agreement if the Union negotiated other contracts that placed them at an economic disadvantage. (A.20; 107(p.306), 313,314.)

increasingly involved, and Foley viewed the meetings as opportunities to determine where the other side was flexible. The Union freely admitted that it wanted the Employer to participate in the Union's health plan and to reduce the number of non-benefited employees. Tufariello left the meetings convinced that the Employer's health plan was less expensive than participating in the Union's plan. Throughout negotiations he never changed his mind. (A.21-22; 230(p.1073).) By the end of the second meeting, Alcott recognized that the Union was not going to get all the things it wanted. (A.19; 110(pp.316-17).)

On June 30, the parties held a formal bargaining session and discussed the Union's proposal regarding reduced hours at Victoria. The Employer was willing to agree to a shortened workweek, but it was unwilling to include a wage multiplier so that weekly wages would be unaffected. (A.20; 82(p. 191).) At this session, the Union also confronted the Employer about its advertisements seeking replacement workers that were running in the local paper. The Union told the Employer that it had no intention of calling any job action at that point, and asked the Employer why it was seeking replacement employees and offering significantly higher wages than it paid the current employees. The Employer was nonresponsive. (A.20; 81-82(pp.189-90),305.)

However, Wayneview's Administrator, Margaret Nolan, later explained that she and Tufariello believed it was necessary to offer the replacement employees

more money because the Employer was only seeking employees looking for temporary work. The Employer told potential replacement applicants that they “might never work at all” and that they could be replaced by the original employees “at any time.” (A.24; 200(pp.888-89).)

After the June 30 session, the Union assigned Foley to another job. Before he left, he drafted a transition memo describing the state of negotiations for Alcott. In the memo, Foley commented on the Union’s biggest hurdles: getting the Employer into the Union’s health plan and reducing the number of no-frills employees. (A.20-21; 63-64(pp.105-108),239(pp.1121-22).)

C. In August, the Parties Transition to More Substantive Economic Discussions, and the Union Makes Significant Movement Away from Its Original Demands

The parties met again on August 5. Alcott, now the Union’s chief negotiator, presented the Union’s modified economic package and attempted to clarify the open and settled issues. (A.21; 82-84(pp.192-99),108(pp.309-10),326-33.) Many of the Union’s demands were less costly to the Employer than its previous proposal. For instance, the wage demand provided five increases ranging down from 3% to 2% over the life of the contract; the pension proposal was reduced; the proposal reducing the workweek at Victoria was withdrawn; and the demand to contribute to the legal fund, contingent upon entering the Union’s health plan, also was withdrawn. The Union continued to propose that the Employer join

the Union's health plan, but with a later effective date. This reduced the overall cost of the total economic package over the term of the contract, as the Employer would only be contributing to the Union's health plan during the latter portion and not the entire term. (*Id.*) Additionally, the Union proposed a system to reduce the number of no-frills employees gradually over a period of time rather than all at once. Moreover, based on the employees' specific request, the Union altered its PTO proposal for Victoria. (*Id.*)

At the August 5 meeting, the Employer responded with an updated wage proposal (4% increase in the first year and 1.5% increases in the following years), a separate wage increase for no-frills employees, a PTO proposal for Victoria, and a training proposal. (A.21; 84(p.200),334,338.) At this meeting, the parties tentatively agreed to proposals related to pay for employees working in higher classifications, merit increases, direct deposit, transfers to higher grades, and a conceptual agreement on wages for no-frills employees. (A.21; 115(p.355),338.)

The parties met at the bargaining table again on August 9. The Union presented two proposals. The Union reduced its PTO demands, asking for fewer vacation, holiday, sick, and personal days and pushing the effective date of certain accruals later in the contract, thereby reducing the overall cost. (A.21; 84-85(pp.201-03),121(pp.368-70),336.) By the end of the session, the parties narrowed the PTO issue solely down to one of how many days the employees

would receive. (A.21; 85-86(pp.205-07),116-17(pp.353-54),122(pp.372-73).) The Union also proposed successorship language to address new information it had obtained about a potential sale of one of the facilities. When the Union requested further information from the Employer at the bargaining table about the rumored sale, the Employer responded saying it was none of the Union's business and that there was already some language in the contract. (A.21; 85(p.204),337.)

While not agreeing on everything, the parties continued to narrow the issues, and in a sidebar meeting on August 9, Tufariello told Alcott that the biggest stumbling blocks to an agreement were proposals on health coverage and no-frills employees. (A.21; 122(pp.372-73).) Tufariello claimed that many employees preferred the no-frills option, foregoing benefits for an extra \$1.50 in hourly wages, and given the choice, they would not change their status. Alcott described different scenarios, stating that if none of the no-frills employees elected to become benefited employees, as Tufariello suggested, health costs effectively were not at issue. Tufariello did not dispute this. However, he insisted that the Employer wanted to maintain its own health plan, and cost was less of a factor. (A.21; 85-86(pp.205-07).)

The parties met again on August 11, and the Employer presented counter-proposals. Following a detailed discussion of the proposals, the Union caucused to discuss its options. Thereafter, Alcott proposed that the parties move forward with

bargaining either by continuing as they had been, trying to narrow the differences on each issue, or by determining the total amount the Employer was willing to spend over the three years and seeing how the money could be distributed.

Tufariello rejected the latter approach and suggested they continue as before. In a sidebar meeting, Tufariello told Alcott that he thought they were at impasse.

Alcott responded that the parties were continuing to make progress and were not at impasse. The parties continued bargaining. Although there was some dispute over who suggested it, the parties decided to bring in mediators to assist with negotiations. (A.22; 87-88(pp.212-16),106(pp.301-02),119(p.364),127(p.391), 172(p.746-47).)

After the August 11 meeting, the Union decided to send the Employer notices describing potential job actions at both facilities. The Union had previously circulated a petition at each facility to assess the actions its members were willing to take. A majority of employees at each facility were willing to engage in some form of collective action, although the employees at Wayneview were not willing to strike. On August 12, the Union sent the Employer notices indicating the Union would “engage in a strike, picketing, or other concerted refusal to work beginning at 7:00 AM on Tuesday August 23, 2005.” (A.16,24; 48(pp.23-25),95(pp.243-44),306, 307.) Alcott described these as typical notices,

required by the Act,⁵ designed to broadly let an employer know of a potential job action by the employees. Before taking any action, the Union would put the decision to a membership vote. Regardless of the notices, the Union intended to continue bargaining. (A.24; 95(pp.243-44).)

D. The Employer Tells Employees They Cannot Wear Union Buttons and They Will Lose Their Benefits or Be Terminated if They Strike

Following the Union's 10-day notices, the Employer's director of housekeeping at Wayneview called all the housekeeping employees into a meeting and said that the employees could not wear union buttons and that they could not talk about the Union. He told the employees that if they went on strike, they would lose their benefits, sick time, and other things. (A.29-30; 130-31(pp.408-10),147(pp.517-18).) At Victoria, an assistant director of nursing told at least one employee that all the employees could be fired if they went on strike. (A30; 165(p.644).)

The Employer had demonstrated similar behavior at both facilities earlier in the summer. The Wayneview director of housekeeping prohibited employees from eating in the lunchroom, where union representatives typically met with employees, because the Employer did not want them talking to the Union. If employees disobeyed, managers told them they could be fired. (A.30; 131(p.412).)

⁵ In the healthcare industry, a union is required to give an employer a 10-day notice prior to commencing any job action under Section 8(g) of the Act (29 U.S.C. § 158(g)).

At the Victoria facility, the Employer posted a letter stating that “[a]nyone who calls out during a strike will be terminated.” (A.30; 153(pp.550-51),412.)

E. Marathon Negotiations on August 18th and 19th

On August 18, the parties met again for a long negotiating session that lasted until around 4 a.m. the next day. Tufariello, Nolan, DeSordo, and the Employer’s attorney, Dennis Alessi, negotiated on behalf of the Employer. Alcott, Silva, and the employee committees from each facility represented the Union. Two mediators also attended.

The Union presented two separate proposals, one for Wayneview and one for Victoria. (A.22; 89(pp.218-19),339-68,370-99.) Following a brief explanation, each side caucused in separate rooms. For the remainder of the session, the parties mainly communicated in sidebar meetings and through the mediators shuttling messages and proposals between the rooms. (A.22; 90-91(pp.223-25),95(p.241).)

Alcott and Silva put together a proposal, which they gave to the mediators to communicate to the Employer. The Union moved on many items. Instead of pegging wages to specific dates and percentages, the Union explained that it was flexible and that it merely sought to reach a certain level by the end of the agreement in March 2008. (A.22; 91(pp.226-27).) The Union sought to raise the minimum wage rates by the end of the contract. Importantly, the Union agreed to the Employer using its existing health plan or a similar plan, rather than the

Union's plan. (A.22; 91-92(pp.228-29).) The Union considered this a significant concession responding to Tufariello's insistence that the Employer control health benefits. (A.22; 49-50(pp.29-30),91-92(pp.225-29),308-09.) The Union walked away from its entire proposal on no-frills employees, essentially accepting the Employer's position on the condition that employees could change status from benefited to no-frills only during a certain window period. (A.22; 92(p.230),308-09.)

The Union moved on several other issues as well. The Union proposed that the implementation date of an extra sick day for Wayneview employees would be shifted to the end of the contract term, which was cheaper than its earlier proposal. The Union proposed that the Employer contribute 2% into the employees' pension, reducing its goal of 2.5%. (A.22; 92(pp.230-31),308-09.) And the Union sought a middle ground on the alliance, training, and legal funds; for example, it agreed to the Employer's proposal on the training fund for the first 30 months of the contract, asking that the Union proposal to be implemented in the last six months. (A.22; 92(pp.231-32),308-09.) While the Union may have originally sought to obtain benefits similar to its other contracts, by August 18, it had abandoned that goal. (A.22; 64(pp.107-08)127(p.391),243(p.1147),244(p.1149).)

After midnight on August 19, Alessi met with Alcott and Silva and the mediators explained the Employer's counter-proposal. (A.22; 50(pp.31-

32),170(p.712),310-11.) The Employer increased the minimum wage rates. The health proposal had significant changes, including a reduction in the employee costs and a beneficial provision later in the contract term. The new PTO proposal increased the allotment for Victoria employees. For no-frills employees, the Employer proposed an increase in the Victoria wage rate of \$1.50 per hour. Moreover, while the Employer did not accept the Union's exact opt-out window for no-frills employees, it agreed to create a window. Additionally, although the Employer did not agree to the Union's training fund proposal, it agreed to contribute to the alliance fund (a joint Union-Employer fund that advocates for state money for the nursing home industry) effective later in the contract. The Employer also agreed to maintain the status quo for contributions to the legal fund for Wayneview employees. (A.22-23; 93-94(pp.234-39),310-11.) Significantly, the Employer agreed that it would contribute 2% to the employees' pension fund at both locations. (A.22-23; 310-11.) Alcoff felt the parties were making significant progress and they were "in the ballpark" on many issues. (A.23; 93-94(pp.235-39).)

By the time the mediators had finished describing the Employer's proposals it was close to 3 a.m. on Friday, August 19. Alessi explained that, before going further, Tufariello needed to talk to the owners of the nursing homes, who were in Florida. Alcoff stated that he thought the parties could get to a contract and that he

would be available over the weekend to continue bargaining. Alcott gave Alessi and a mediator his cell phone number. Alessi said he would speak to Tufariello and communicate with Alcott through a mediator. (A.23; 95(pp.241-43),98(p.257).)

Alcott then briefed the employee committees on the Employer's proposals, telling them he saw a road map to a deal. (A.23; 95(pp.242-43).) Alcott was hoping the parties would make more progress, and he contacted the mediator over the weekend and on Monday morning, but the mediator had no updates. (A.23; 96(p.245).)

F. The Union Prepares for Job Actions

In the absence of any new information, on Monday August 22, the Union conducted meetings at each of the facilities. Alcott met with the Victoria employees, describing the status of negotiations, explaining the progress and noting the movement the parties were making. (A.24-25; 98(p.259),126(p.388).) He explained that employee action was needed to push the Employer further along. Ultimately, a majority of the Victoria employees voted, via secret ballot, in favor of a five-day strike. (A.24-25; 98-99(pp.259-60),155(p.560).)

Silva conducted a similar meeting at Wayneview. But the Wayneview employees were unwilling to strike. Instead, they voted to conduct a one-day informational picket during their non-working hours (before and after their shifts

and during their lunch breaks) and to report to work as usual. (A.24; 67(p.118),132(p.415).) This was consistent with an earlier conversation the Union's shop steward, Marjorie Barnett, had with Wayneview's Administrator, Margaret Nolan. Barnett and other stewards told Nolan, soon after the 10-day notice was sent, that the Wayneview employees did not want to strike. (A.24; 138(p.460).)

Shortly after the vote at Wayneview, Silva sent a letter to Tufariello, by mail and fax, explaining the limited one-day action planned at Wayneview. Silva stated the Wayneview employees would work their normal shifts. (A.25; 51(p.37),100(p.266),312.) That evening, the Employer's attorney, Alessi, faxed Silva a letter stating that "Wayneview hired temporary replacements" after receiving the 10-day notice. (A.25; 52(p.39),313.) Alessi stated that no unionized employees were on the schedule and therefore, there was "no work for your members at [Wayneview]" until further notice. (*Id.*)

G. The Employer's August 22 Proposal Is Submitted to the Union Without any Indication that Bargaining Had Concluded

That same day, August 22, the mediator contacted Alcott stating that he had a new proposal from the Employer. Without comment, the mediator said he would fax the proposal to Alcott; he received it that evening. (A.23; 99(p.263),400-02.)

The Employer's August 22 proposal included many significant regressive changes. (*Id.*) The Employer's most obvious reversal from its prior proposal was

an increase in employee contributions to the health plan. For example, on August 19, the Employer proposed that an employee electing family coverage pay \$150 per month in the first year of the contract and \$125 in the second and third years. (A.23; 310-11.) The Employer's August 22 proposal required the same employee to pay \$180 per month in each year of the contract – a \$30 increase in the first year and \$55 increase in the second and third years. (A.23; 400-02.) Similarly, the new proposal required employees electing husband/wife or parent/child coverage to pay \$35 more per month than the previous proposal. (A.23; *compare* 310-11(August 19 proposal) *with* 400-02(August 22 proposal).) The Employer also withdrew its prior offer to increase pension contributions to 2%, and its offer to increase the wages of employees electing “partial frills.” (A.23; 400-02.) Alcott was bewildered by the Employer's movement, but did not believe that bargaining was finished or that the parties were at impasse. The Employer gave no verbal or written indication that negotiations had concluded. Neither the proposal nor the fax cover sheet designated the proposal as the Employer's last or best offer. (A.23-24; 99-100(pp.261-64),400-02.)

H. The Employer Unilaterally Declares Impasse, Declines the Employees' Unconditional Offer to Return to Work, Locks Employees Out, and Declares It Will Implement Its August 22 Offer

On August 23, the Wayneview employees arrived before their start time to informational picket and then report to work for their normal shift. However, the

police were at Wayneview, and when the employees attempted to report for work, they were not allowed inside the building. (A.25; 100(p.267),133(p.419).) For the next two days, despite the lack of picketing or other job action, the police again turned away the employees reporting for work. One employee had just returned from vacation and insisted that she was scheduled to work on August 25.

Although she was initially welcomed back, the director of nursing told her that the Employer's lawyer would not allow union members to work and instructed her to leave. (A.25; 144-45(pp.501-04).)

The employees at Victoria were treated similarly when they attempted to return to work. After three days on strike, on August 26, Alcott sent a letter to the Employer stating the employees were unconditionally offering to return to work on Sunday, August 28. (A.26; 53(pp.44-45),101(pp.269-70),314.) Around 9:30 p.m. that evening, Alessi called Alcott and told him that the Union could not make an unconditional offer to return because the Employer made its "last best" offer. Alcott responded that the Employer had made no such offer. Alessi claimed that it was in the August 22 fax. Alcott replied that the fax was a proposal, and did not indicate that it was a "last best" offer. Alcott maintained the old contract remained in effect, and that the employees could return subject to those conditions. Alcott stated that a deal could be made, and the Union planned to return to the bargaining table. (A.26; 101-02(pp.271-72).)

Alessi declined the unconditional offer to return to work because the Union would not accept the August 22 offer. Nonetheless, accompanied by Alcott and Silva, the Victoria employees attempted to return to their jobs on August 28. (A.26; 54-55(pp.51-54),101-02(pp.271-75),156(pp.562-64),315.) When they arrived, they were greeted by the police and Victoria Administrator Michael DelSordo, who told the employees that they were not allowed into work if they were not on the schedule. He ordered employees to leave or risk arrest. Alcott asked how the employees could get on the schedule. DelSordo did not reply. Silva asked DelSordo if the employees were locked out. DelSordo discussed the matter with Tufariello and stated that the employees were locked out. (A.26; 54-55(pp.51-54),102(pp.274-75),156(pp.562-64).)

I. The Union Seeks Continued Bargaining and Returning the Employees to Work

On August 30, Alcott sent Alessi a letter stating that the parties were not at impasse, that numerous issues were open, and that the Union was preparing a comprehensive counter-proposal. Alcott also requested information from the Employer so that it could adequately respond to the Employer's August 22 offer. The Union proposed possible dates to continue negotiations, beginning the week of September 6. (A.27; 103-04(pp.277-82),403.) Despite the Union's efforts, the Employer responded that it would implement its last best offer (the August 22 proposal) at both facilities on September 6. (A.27; 55(pp.55-56),315-21,322-25.)

On September 1, Alcott wrote to Alessi informing him that when the Victoria employees reported to work on August 28, they were locked out. (A.27; 104(p.282),404.) Alcott wrote again on September 3, informing Alessi that the employees at both locations had offered to return to work before the Union was notified of the Employer's last best offer and when the terms of the expired contract were in effect. The employees at both facilities were prepared to return to work on Tuesday September 6, to the same jobs, under the terms of the expired contract. Alcott reiterated that the parties were not at impasse and the Union was prepared to offer a counterproposal. Alcott repeated his request for bargaining dates. (A.27; 408.)

On September 6, when the Wayneview employees arrived at work with Silva, two managers came out and asked why they were there. Silva explained that the employees wanted to return to work, and the managers went inside. Shortly thereafter, the police arrived. After consulting with Nolan, Wayneview's administrator, the police told Silva that the Union was not allowed on the premises. Silva left. The Employer then inconsistently, without apparent reason, allowed only some of the employees back into work. (A.28; 56(pp.58-60),78-79(pp.166-67),135(p.427).)

Some Wayneview employees who showed up to work on September 6 were told to leave. (A.28; 137(p.433).) For example, Marcia Cover, who was on the

Union's employee bargaining committee, reported for her 7 a.m. shift. She entered the facility and began working. After about an hour, she was taken to the office where her immediate supervisor and the director of nursing asked her if the Employer had contacted her. Cover replied that she had not received any letter or call, but she was returning to work. The supervisor and director responded: "We don't need you anymore." (A.28; 149-50(pp.526-28).)

Marjorie Barnett, a 16-year Wayneview employee and union shop steward, was initially told she could not work. Although she was told that she should have received a letter from the Employer, she had not. She confronted Nolan, who let her in the facility on September 6. The next day, Barnett received a letter dated August 31, but postmarked September 6, that stated employees should contact their supervisor if they wanted to return to work. (A.28; 135-37(pp.427-35),409,410.)

Although Barnett had not received a letter until September 7, she was allowed to work. When she started working, however, Nolan followed her and watched her as she performed her duties. Barnett asked Nolan if she was going to be harassed. (A.30; 136-37(pp.431-36).) Nolan said "no." (*Id.*) However, over the next few days, Wayneview called Barnett into two meetings, gave her four disciplinary write-ups, and suspended her for three days. The Union grieved the discipline, and eventually Wayneview rescinded the disciplines and repaid Barnett for her lost wages. (A.30.)

On September 6, the Victoria employees also attempted to return to work with mixed results. Some employees had been called by their supervisors and told they could return to work if they put their names on a list. (A.28-29; 134(pp.422-24),194-95(pp.863-64).) Some employees who were not called attempted to report to work. However, their time cards were not in their customary place so employees were unable to punch into work. (A.29; 156(p.565).) Union organizer Neal Gorfinkle was at the facility with some employees who had not received letters. Together they walked to Administrator DelSordo's office. DelSordo met the group and Gorfinkle stated the employees were there to work. DelSordo responded that employees should have notified their supervisors before the previous Friday to get on the schedule. Gorfinkle asked how the employees would know that, and DelSordo said they should have received a letter. DelSordo said that employees who were not on the schedule had to leave or he would call the police. He allowed employees to place their names on a list to be recalled as vacancies arose. (A.29; 156-57(pp.565-67).)

Employee Geraldine Morgan had worked as a benefited employee since March 2005 and was with Gorfinkle when the employees attempted to return to work. (A.29; 165-66(pp.644-48).) Despite her attempts to return to work, Morgan never received a letter and was never recalled on a full-time basis. Over a year

later, in October 2006, she was called by a manager and offered employment as an on-call, no-frills employee.

Another Victoria employee, Agathe Guillaume, was also denied work when she attempted to return to her job on September 6, 2005. Guillaume called the Employer on September 10 and asked for her job back. She was told it was too late. Guillaume was called back to work on January 23, 2006. When she returned, Guillaume learned that she lost the 27 PTO days that she had previously accumulated. (A.29; 173-75(pp.751-59),415,416,417.) At least ten Victoria employees, who were not immediately returned to work on September 6, were stripped of their PTO accruals when they returned to work after being locked out. (A.33; 161-64(pp.607-20).)

Guillaume was also denied her regular uniform allowance. (A.29; 175(p.759).) Under the prior collective bargaining agreement, Victoria employees were entitled to receive a \$100 uniform allowance twice each year, once in the spring and once in the fall. (A.29,33; 161(p.607).) Beginning in the fall of 2005, and continuing in the spring of 2006, Victoria failed to pay the uniform allowance to some employees involved in the strike. (A.29,33; 161(p.607),175(p.760).)

J. The Employer Assists in a Campaign to Decertify the Union

When employee Margaly Pierre returned from vacation and entered the Wayneview facility on August 25, Director of Nursing Nancy Ziccone asked her

whether she wanted to work with the Union or with the Employer. (A.31; 145(p.504).) Pierre replied that she was a single mother who needed a job. (A.31; 145(p.505).) Ziccone telephoned Unit Coordinator Simone Henderson and handed the phone to Pierre. (*Id.*) Henderson told Pierre that if she agreed to work without the Union, she would receive health benefits, paid vacation, and PTO days. Then Ziccone gave Pierre a decertification petition, which described voting out the Union and included signatures of various employees. Ziccone told Pierre if she wanted to work she needed to sign the paper; Pierre did. (A.31; 145-56(pp.505-09).)

Additionally, employees Marcia Cover and Marjorie Barnett witnessed other managers who were involved in collecting signatures for a decertification petition. Wayneview Staffing Coordinator Christopher Irizarry and Unit Coordinator Simone Henderson attended two meetings in nearby parking lots where locked-out employees signed the petitions in front of the supervisors thinking this would allow them back to work. (A.31; 134(p.423),148(p.523).) That same week, a decertification petition was filed with the Board. (A.31,36.)

K. The Employer Begins to Refuse the Union Access to the Facility

Shortly after the Employer presented its August 22 proposal, it unilaterally instituted new rules regarding union access and visitation. The Employer discontinued following provisions in the existing collective bargaining agreement

to allow the Union's representatives access to the facilities. In a letter dated September 27, Wayneview advised the Union that it would no longer permit access and visitation to the facility. (A.31-33; 139-41(pp.474-83),411.) Similarly, by letter dated September 28, Victoria advised the Union that it would no longer have regular access to that facility. (A.31-33; 154(pp.555-57),157-58(pp.568-70),413-14.)

L. The Union's Information Requests and Efforts to Continue Bargaining

Although the Employer provided the Union with certain information at the beginning of negotiations (A.16; 186-87(pp.831-32)), after the August 22 proposal, the Employer did not fully comply with the Union's information requests. The Employer's August 22 proposal significantly changed its health proposal, and the Union needed information to assess the offer. The Union sought information relating to the Employer's contract with its health plan provider. Because the August 22 proposal broadly linked its health proposal to the Employer's non-bargaining unit employees, the Union sought relevant information. (A.27; 103(p.277),403.) Although the Employer provided its health plan at the beginning of negotiations, the Employer either failed to provide complete or accurate information in response to the Union's other requests. (A.27,36; 405-06.)

The parties met again on September 19, 2005. (A.28; 105(p.289),106-07 (pp. 303-04).) One of the mediators was present. Alessi attended on behalf of the

Employer. Alcott, Silva, and the employee committees represented the Union. Alessi refused to meet with the Union's bargaining committee, but met with Alcott and Silva. During the discussion, Alessi conditioned an agreement on the terms of the August 22 proposal and withdrawal of the unfair labor practice charges the Union had filed with the Board.⁶ He further stated that unless the Union accepted the "last best" offer and withdrew its charges, the employees who had not been permitted to return to work would be permanently replaced. (A.28; 105(p.290).) When Alcott sought to clarify Alessi's position, Alessi said, "you understand English, you're a smart guy, this conversation is over." (A.28; 57(p.62), 105(p.290).) There were no more negotiations. (A.28; 56(p.61).)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, a three-member panel of the Board (Chairman Liebman and Members Becker and Hayes) found, in agreement with the administrative law judge, with slight modification, that the Employer engaged in numerous unfair labor practices. More specifically, Wayneview violated Section 8(a)(1), (3), and (5) of the Act by: suspending Marjorie Barnett; assisting employees in the solicitation of signatures on a petition to decertify the Union and promising employees reinstatement and increased benefits if they signed a

⁶ The charges included allegations that the Employer unlawfully instructed employees to remove union buttons, threats, and assistance with a decertification petition – charges ultimately found unlawful by the Board and currently before this Court.

decertification petition; threatening employees that they would be fired if they wore union buttons or spoke to the Union and instructing employees to remove union buttons; locking out its employees because they supported the Union and to coerce the Union into accepting unilaterally implemented terms and conditions of employment; threatening to and unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective bargaining negotiations; refusing to meet with the Union; denying union representatives access to the facility; and failing to provide information to the Union. (A.43-45.)

The Board also found that Victoria violated Section 8(a)(1), (3), and (5) of the Act by: threatening employees with discharge if they engaged in a lawful strike; withdrawing benefits and uniform allowances from employees because they participated in a lawful strike and supported the Union; threatening to and unilaterally implementing new terms and conditions of employment prior to reaching a lawful impasse in collective bargaining negotiations; refusing to meet with the Union; denying union representatives access to the facility; failing to provide information to the Union; conditioning agreement and reinstatement of employees on the Union's agreement to withdraw its pending charges against both Victoria and Wayneview; threatening to permanently replace unlawfully locked

out employees; and refusing to reinstate striking employees and locking out employees. (A.43-45.)

To remedy the violations at Wayneview, the Board's Order requires Wayneview to cease and desist from engaging in the above-described unfair labor practices. Affirmatively, the Board's Order requires Wayneview to: bargain, upon request, with the Union; remove from its files any reference to the unlawful suspension of Marjorie Barnett and the unlawful lockout of employees, and provide a specific notification to affected employees; make unit employees whole; upon the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after September 6, 2005; provide the Union with relevant information; and post a remedial notice. (A.11-12,43-45.)

To remedy the violations at Victoria, the Board's Order requires Victoria to cease and desist from engaging in the above-described unfair labor practices. Affirmatively, the Board's Order requires Victoria to: bargain, upon request, with the Union; offer Geraldine Morgan and any unit employees who remain locked out full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make unit employees whole; remove from its files any reference to the unlawful lockout and failure to reinstate and provide a specific notification to affected employees; upon the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or

after September 6, 2005; provide the Union with the relevant information it requested; and post a remedial notice. (A.11-12,43-45.)

SUMMARY OF ARGUMENT

This case involves numerous unfair labor practices committed by the Employer while it was negotiating with the Union over a new contract. After a series of negotiating sessions, in which the parties made significant progress while narrowing the issues, the Employer suddenly reversed course, declared impasse, and engaged in unlawful behavior designed to undermine the Union as bargaining representative.

First, the Employer does not contest that it committed several unfair labor practices during negotiations and after it declared impasse. The Employer now concedes that it threatened discharge if the employees engaged in a strike, wore union buttons, or talked to the Union. It no longer contests that Wayneview disciplined and suspended one employee for engaging in union activity. Additionally, the Employer does not challenge the Board's finding that it threatened that it would only allow employees to return to work after the lockout if the Union agreed to its August 22 proposal and withdrew its unfair labor practice charges. The Employer also waived any argument that it failed to provide the Union with information relevant to bargaining and refused to meet with the Union.

These uncontested violations illustrate the poisonous atmosphere the Union encountered when it attempted to negotiate new contracts.

Second, substantial evidence supports the Board's findings that the Employer violated the Act by unilaterally implementing its August 22 proposal, in the absence of a valid bargaining impasse. The credited facts simply do not support any other finding. As negotiations progressed, both parties moved significantly from their initial positions. Credited testimonial and documentary evidence shows that the Union made a number of concessions in an attempt to accommodate the Employer's stated goals. But following what appeared to be major progress by both sides at a marathon negotiating session, the Employer suddenly—and without explanation—made a regressive offer to the Union. Shortly thereafter, the Employer prematurely declared impasse and threatened the Union that it would unilaterally implement its offer if it refused to accept it. As the Union attempted to get information about the proposal and to meet with Employer to continue bargaining, the Employer instead fulfilled its threat and unilaterally implemented its offer. The Employer's arguments to the contrary are based on discredited testimony and, therefore, inapposite caselaw.

Third, substantial evidence supports the Board's finding that the Employer violated the Act by unlawfully locking out the employees at Victoria and Wayneview in the absence of a legitimate and substantial business justification.

The credited evidence demonstrates the Employer locked out the employees to coerce them into accepting the regressive August 22 proposal. The Employer's stated justification for the lockout, that is, to ensure continued patient care, is unsupported by the record: The replacement workers were hired only on a temporary basis, and the Union members made an unconditional offer to return to work. Furthermore, the Employer's haphazard mechanism for finally allowing the employees back to work resulted in an unlawful partial lockout.

Last, substantial evidence supports the Board's finding that Wayneview violated the Act by unlawfully assisting employees in an attempt to decertify the Union by soliciting signatures and promising employees jobs and increased benefits if they rid themselves of the Union. Indeed, the Employer's brief completely ignores the credited evidence on which the Board based this finding. The Act guarantees employees the right to self-organization and to engage in concerted activities for the purpose of collective bargaining, and prohibits employers from interfering with these rights. The Employer's repeated behavior throughout this case clearly illustrates its intention to disrupt these rights.

STANDARD OF REVIEW

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). The Board's findings of fact are "conclusive" under Section 10(e) of the Act if supported by substantial evidence in the record considered as a whole. 29 U.S.C. § 160(e). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; see also *Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion."). Thus, the Board's reasonable inferences between conflicting views may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*. See *Universal Camera*, 340 U.S. at 488; *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

Moreover, this Court gives great deference to an administrative law judge's credibility determinations, as adopted by the Board. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). Indeed, this Court defers to such credibility

determinations unless they are “hopelessly incredible,” “self-contradictory,” or “patently unreasonable.” *NLRB v. Capital Cleaning Contractors*, 147 F.3d 999, 1004 (D.C. Cir. 1998).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCHALLENGED PORTIONS OF ITS ORDER

Section 10(e) of the Act 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.” 29 U.S.C. § 160(e). An employer that does not file exceptions with the Board to an administrative law judge’s findings is thus jurisdictionally barred from obtaining appellate review of those findings. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord W&M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

The Employer did not contest many of the administrative law judge’s findings before the Board. (A.10 n.2.) Specifically, the Employer did not contest that Wayneview violated the Act by telling employees to remove union buttons and by (a) threatening to discharge employees for striking, wearing union buttons, or talking to the Union, and (b) suspending employee Marjorie Barnett. The Employer equally did not contest that Victoria violated Act by (a) threatening to discharge employees for striking and threatening to permanently replace locked-out employees; (b) conditioning a contract and employees’ return to work on the Union’s agreeing to withdraw pending unfair labor practice charges; and

(c) unilaterally withdrawing benefits from returning strikers because they engaged in a strike. Lastly, the Employer did not contest that both Wayneview and Victoria violated the Act by denying the Union access to the facilities. As the Employer waived its right to contest these violations, the Board is entitled to summary enforcement of these portions of its Order.

Additionally, consistent with Rule 28 of the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived. Fed. R. App. P. 28(a)(9)(A). This Court has repeatedly refused to consider passing references to a vague and unsupported narrative, and it has consistently ruled that an opening brief “must contain” citations to the authorities and record that support the petitioner’s arguments. *See Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (citing cases). When an employer does not challenge in its initial brief the Board’s findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the Board is entitled to summary enforcement. *See New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *Public Service Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n.3 (10th Cir. 2003); *see also Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (passing reference to an issue, without discussion and supporting legal authority, constitutes a waiver).

The Board found that the Employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information relevant to bargaining and by refusing to meet with the Union following the August 22 proposal. (A.11-12,28,36,38.) The Employer did not address these violations in its statement of issues, and it equally failed to contest the findings in its argument section of its brief. The Employer merely made vague references (Br. 12, 13, 24, 30) to the information requests, much of which related to requests that were made during the initial stages of bargaining and not relevant to the violations. And the Employer made no argument whatsoever contesting the findings that it refused to meet with the Union following the August 22 proposal. The Employer has waived its right to later raise these issues, and the Board is entitled to summary enforcement on these portions of its Order. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (merely referring to matter in the opening brief is insufficient) (quoting *Board of Regents of University of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)).

Moreover, courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, “lending their aroma to the context in which the [remaining] issues are considered.” *See NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982). *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc).

See also NLRB v. Pace Manor Lines, Inc., 703 F.2d 28, 29 (2d Cir. 1983) (“It is against the background [of uncontested violations] that we consider the Board’s remaining findings.”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY PREMATURELY DECLARING IMPASSE, THREATENING TO IMPLEMENT, AND IMPLEMENTING NEW TERMS AND CONDITIONS OF EMPLOYMENT PRIOR TO REACHING A LAWFUL IMPASSE

A. Introduction

The Board’s determination that the parties were not at impasse, and therefore the Employer could not lawfully implement its final offer, is grounded in detailed credibility findings. The judge credited union representatives Foley and Alcoff who had “more precise recollection of the negotiations.” (A.24.) In contrast, Employer representative Tufariello had a “very vague recollection of the specific offers” and could not explain figures and notations made during negotiations. (*Id.*) The conclusion that the parties continued to narrow the issues and made progress during the August 18 marathon negotiating session before the Employer inexplicably submitted its August 22 regressive proposal and declared impasse, is based on this credited and documentary evidence.

In contrast, the Employer’s arguments before this Court that the parties were at impasse rely almost exclusively on unsubstantiated and discredited evidence. The foundation of the Employer’s argument—that the Union engaged in bad faith

bargaining—is grounded on the expressly discredited testimony of Odette Machado and Josephine Ortiz. The judge found that Machado was not a reliable witness, because she “often contradicted herself,” did not recall dates and bargaining issues, and “was not truthful” about her role as president of a rival union and her efforts to supplant the Union. (A.18.) Likewise, the judge found that Ortiz was an unreliable witness whose assertions about negotiations were “contrary to the documentary evidence.” (*Id.*) Because the Employer’s arguments are based on discredited evidence, they provide no basis for its claim that the parties were at impasse.

B. Applicable Principles

A stalemate in negotiations can be deemed a good-faith impasse only when “the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.” *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citation omitted). As this Court has stated, impasse is defined as the deadlock reached by bargaining parties “after good-faith negotiations have exhausted the prospects of concluding an agreement,” and there is no realistic prospect that continuing the discussion will be productive. *See Teamsters Local 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986) (citations omitted).

The burden of establishing impasse lies with the party asserting it. *See, for example, PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced sub nom. Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987). The Board, with this Court’s approval, considers a number of factors in determining whether impasse exists. These include the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations” *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff’d. sub nom, American Fed’n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In sum, the evidence must show that both parties believed that they were at the end of their bargaining rope. *See Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1177 (5th Cir. 1982).

The determination of whether an impasse exists is a question of fact and “because of the subjectivity involved in deciding when an impasse has occurred, its existence is an inquiry ‘particularly amenable to the experience of the Board as a fact-finder.’” *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (quoting *Richmond Recording*, 836 F.2d at 293). As this Court has repeatedly emphasized, “in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or

better suited to the expert experience of a board which deals constantly with such problems.” *Dallas General Drivers Local 745 v. NLRB*, 355 F.2d 842, 844-45 (D.C. Cir. 1966). *See Sign and Pictorial Local 1175 v. NLRB*, 419 F.2d 726, 734 (D.C. Cir. 1969) (the degree of cooperation a party must show is a matter for the Board’s expertise).

It is firmly established that an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing new terms and conditions of employment proposed during contract negotiations, in the absence of a bona fide impasse in those negotiations.⁷ *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)); *United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 886 (D.C. Cir. 1997); *American Fed’n of Television and Radio Artists v. NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968). This is so because such an action both “minimizes the influence of organized bargaining” and emphasizes to the employees “that there is no necessity for a collective bargaining agent.” *May Dep’t Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). Thus, unilateral action absent a valid impasse is proscribed because “it

⁷ Section 8(a)(5) makes it unlawful for an employer “to refuse to bargain collectively with the representatives of his employees.” A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See, e.g., Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.” *Katz*, 369 U.S. at 743.

C. The Parties Were Not at Impasse Because They Were Continuing to Make Significant Movement

Throughout the course of negotiations, the Employer and Union continued to narrow the issues at the bargaining table. Ample evidence supports the Board’s finding that when the Employer presented its August 22 proposal, there was still room to negotiate and that the parties were expecting further negotiations. (A.35.) *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (parties’ perception regarding the progress of the negotiations is of central importance to the Board’s impasse inquiry) (citing *Saunders House v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983)); *see also Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982).

While the parties had come to agreement on a number of non-economic items earlier in negotiations, real movement on economic items began to occur in early August 2005. The Union proposed delaying the Employer’s implementation of many Union proposals, such as wage increases and when the Employer would join the Union’s health plan, thereby reducing the cost to the Employer. The Union reduced its pension proposal and its demands for more PTO time. It also withdrew its proposal for a shorter workweek. (A.21; 82-84(pp.192-99),84-85(pp.201-03),108(pp.309-10),121(pp.368-70),326-33,336.)

During the August 18-19 marathon session, the parties continued to narrow the issues that divided them. Contrary to the Employer's contentions (Br. 36-39), this session clearly illustrated the Union's flexibility, as the Union retreated from its primary goals. The Union agreed to abandon its insistence on phasing out no-frills employees and using the Union's health plan. (A.22; 49-50(pp.29-30),91-92(pp.225-29),308-09.) These changes accommodated the Employer's stated goals. (A.21,34-35; 122(pp.372-73).)

After reviewing the Employer's proposals, Alcott told Alessi and the mediator that he thought that there were positive developments and that on many issues the parties were close to a deal. (A.22-23; 93-94(pp.234-39),310-11.) As the late night session came to a close, the Union expressed its desire to continue meeting over the weekend. (A.23; 96(p.245),98(p.257).) Alessi said Tufariello would be contacting the owners over the weekend to see what other movement could be made, and he agreed to communicate with the Union via the mediator. Neither of the parties mentioned impasse, that negotiations were coming to an end, or that they were submitting their last, best, or final offers.

The Employer's contention (Br. 50) that the Union's movement during the August sessions was a sham, and that the facts are similar to cases like *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), is utterly without merit. In *TruServ*, the union conceded that the parties were at impasse on a number of key

economic and non-economic issues, including holidays, workweek, and workday proposals. *Id.* at 1111-12. In finding impasse, the Court in *TruServ* relied on the lack of evidence indicating substantive negotiations would be fruitful. *Id.* Here, in direct contrast, the judge found “the parties’ contemporaneous understanding of the negotiations was that further bargaining would be fruitful.” (A.35.) Moreover, the Union never conceded that the parties were at impasse on any issue, and offered concessions on issues the Employer stated were the biggest stumbling blocks to reaching a deal: the Employer’s health plan and the unfettered use of “no-frills” employees. This evidence also refutes the Employer’s assertions (Br. 37-40) that the case is like *J.D. Lunsford Plumbing*, 684 F.2d 1033 (D.C. Cir. 1982), and *Richmond Electrical*, 348 NLRB 1001 (2006). Unlike those cases, the credited evidence here showed that the Union was not bound by any pre-set guidelines or the terms of a separate master agreement. While the Union continued to try and reduce the employee cost for health coverage, its proposals continued to make significant movement away from its original demands and closer to the Employer’s position.

The Employer’s next proposal on August 22, unfortunately, took steps backwards. (A.35.) Without any explanation, the Employer withdrew its pension offer and increased employee contributions for health coverage. (A.23; 99(p.263), 400-02.) This regressive proposal at such a critical stage in negotiations, prior to

any strike action, suggests the Employer was attempting to frustrate the bargaining process. *See, for example, NLRB v. Hardesty Co.*, 308 F.3d 859, 868 (8th Cir. 2002) (company's regressive and largely unexplained bargaining behavior indicated bad faith bargaining); *see also Houston County Elec. Co-op., Inc.*, 285 NLRB 1213, 1215 (1987).

Furthermore, there is no record support for the Employer's assertion that the August 22 offer was submitted to the Union as the "last best" offer. The Union did not learn of this label until August 26, when Alcott contacted Alessi, who declared the August 22 proposal was the "last best" offer. Alcott responded by saying the Union planned to return to the bargaining table because "there [was] a deal to be had." (A.26,35; 126(p.387).) Instead of explaining the offer or agreeing to meet, Alessi threatened to permanently replace all the employees if the Union pushed any further. The Employer's threats to coerce the Union into accepting a regressive proposal – without any willingness to discuss it – undermine any argument that the parties were at impasse. *See Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (where parties had an inadequate opportunity to fully explore and negotiate the company's position, impasse did not exist).

Again, the facts here undermine the Employer's flawed comparison (Br. 50) to *TruServ*. In *TruServ*, the company signaled to the union that it was reaching the

limits of its bargaining and that it would soon be delivering its last, best, and final offer. And when the parties met, the company thoroughly explained its offer (which did not include any regressive proposals) to the union. *TruServ*, 254 F.3d at 1111-12, 1116. In *TruServ*, the union essentially rejected the offer by stating there was nothing in the final offer that could be recommended to the employees. *Id.*

Here, the Union's response to the Employer that the parties were not at impasse was not, as the Employer contends (Br. 3, 50), merely a self-serving position, it was a demonstrated reality. As the Union stated, it was preparing a counter-offer to the Employer's August 22 proposal, and it suggested possible bargaining dates. To fully assess the Employer's proposals, the Union also requested information about them. (A.27; 103-04(pp.277-82),403.) The Union's willingness to continue bargaining is amply demonstrated by its chief negotiator's statements to the Employer and subsequent letters.

Instead of discussing the proposals with the Union, the Employer threatened to implement its offer and then unilaterally implemented it on September 6. As the Union was still willing to negotiate, the parties had continued to move from their original positions, and they were not at impasse, the Employer violated the Act by implementing the terms of its August 22 proposal. *Litton*, 501 U.S. at 198 (violation to unilaterally implement new terms and conditions proposed during

contract negotiations, in the absence of a bona fide impasse); *Beverly Health & Rehab. Servs., Inc. v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003) (same).

D. The Employer's Arguments That It Was Justified in Declaring Impasse Are Founded on Unreliable and Discredited Evidence

The majority of the Employer's arguments are linked to discredited testimony. The Employer claims (Br. 33-39, 51) that bargaining was futile because the Union inflexibly adhered to the most-favored-nations clause in the Tuchman agreement and that the Union was engaged in bad faith bargaining. But the Employer relies primarily on the testimony of Odette Machado and Josephine Ortiz to support its erroneous conclusions. As discussed above, the judge discredited Machado and Ortiz's testimony finding them to be "unreliable" witnesses. (A.18.) After Machado's unsuccessful bid to become the Union's president, in an admittedly ugly election, she created a rival organization and sought to decertify the Union in various locations. (A.17-18; 210-12(pp.952-59).) Machado admitted to a history of trying to undermine the Union. Moreover, Machado "often contradicted herself" and was unreliable on "dates, issues in the bargaining and other subjects on which she was questioned." (A.18.) Likewise, the judge discredited Ortiz, whose testimony was not corroborated by any Union or Employer witnesses and was "contradicted by the documentary evidence." (A.18,27.)

The Employer's claims (Br. 22-23, 45-46) that the Union was being unreasonable in its health proposal and forcing the parties to deadlock are unsupported. First, during the August 18-19 marathon session, the Union retreated from its original health proposal and agreed to give the Employer control over the health plans. The evidence clearly demonstrates, as the Board found (A.10), that "the most-favored-nations clause was not a bar to further movement by the Union." Second, the Employer's claim that the Union's proposal was exorbitant is without record support. The Board discredited the Employer's testimony related to total cost of the health plan because the Employer's witnesses were unable to explain the basis for such claims. (A.23.) Furthermore, assuming the truth of the Employer's chief negotiator's statements that employees would prefer to be no-frills, earning an extra hourly rate in lieu of benefits such as health insurance, the Union's health proposal would have negligible cost as few of the employees would elect coverage. (A.34; 116-17(pp.353-54).) Third, a comparison between the Union's and Employer's health proposals (A.308-09 and 310-11) during the August 18-19 marathon session shows that the parties were significantly narrowing the gap between their positions. While the parties had been arguing for different plans with different cost structures, they were now in the "same ballpark," as described by the Union's negotiator. (A.23; 93-94(pp.235-39).)

In addition to citing to discredited testimony, the Employer refers to other facts to support its claim that the Union acted in bad faith. For example, the Employer claims (Br. 12, 42) that the Union's 2004 informational picketing, before the parties even began negotiations, somehow demonstrates bad faith bargaining. But the Employer never filed formal charges against the Union that it had engaged in unlawful picketing or that it was bargaining in bad faith. Indeed, there is no evidence this protected concerted activity was even connected to the negotiations. In fact, the Union's president explained the 2004 picketing highlighted a separate issue. (A.58-60(pp.73-79).)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE EMPLOYER VIOLATED SECTION 8(a)(3), (5), AND (1) OF THE ACT BY UNLAWFULLY LOCKING OUT ITS EMPLOYEES, BY FAILING TO REINSTATE EMPLOYEES UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK, AND BY ATTEMPTING TO COERCE THE UNION INTO ACCEPTING UNILATERALLY IMPLEMENTED TERMS AND CONDITIONS OF EMPLOYMENT

A. Introduction

In limited instances, an employer can justifiably lock out its employees. Here, following protected concerted activity by employees (a one-day picket during non-work hours by Wayneview employees and a five-day strike by Victoria employees), the employees gave unconditional offers to return to work. The Employer here claims that it had to replace the employees because of the Union's advance notice of pending collective action. While the Employer may have been

required by the state to have a contingency plan, it offered no justifiable reason for refusing to allow its employees back to work when they unconditionally offered to return. The Board found the Employer locked out its employees to coerce the Union into accepting the terms of the unlawfully implemented regressive August 22 proposal. The Employer failed to demonstrate a legitimate business justification for its action. And, even after the Employer finally decided to end its lockout, it continued to unlawfully deny many of the employees who had participated in the collective action their right to go back to work..

B. Applicable Principles

When an employer locks out its employees for the purpose of evading its duty to negotiate with the employees' bargaining representative, the employer violates Section 8(a)(5) and (1) of the Act.⁸ *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085, 1088 (D.C. Cir. 1991) (citing *American Cyanamid Co. v. NLRB*, 592 F.2d 356, 364 (7th Cir. 1979)) (finding Section 8(a)(5) violation when employer's "lockout was to compel acceptance of . . . its unfair labor practice"); *see also Hopwood Retinning Co.*, 4 NLRB 922, 940 (1938), *enforced*, 98 F.2d 97 (2d Cir. 1938). By locking out and replacing its employees, an employer may also violate Section 8(a)(3) of the Act. *See Teamsters Local Union No. 639*, 924 F.2d at 1085, *citing American Ship Bldg. Co. v. NLRB*, 380 U.S. 300,

⁸ The 8(a)(1) violations are derivative of the other violations. *See* n.7, *supra*.

318 (1965). In the case of a “bargaining” lockout, however, the lockout, to be permissible, must be for the “sole purpose of bringing economic pressure to bear in support of [the employer’s] legitimate bargaining position.” *American Ship Bldg.*, 380 U.S. at 318.

C. The Employer’s Lockout Was Designed To Coerce Employees To Accept Its August 22 Proposal, and the Employer Failed to Provide a Legitimate and Substantial Business Justification for Refusing to Reinstatement the Employees Upon Their Unconditional Offer to Return

As the Board found, the Employer did not claim that the lockout was designed to pursue a “legitimate bargaining position.” Instead, the Board found that the lockout was designed to coerce the Union into accepting an unlawful, unilaterally implemented final offer, and was not supported by a legitimate business justification such as ensured patient care. *See Royal Motor Sales*, 329 NLRB 760, 777 n.51 (1999) (company violated the Act when its lockout was motivated by its unlawful plan of coercing union into accepting its pre-impasse final offer), *enforced*, 2 Fed. App’x. 1 (D.C. Cir. 2001).

As discussed above, the Employer unlawfully unilaterally implemented its August 22 proposal because the parties were not at impasse. Thereafter, on August 23, the Employer locked out employees at both facilities. Its unlawful intent was proven by credited testimony that Alessi told the Union that if it continued to push bargaining, the Employer would permanently replace the employees. (A.26.) During a later exchange, he told Alcoff and Silva that the Union had to accept the

so-called “last best” offer and withdraw its unfair labor practice charges or those employees who had not been permitted to return to work would be permanently replaced. (A.28; 105(p.290).) Because the lockout was to coerce the employees and the Union into accepting the August 22 regressive offer, it violated the Act.

Moreover, the Board found that the lockout was unlawful because the Employer failed to demonstrate that in either facility, the lockout was reasonably necessary to ensure continued patient care. (A.38,40,43-44.) The judge expressly discredited the testimony of Wayneview administrator Nolan who claimed temporary replacements were hired with a two-week commitment. The judge found her testimony was “unreliable and shifting.” Further, contrary to the claimed two-week verbal commitment, Nolan also testified that the replacement workers were offered more money per hour was because it was difficult to get workers to agree to be on standby. The Employer told the temporary employees that they might not work at all and that they could be replaced by the employees at any time. (A.24,37; 200(pp.888-89).) At Victoria, the Employer provided no evidence that it had made any commitment to the replacement workers.

Moreover, the Employer had no additional business justification for keeping the union members out of work. When the Union notified the Employer at Wayneview of the employees’ intent to only perform a one-day informational picket during their non-work time, the Employer should have allowed them to

work on August 23 as normally scheduled. Indeed, the Union's shop stewards at Wayneview had previously told Nolan, after the Union's 10-day notices, that the employees would not go on strike, further supporting the Board's finding that the Employer replaced the employees for reasons other than ensuring continued patient care. (A.24; 138(p.460).) Likewise, when the Union made its unconditional offer on August 26 to return to work at Victoria on August 28, the Employer had no legitimate or substantial business justification to turn the employees away. There was no evidence that the Union was planning additional action at either facility or would not adhere to its announced plans.

Once the Wayneview and Victoria employees unconditionally informed the Employer that they were prepared to work, the Employer was required to immediately reinstate them and discharge all the temporary replacements. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967). *Accord Harvey Mfg.*, 309 NLRB 465, 466-69 (1992) (by failing to show a mutual understanding between the employer and the replacements that the nature of their employment is permanent, the company failed to satisfy its burden with respect to a legitimate and substantial business justification, and economic strikers were entitled to immediate reinstatement). In the absence of a legitimate business justification, the Employer violated Section 8(a)(3) and (1) of the Act by failing to reinstate the employees. *See Hansen Bros. Enterps.*, 279 NLRB 741, 741-42 (1986).

The Employer's suggestion (Br. 55) that the Union's offer to return to work was conditional is contrary to the record evidence. On August 26, the Union sent the Employer a letter clearly stating the employees' unconditional offer to return to work. (A.26; 53(pp.44-45),101(pp.269-70),314.) Unlike the cases cited by the Employer (Br. 55), *e.g.*, *Pan American Grain Co.*, 343 NLRB 318, 319 (2004), the Union here did not condition the offer on terms the parties had allegedly agreed to in negotiations. It offered to return to work under the same conditions the employees had previously been working under. This was the *status quo* which the Employer was required to maintain until a lawful impasse was declared. Indeed, when the Union made the unconditional offer to return to work, it was unaware the Employer even intended its August 22 proposal to be its "last best" offer. And upon learning this claim from the Employer's attorney, the Union correctly asserted the negotiations were not at impasse.

D. After the Employer Began Allowing Employees Back to Work, It Continued to Refuse to Reinststate Some Employees, Which Resulted in an Unlawful Partial Lockout

Moreover, the Board determined that the manner in which the Employer allowed the employees to return to work following the lockout was unlawful. Around September 6, 2005, when the Employer began allowing employees to return to work, it only allowed some employees to return. The process for returning employees was unclear and inconsistent. The Employer claims (Br. 57-

58) that, at Victoria for instance, the employees were sent letters and told to contact their supervisors if they wanted to return. But employees from both facilities credibly testified that many employees either received delayed letters or no letters at all. (A.28-29; 137(p.433),149-50(pp.526-28),156-57(pp.565-67).)

The Employer produced no credible evidence to refute this. Some employees, who were told they were not on the list, were returned to work while others were told to go home. The Employer provided no justification for this inconsistent procedure. Thus, the lockouts, while ending for some employees, continued for others. The failure to return these employees amounted to an unlawful partial lockout. *See Field Bridge Associates*, 306 NLRB 322, 334 (1992) (incumbent on the employer to offer reinstatement to all the strikers who had offered to return to work unless there was a justifiable impediment to so doing so), *enforced*, 982 F.2d 845 (2d Cir. 1993).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT WAYNEVIEW VIOLATED SECTION 8(a)(1) OF THE ACT BY UNLAWFULLY ASSISTING EMPLOYEES IN THE SOLICITATION OF SIGNATURES TO DECERTIFY THE UNION

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join or assist labor organizations, ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ...” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for employers to

“interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.”

It has long been recognized that an employer generally “must maintain a neutral position” with regard to its employees’ efforts to decertify their bargaining representative, *Texaco, Inc. v. NLRB*, 722 F.2d 1226, 1236 (5th Cir. 1984), and must not go “beyond mere passive observance,” *NLRB v. Birmingham Pub’g Co.*, 262 F.2d 2, 8 (5th Cir. 1958). An employer therefore violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by instigating a petition to decertify a union, soliciting signatures for the petition, or lending more than ministerial aid to a decertification effort. *See NLRB v. Maywood Plant of Grede Plastics*, 628 F.2d 1, 3 (D.C. Cir. 1980) (violation of Section 8(a)(1) of the Act where supervisor solicited signatures for a decertification petition in conjunction with promising better economic benefits if the Union were voted out). *See also Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 164 (1st Cir. 2005); *V&S Progalve v. NLRB*, 168 F.3d 270, 276-77 (6th Cir. 1999); *NLRB v. American Linen Supply Co.*, 945 F.2d 1428, 1433 (8th Cir. 1991); *NLRB v. United Union of Roofers, Local 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990).

Here, the record fully supports the Board’s finding that the Employer unlawfully encouraged and assisted in circulating a decertification petition. Employee Margaly Pierre credibly testified the Director of Nursing, Nancy

Zicccone, asked her whether she wanted to work with the Union or with the Employer. (A.31; 145(p.504).) Pierre responded that she was a single mother who needed work. She was told that if she turned her back on the Union she would receive health benefits, paid vacation, and PTO days. Zicccone gave Pierre a decertification petition and told her if she wanted to work she needed to sign the paper. (A.31; 145-46(pp.505-09).) The Employer presented no contradictory evidence.

In challenging the Board's Order, the Employer utterly fails to address the credited testimony that forms the basis for its finding that the Employer assisted employees with a decertification petition. Instead, the Employer claims (Br. 58-61) that it merely provided ministerial aid to the decertification effort, focusing on the behavior of Christopher Irizarry. However, the Board specifically found it unnecessary to rely on Irizarry's conduct to support its findings. (A.10 n.3.) Contrary to the cases it cites, the Employer did not merely provide ministerial aid, for instance, by providing an employee the Board's website or phone number to find further information on how to decertify a union. Rather, the Employer's representative gave employee Pierre the choice of working or supporting the Union and then had her sign the petition to keep working. This is without question more than ministerial aid; it is coercion at its worst.

CONCLUSION

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

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September 2011

ADDENDUM

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STATUTES

Sec. 3(b) of the Act (29 U.S.C. § 153(b)) provides in relevant part:

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Sec. 7 of the Act (29 U.S.C. § 157) provides:

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 of 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 158(a)(3) of this title.

Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

(5) to refuse to bargain collectively with the representatives of his employees

Sec. 8(g) of the Act (29 U.S.C. § 158(g)) provides:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Sec. 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) 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) 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]. . . . 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) 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 a 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. 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.

FEDERAL RULES

Sec. 28(a)(9)(A) of the Federal Rules of Appellate Procedure provides in relevant part:

(a) The appellant's brief must contain,

(9)(A) the argument, which must contain [the] appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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VICTORIA HEALTH CARE CENTER)
)
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)
v.) Board Case No.
) 22-CA-26987
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
119 SEIU UNITED HEALTHCARE)
WORKERS EAST)
)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,298 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 1st day of September 2011

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)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 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
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