ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1053 & 11-1097

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRESH & EASY NEIGHTBORHOOD MARKET, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS OF AMERICA INTERNATIONAL UNION, REGION 8---WESTERN

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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and Amici: Fresh & Easy Neighborhood Market, Inc., the petitioner/cross-respondent herein, was respondent in the case before the Board. The Board is the respondent/cross-petitioner herein, and the Board's General Counsel was a party in the case before the Board. United Food and Commercial Workers of America International Union, Region 8—Western is the intervenor herein, and was the charging party before the Board.

(B) Ruling Under Review: This case involves a petition for review and a cross-application for enforcement of the Board's decision and Order issued on January 31, 2011, and reported at 356 NLRB No. 90.

(C) Related Cases: This case has not previously been before this Court or any other court. Board counsel are unaware of any related cases pending before, or about to be presented before, this Court or any other court.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

This case is before the Court on a petition from Fresh & Easy Neighborhood Market Inc. ("the Company") to review the National Labor Relations Board's Order issued against the Company. The Board had subject matter

jurisdiction over this case under Section 10(a) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 151, 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order issued on January 31, 2011 and is reported at 356 NLRB No. 90.[1] It is a final order with respect to all parties under Section 10(e) of the Act. 29 U.S.C. § 160(e).

On February 18, 2011, the Company filed a petition for review of the Board's Order, and, on March 30, 2011, the Board filed a cross-application for enforcement. The United Food and Commercial Workers of America International Union, Region 8—Western ("the Union"), charging party before the Board, has intervened on the Board's behalf. Both the petition for review and the cross-application for enforcement were timely, as the Act imposes no time limit for such filings. This Court has jurisdiction over the petition and cross-application pursuant to Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are found in the Addendum to this brief.

[1] "A." references are to the joint appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by orally promulgating and maintaining a rule prohibiting employees from talking about the Union with each other while working, but not prohibiting them from talking about any other subjects.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by unlawfully prohibiting employees from discussing their discipline with their coworkers, while allowing discussion of other subjects.

3. Whether substantial evidence supports the Board's finding that the Company invited an employee to quit in response to her protected concerted activities, in violation of Section 8(a)(1) of the Act.

STATEMENT OF THE CASE

Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act in three ways. First, the complaint alleged that the Company unlawfully orally promulgated a rule that prohibited employees from talking about the Union while working, but allowed discussions of any other subject. Second, the complaint alleged that the Company unlawfully orally promulgated a rule that prohibited

employees from discussing discipline while working on the sales floor or while on the clock, while allowing other discussions to continue. Third, the complaint alleged that the Company coerced employees by inviting them to quit their employment in response to protected concerted activity.

Following a hearing, the administrative law judge issued a decision and recommended order finding the Company had violated Section 8(a)(1) of the Act as alleged. The Company and the Union filed exceptions with the Board. After considering the exceptions, the Board issued a Decision and Order, adopting the judge's recommended order, as modified.

Thereafter, the Union filed a motion for reconsideration objecting to, and seeking clarification of, the Board's remedial order. The Company opposed the Union's motion. On March 22, 2011, the Board granted the Union's motion, imposing the Board's standard remedial language, and, citing *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372, at *2 (Oct. 22, 2010), instructing that any issues regarding electronic notice be resolved in compliance proceedings.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Spring Valley Facility; The Company Permits Employees to Converse Over a Wide Range of Topics as Long as They Continue Working

The Company is owned by Tesco, a foreign corporation based in the United Kingdom, and operates retail supermarkets. (A. 2; 34.) The events at issue took place in the Company's Spring Valley, California store. The store opened to the public on February 6, 2008. (A. 2; 34.)

James Tillinghast was the store manager at the Spring Valley facility at all relevant times. (A. 3; 36.) Team leads report to the store manager and supervise customer associates. (A. 1; 35.) Sylvia Soliz was a team lead. (A. 3; 108.) Two to four customer associates work during each of the three shifts. (A. 2; 35.) Although the store is entirely self-checkout, customer associates assist shoppers in checking out their purchases, approve purchases of alcoholic beverages, gather shopping carts, and stock items on shelves and displays, among other duties. (A. 2; 34.) Employees regularly talk to each other while working about a wide range of topics, from family to sports to health. There is no rule prohibiting these conversations. As long as the employees continue to work while talking, the team leads and store manager allow them. (A. 3; 37-38.)

The Company maintains a lawful rule prohibiting "[u]nauthorized solicitation or distribution on Company property while on Company time." (A. 3; 161, 272.) Employees use their individual badges to clock in and out for their workday and all breaks, and therefore are not "on the clock" during their meal and rest breaks. (A. 3; 64-65.)[2]

B. In Response to Shannon Hardin's Announced Support for the Union, Store Manager James Tillinghast Prohibits Hardin from Talking about the Union with Other Employees While Working

Employee Shannon Hardin has worked as a customer associate at the Spring Valley store since January 2008. (A. 3; 33.) At some point thereafter, a union organizing campaign began at the store. Hardin supported the Union and signed an authorization card. (A. 3; 39.) On June 11, 2009[3] in the break room, Hardin told store manager Tillinghast that she supported the Union. (A. 3; 39.) Tillinghast replied that it had been obvious for quite some time. Hardin said that she would be talking with other employees about the Union and that she would continue working as she talked. (A. 3; 39-40.) Tillinghast told Hardin that she was not allowed to talk about the Union while she was on the clock or on the sales floor. (A. 3; 40.) When Hardin asked if the rule was Tillinghast's or if it had come from corporate, Tillinghast replied that the rule came from corporate. (A. 3; 40.) After Hardin said

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[2] Before the Board, no party asserted that the solicitation rule was at issue here.
[3] All dates herein occur in 2009 unless otherwise noted.

the rule was wrong, Tillinghast offered to have someone from corporate contact her the next day. (A. 3; 40.) Later that day, Hardin sent Tillinghast an email message referencing their conversation. (A. 3; 140.) Hardin reiterated her support for the Union, her intent to talk to other employees while she was working about workplace issues, and her belief that "a union will help solve those issues." (A. 3; 140.)

The next day, June 12, Hardin was summoned to the break room where the Company's corporate human relations manager, Paula Agwu, was waiting to talk to her. (A. 3; 40-42.) Agwu said that she understood that Hardin supported the Union, assured Hardin that there would be no retaliation, and told Hardin that she would not be treated any differently than she had been treated before. (A. 3; 41.) However, Agwu stated that Hardin was not allowed to solicit while she was on the clock or on the sales floor. (A. 3; 41-42.) When Hardin interrupted and asked Agwu to define "solicit," Agwu appeared upset by the question and said that Hardin could not hand out paperwork or brochures while she was on the clock or on the sales floor. (A. 3; 42.) Hardin replied that she understood that, but that she would be discussing the Union with other employees. (A. 3; 42.) Agwu answered "Well, okay," but that something would have to be done if other employees reported her harassing them. (A. 3; 42.) Hardin said that she was not there to "harass anybody" or "break anybody's arm." (A. 3; 42.) Agwu replied that she

was glad that they had cleared that up. (A. 3; 42.) Agwu did not correct Tillinghast's statement that Hardin was not allowed to discuss the Union on the sales floor or while she was on the clock. (A. 3; 42.) At the end of the meeting, Agwu asked Hardin why she supported the Union. (A. 3; 42.) Hardin explained that she had suffered retaliation several times after she complained to corporate, in contravention of the Company's claimed "open door" policy. (A. 3; 42.)

C. Team Lead Sylvia Soliz Disciplines Hardin for an Incident That Occurred the Day Before and Later Invites Hardin to Quit; Tillinghast Again Forbids Hardin from Talking about the Union with her Coworkers on the Sales Floor

On July 31, team lead Soliz witnessed Hardin yelling across the store to ask another employee to bring in shopping carts. (A. 3-4; 43, 120-21.) The next day, Soliz orally reprimanded Hardin, telling her that yelling in the store was not professional. (A. 3; 120.) Hardin responded that the warning was ridiculous because the store did not have an intercom system and the bell did little good as no one responded to it. (A. 3-4; 43-44.) Hardin noted that she had been yelling across the store to employees to get carts or bags for customers for a year and a half. (A. 3; 43.) Moreover, Hardin pointed out that no one had reprimanded her when the incident occurred. (A. 4; 43.)

The following day, August 2, Hardin spoke to an off-duty coworker about Soliz's warning near the checkout area. (A. 4; 46.) As they were talking, Soliz approached and overheard at least part of the conversation. (A. 4; 48.) Soliz said:

"Well, I know if I had a manager that didn't like me, I would take my check and walk out." (A. 4; 48.) Later that day, after returning from a meal break, Hardin encountered Soliz alone, stocking items in an aisle. (A. 4; 49-50.) Hardin told Soliz that with the economy and the job market as they were she could not afford to just walk out—she had bills to pay, and she could not just leave and hope she would find another job. (A. 4; 50.) Soliz agreed, but added, "[w]ell, if you get fired, at least you would get unemployment." (A. 4; 50.) Hardin countered that she did not think that it was always true, but that it depended on the reason one was fired. (A. 4; 50.) Soliz again said that she thought that Hardin would qualify for unemployment compensation benefits. (A. 4; 50.)

On August 3, Hardin told Tillinghast that she was unhappy about the warning and that she believed it was the Company's first step in trying to get rid of her because she supported the Union; Tillinghast denied this. (A. 4; 50-51.) He then repeated his June 11 statement that Hardin was not allowed to talk about the Union on the sales floor or while on the clock. (A. 4; 51.) Hardin acknowledged that she could not hand out paperwork or pamphlets or ask other employees to sign an authorization card, but she maintained that she could discuss the Union while working. (A. 4; 51.) In response to Tillinghast's warning against harassing other employees, Hardin assured him that she was not there to harass anyone but would answer questions about the Union and discuss it with employees. (A. 4; 52.)

D. Tillinghast Gives Hardin a Written Warning, and Then Forbids the Crying Hardin from Discussing her Discipline with Other Employees; Tillinghast Repeats the Prohibition against Employees Talking to Each Other about the Union at an October 2009 "Team Huddle"

On September 26, Tillinghast gave Hardin a performance improvement plan, step 1. The Company based this initial written warning on an argument Hardin had on the sales floor with another employee on September 17 that had been witnessed by other employees and customers. (A. 4; 53, 149.) Tillinghast read the warning to Hardin, who said that the warning was ridiculous, exaggerated, and not even close to what had happened. (A. 4; 53.) Tillinghast responded that he had viewed the surveillance camera tape and he was not playing games anymore. (A. 4; 54.) In tears, Hardin signed the warning under protest and indicated on the form that the allegations were not true. (A. 4; 53-54.) Tillinghast told Hardin that he had instructed the team leaders to immediately document it if she discussed the warning with other employees while she was on the clock or on the sales floor, and to send her home if she did. (A. 4; 54.)

In mid-October, in a morning "team huddle" led by Tillinghast and attended by employee Deborah Kalilimonku, Tillinghast told employees that he had received word from corporate that union representatives were not going to be

allowed in the store. He reiterated that employees were not allowed to talk about the Union in the store or with each other. (A. 3; 201.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, in agreement with the judge, found the Company violated Section 8(a)(1) in three separate instances. The Board (Members Becker, Pearce, and Hayes), like the judge, found that the Company unlawfully orally promulgated and maintained a rule that prohibited employees from talking about the Union to each other while working but did not prohibit employees from talking about other subjects and prohibited employees from talking about their discipline with other employees while working, but did not prohibit employees from talking about other subjects. Additionally, the Board (Members Becker and Pearce; Member Hayes, dissenting) found that the Company unlawfully invited employees to quit their employment in response to the employees' protected, concerted activities. (A. 1.) The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. (A. 2, 6.) The Board modified the judge's recommended Order to affirmatively require the Company to post copies of a remedial notice both at its Spring Valley, California facility and, in accord with *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372 (Oct. 22,

2010), to distribute the same notice electronically if the Company customarily communicates with its employees by such means. (A. 1-2, A. 1 n.3.)

SUMMARY OF ARGUMENT

The Board reasonably found three violations of Section 8(a)(1) of the Act in three statements made by company managers to employees. It is undisputed that prior to the Union's organizing efforts, employees were allowed to discuss any subject while working, as long as they continued to do their work. However, after Shannon Hardin announced her support for the Union, store manager Tillinghast forbade Hardin from talking about the Union on the sales floor, or while on the clock, in violation of Section 8(a)(1). Thereafter, the Company again violated the Act when Tillinghast forbade Hardin from discussing with other employees the disciplinary action that the Company had taken against her. Recognizing the importance of employee communication about union organizing at the workplace, the Board, with this Court's approval, has determined that prohibiting employees from discussing unionization or discipline on work time while allowing discussion of other subjects unrelated to work, is unlawful. The Company's defenses simply misunderstand the objective nature of the Board's inquiry when analyzing violations of Section 8(a)(1). Contrary to the Company's repeated claims, Hardin's subjective reaction to the rules is irrelevant. The Company's other

arguments ignore established precedent and mischaracterize the credited record evidence.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) when team lead Soliz invited Hardin and another employee to quit their employment rather than continue to engage in protected concerted activity. It is well established that when an employer invites an employee to quit in response to the employees' protected concerted activity, the statement is coercive because it conveys to employees that engaging in concerted protected activity and continued employment are incompatible. The Company's arguments to the contrary mischaracterize the credited evidence and applicable law.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). 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."). If there is substantial evidence to support the Board's decision, the Court must not disturb that decision, even though it might "have

made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488.

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

The Board reasonably found three violations of Section 8(a)(1) of the Act, each of which is supported by substantial evidence. The Board found that the Company promulgated two discriminatory rules that explicitly prohibited protected Section 7 activity. Additionally, consistent with established precedent, the Board found the Company unlawfully invited employees to resign their employment in response to the employees' protected concerted activity.

The Company's defenses to each of these violations share the same flaws. First, the Company incorrectly asserts that oral statements cannot be rules and thus, cannot constitute a violation of Section 8(a)(1). Second, the Company repeatedly and erroneously substitutes a subjective standard, rather than the established objective standard, for evaluating whether the Company's oral rules and invitation

to quit reasonably tend to coerce employees in violation of the Act. Third, despite its claim that it is not contesting the facts as found by the Board (Br. 4 n.2, 6 n.3, 13), the Company relies on discredited testimony and misstates the credited facts to support its arguments. As shown below, none of the Company's defenses have merit.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ORALLY PROMULGATING AND MAINTAINING A RULE PROHIBITING EMPLOYEES FROM TALKING ABOUT THE UNION WHILE WORKING, BUT NOT PROHIBITING TALKING ABOUT ANY OTHER SUBJECT

A. Applicable Principles Regarding Section 8(a)(1)

Section 7 of the Act (29 U.S.C. § 157) gives 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 Section 7 rights by making it an "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."

An employer's rule violates Section 8(a)(1) if "employees would reasonably construe the language to prohibit Section 7 activity." *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). The test of whether the employer's conduct violates the Act is whether it has a reasonable tendency to coerce; actual coercion

is not necessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991). In evaluating the coercive tendency of an employer's statement, the Board and a reviewing court must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Furthermore, the scope of the inquiry must encompass the employer's entire course of conduct. Remarks "that may not appear coercive when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances." *NLRB v. Kaiser Agric. Chems.*, 473 F.2d 374, 381 (5th Cir. 1973).

B. The Company Promulgated and Maintained a Discriminatory Rule Prohibiting Talk about the Union while Allowing Talk about Other Subjects

The Board reasonably found that the Company promulgated a discriminatory no-talking-about-the-Union rule. It is undisputed that prior to Hardin's announcement of her support for the Union, the Company had permitted employees to talk about anything they wanted while they worked, as long as they continued working. (A. 3; 37-38.) However, as soon as Hardin told Manager Tillinghast that she supported the Union, Tillinghast prohibited her from talking about the Union while she was working. (A. 3; 40.)

The Board, with Court approval, has consistently found that an employer violates Section 8(a)(1) by promulgating a discriminatory rule that prohibits employees from talking about a union during work time, but permitting discussions of other subjects unrelated to work. *See ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001), *enforcing* 331 NLRB 4 (2000); *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 755, 759 (D.C. Cir. 2000) ("*Frazier*"), *enforcing* 328 NLRB 717, 717, 725-26 (1999); *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 307, 311 (7th Cir. 1981). *See also Capitol EMI Music, Inc.*, 311 NLRB 997, 1006 (1993) (no-talking rule unlawful given timing of its promulgation during union campaign, and employer's failure to show that past practice of permitting talking had become problematic), *enforced mem.*, 23 F.3d 399 (4th Cir. 1994).

The credited evidence demonstrates that, on June 11, following Hardin's revelation that she was a union supporter, Tillinghast told her that she was not allowed to talk about the Union while she was on the clock or on the sales floor—a rule that he claimed came from the Company's corporate headquarters. (A. 3; 40.) In her meeting with Hardin the next day, corporate human relations manager Paula Agwu did not correct Tillinghast's statement that Hardin was not allowed to discuss the Union on the sales floor or while she was on the clock. (A. 1 n.2, 3; 40.) And, on August 3, Tillinghast again told Hardin that she was not allowed to talk about the Union while she was working. (A. 4; 51.)

This case parallels *Teledyne Advanced Materials*, 332 NLRB 539, 539 (2000), where the Board reiterated its well-established rule that an employer violates Section 8(a)(1) when, as here, "employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in specific response to the employees' activities in regard to the union organizational campaign." Further, contrary to the Company's claim (Br. 20-21 n.6), the other cases on which the Board relied (A. 5) involved similar fact patterns where the employer orally implemented a discriminatory non-talking rule that the Board found unlawful. *See Orval Kent Food*, 278 NLRB 402, 407 (1986) (rule forbidding employees to discuss unionization while permitting them to discuss other subjects); *Liberty House Nursing Homes*, 245 NLRB 1194, 1194 (1979) (employer permitted discussion on other topics in areas where discussion about the union was forbidden); *Olympic Med. Corp.*, 236 NLRB 1117, 1122 (1978) (employees not permitted to discuss the union while working, but allowed to discuss other subjects), *enforced* 608 F.2d 762 (9th Cir. 1979). Thus, the Board's finding is fully consistent with established precedent in view of the credited facts.

C. The Company's Arguments Regarding the No-Union-Talk Rule Lacks Record and Case Law Support

The Company counters the Board's finding that the "no union talk" rule here is unlawful by claiming a panoply of defenses including: (1) Hardin was not, in

fact, coerced and no one was "harmed" (Br. 9); (2) Tillinghast's repeated oral statements were "isolated" (Br. 20); and (3) oral statements cannot constitute a "rule" (Br. 16). There is simply no record or legal support for these arguments, all of which suggest a fundamental misunderstanding of Section 8(a)(1) of the Act.

As discussed above, the test for determining a violation of Section 8(a)(1) is whether the employer's conduct reasonably tends to coerce or interfere with an employee's exercise of their Section 7 rights. *ITT Indus.*, 251 F.3d at 1006; *Frazier*, 213 F.3d at 755, 759; *Atlas Metal Parts*, 660 F.2d 304 at 307, 311. This test is not a subjective test, and therefore, contrary to the Company's repeated arguments, it is immaterial whether Hardin was, in fact, coerced.

Moreover, contrary to the Company's claim (Br. 20), the credited evidence demonstrates that Tillinghast's statements were neither "isolated" nor "innocuous." Rather, on two separate occasions, Tillinghast directly forbade Hardin from talking about the Union on the sales floor. (A. 1 n.2, 3, 4; 40, 50-51.) And employee Deborah Kalilimonku credibly testified that, in mid-October, she attended a "team huddle" led by Tillinghast where he again told employees that they were not allowed to talk about the Union in the store or with each other. (A. 3; 201.) As the Board reasonably found (A. 5), these credited facts establish not an isolated statement, but the repeated invocation of the same unlawful rule. This repetition of an unlawful prohibition materially distinguishes the instant case from the cases the

Company proffers, which involve "isolated" and "innocuous" statements. *See, e.g.*, *Farmbest, Inc.*, 154 NLRB 1421, 1421 (1965) (no unlawful no-distribution rule found where union employer's plant manager remarked to employee who distributed copies of a rival union's official magazine, "Well, I hope you don't bring any more of these in because we have a contract with the local union here"). *But see BJ's Wholesale Club*, 297 NLRB 611, 612 (1990) (refusing to dismiss a complaint allegation that the employer unlawfully imposed a rule forbidding solicitation during working time simply because it was a "single isolated occasion").

There is no merit to the Company's similar arguments (Br. 15-16) that no one was "harmed" by Tillinghast's comments, and without evidence of enforcement, there can be no unfair labor practice. Rather, as this Court has stated, "'mere maintenance' of a rule likely to chill section 7 activity may constitute an unfair labor practice even 'absent evidence of enforcement.'" *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, No. 98-1625, 1999 WL 1215578, at *1 (D.C. Cir. Nov. 26, 1999)). *See also NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 539 (6th Cir. 2000) ("*Main Street*") (oral rule prohibiting discussion of wages was unlawful even though unenforced).

The cases on which the Company relies (Br. 15-16) do not involve discriminatory prohibition of union discussions, but instead concern employer-imposed handbook rules that do not explicitly restrict rights protected by Section 7 of the Act. *Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212 (D.C. Cir. 1996) ("the rule in question in no way precludes employees from conferring with or seeking support from family and friends with respect to matters directly pertaining to the employees' terms and conditions of employment"); *Fiesta Hotel Corp. d/b/a Palms Hotel and Casino*, 344 NLRB 1363, 1367 (2005) ("rule 10 does not explicitly restrict Section 7 activities"); *Safeway, Inc*., 338 NLRB 525, 527 (2002) (rule requiring various categories of information be kept confidential does not implicate any Section 7 right); *K-Mart*, 330 NLRB 263, 263 (1999) (confidentiality provision "does not implicate employee Section 7 rights"). Thus, this Court's decision in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 29 (D.C. Cir. 2001) is distinguishable because the rule there was an "across the board" policy and there was no suggestion that the rule "discriminate[d] against unionization efforts or other protected activity") (internal quotation marks omitted). Therefore, none of the cases cited by the Company requires a different result here.

The Company's claim (Br. 16) that Tillinghast's "oral statements are not 'rules'" is simply wrong. Courts and the Board have not hesitated to find

violations where, as here, individual supervisors orally promulgate a discriminatory rule that prohibits employees from talking about the union or their wages. *Frazier*, 213 F.3d at 755, 759; *Main Street*, 218 F.3d at 539. The Company's argument "would permit employers routinely to evade the dictates of the [Act] by accomplishing through an oral rule what cannot be done through a written one." *Main Street*, 218 F.3d at 538.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEES FROM DISCUSSING THEIR DISCIPLINE WITH COWORKERS, WHILE ALLOWING DISCUSSIONS OF OTHER SUBJECTS

A. The Company Unlawfully Restrained Employees' Section 7 Activity by Forbidding Employees from Discussing Discipline

Substantial evidence supports the Board's finding (A. 1 n.2) that the Company violated Section 8(a)(1) of the Act when, as the Company now admits (Br. 17), Tillinghast forbade Hardin from discussing her discipline with other employees while working.[4] The Act protects employees' right to communicate about their terms and conditions of employment, including discipline. As the Board has found, "[i]t is important that employees be permitted to communicate the circumstances of their discipline to their coworkers so that their colleagues are aware of the nature of discipline being imposed, how they might avoid such

[4] Before the judge, Tillinghast denied telling Hardin that she could not discuss her discipline but claimed that he simply asked Hardin not to carry her emotion onto the floor. (A 4; 150.)

discipline, and matters which could be raised in their own defense." *Verizon Wireless*, 349 NLRB 640, 658 (2007). Thus, a rule limiting employees' ability to discuss an employer's handling of discipline interferes with the employees' right to confer about terms and conditions of employment. *See id.* at 657 (rule limiting discussion of discipline among employees unlawful); *Westside Cmty. Mental Health Ctr.*, 327 NLRB 661, 666 (1999) (employer maintained unlawful overly broad confidentiality rule prohibiting employees from discussing their discipline with one another).

According to credited, and now undisputed, testimony, on September 26, Tillinghast gave Hardin a written disciplinary warning. (A. 4; 52-53, 149.) After Tillinghast read the warning to her, Hardin tearfully disputed it. (A. 4; 52, 150.) Tillinghast warned Hardin not to discuss the discipline with other employees while she was working, adding that he had instructed the team leaders to immediately document any such discussions and send Hardin home. (A. 4; 52.) The Board reasonably found that Tillinghast's discriminatory prohibition on discussing employee discipline, followed by his threat to enforce that prohibition by sending Hardin home, reasonably tended to chill the exercise of protected statutory rights. (A. 1 n.2)

B. The Company's Defenses to its No-Talking-about-Discipline Rule Rely on Discredited Testimony and Misapply Board Law

The Company relies on discredited testimony and a rejected claim of business justification to defend its unlawful prohibition on discussion of discipline. Additionally, the Company repeats its claims, fully discussed above, that an isolated statement does not merit an unfair labor practice finding.

First, although the Company pays lip-service (Br. 4 n.2, 6 n.3, 13) to this Court's policy of not second-guessing credibility determinations, the Company claims (Br. 7) that Tillinghast forbade Hardin from discussing her discipline with her coworkers "in response to [Hardin's] emotion"—baldly claiming that "Tillinghast's concern was warranted." Additionally, the Company claims that Tillinghast prohibited discussion "on one particular day" and therefore the rule was only a "short term prohibition." (Br. 18, 19.) The record does not support these assertions. Indeed, the judge specifically discredited Tillinghast's version of events, including his denial that he did not prohibit Hardin from discussing her discipline, concluding that Hardin's testimony was more accurate than Tillinghast's. (A. 4.) As the judge found (A. 5): "Tillinghast did not require that Hardin get past her emotional condition before returning to the sales floor. Instead, he barred her from discussing her discipline without limitation.")

Second, the Company repeats its claim (Br. 7, 9), rejected by the Board, that it had a legitimate business justification for its prohibition. In order to validly

maintain and enforce an otherwise unlawful rule, an employer must demonstrate a substantial and legitimate business justification that outweighs its employees' interest in discussing the restricted subject matter. *Desert Palace, Inc. d/b/a Caesar's Palace*, 336 NLRB 271, 272 (2001). Here, the Board found that the Company, relying on cases dealing with solicitation on the sales floor, failed to meet this test. The Company relied on *J.C. Penney*, 266 NLRB 1223, 1224 (1983) and *McBride's of Naylor Rd.*, 229 NLRB 795, 795 (1977), both of which, as the judge explained (A. 5) stand for "the well-settled proposition that retail businesses may prohibit *solicitation* on the sales floor; those cases do not address the issue on limiting discussion of discipline on the sales floor." The credited evidence demonstrates that solicitation was not involved here. The judge also rejected the Company's defense that Tillinghast sought only to keep Hardin from getting emotional on the sales floor. As the judge explained (A. 5), the Company could properly have required Hardin to "not appear or act in an emotional fashion" in front of customers, but Tillinghast exceeded those reasonable limits and forbade Hardin from discussing her discipline with other employees. (A. 4, 5; 54.) Further, Tillinghast informed Hardin that the team leads would be watching her to ensure that she did not discuss discipline with her coworkers, and threatened to send Hardin home if she did so. (A. 5; 54.) The facts of this case—where an employer discriminatorily prohibits discussion of employee discipline (with an

accompanying threat to send the employee home if she does so), while allowing other discussions during working time—distinguishes it from the cases relied on by the Company.[5]

There is no support for the Company's assertion (Br. 19-20) that an oral rule promulgated to one employee cannot violate the Act. Simply stated, the Company's argument is contrary to established law because the Board has found, with court approval, that an otherwise unlawful oral rule disseminated to a single employee violates the Act. *Brandeis Mach. & Supply Co.*, 342 NLRB 530, 530 (2004) (oral rule promulgated to one employee that prohibited discussions about "union stuff"), *enforced*, 412 F.3d 822, 834 (7th Cir. 2005); *BJ's Wholesale Club*, 297 NLRB 611, 612 (1990) (employer told employee during disciplinary interview that solicitation was prohibited). An unlawful rule impinges on employee rights

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[5] In the cases cited by the Company, the employers provided legitimate business justifications to support the challenged rules. *See Community Hosps. of Central Calif. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (when read in context, handbook rule that forbade "other disrespectful conduct" could not be reasonably read to apply to union organizing activity); *Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (rule that prohibited employees from voicing complaints in front of patients "is neither surprising nor unlawful" in a small medical practice that "has unique concerns about employees acting in a way that might disturb patients"); *Desert Palace*, 336 NLRB at 272 (although confidentiality rule infringed on employees' exercise of their right to discuss discipline or disciplinary investigations involving fellow employees, when that right was examined in light of the surrounding circumstances of ongoing illegal drug activity in the workplace, the rule ensured that witnesses were not endangered, that evidence was not destroyed, and that testimony was not fabricated).

whether the Company promulgated the rule to one of its employees or to all of them.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INVITING HARDIN TO RESIGN HER EMPLOYMENT IN RESPONSE TO HER PROTECTED CONCERTED ACTIVITIES

A. The Company Violated the Act by Implying that Employees' Union Activities and Their Continued Employment Were Not Compatible

Team Leader Soliz unlawfully invited Hardin and another employee to quit in response to their discussion of Soliz's disciplinary warning to Hardin. (A. 1 n.2.) "The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the *only* reasonable construction." *Double D Constr. Group, Inc.*, 339 NLRB 303, 303-04 (2003) (emphasis added). When an employer invites an employee to quit in response to employees' protected concerted activity, the statement is coercive because "it conveys to employees that support for their union or engaging in other concerted activities, and their continued employment are not compatible, and implicitly threaten[s] discharge of the employees involved." *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997); *see Conley v. NLRB*, 520 F.3d 629, 638-39 (6th Cir. 2008) (in an invitation to quit, "a threat of reprisal for union activity in the comment is manifest and violative of Section 8(a)(1) [of the Act]") (quoting *Delmas Conley d/b/a Conley Trucking*, 349 NLRB 308, 319 (2007)).

Here, on August 2, the day after Soliz orally reprimanded Hardin for yelling across the store to another employee, Soliz overheard Hardin telling an off-duty employee about the warning. (A. 3, 4; 48, 120.) Soliz approached the employees and stated, "Well, I know if I had a manager that didn't like me, I would take my check and walk out." (A. 4; 48.) Later that day, when Hardin approached Soliz and said she could not afford to resign, Soliz said that if Hardin were fired, at least she would qualify for unemployment benefits. (A. 4; 49-50.)

The context and timing of Soliz's statement makes clear that it was made in response to Hardin's criticism of Soliz's discipline of Hardin. *See* A. 1 n.2, 5 (Soliz's three statements were connected, and therefore best addressed as a single violation). Applying its objective test, the Board reasonably determined that Soliz's statement was an implicit invitation to the employees to resign because of their protected concerted criticism of the warning, and therefore reasonably coerced employees in exercise of their statutory rights. (A. 1 n.2.) *See Double D Constr. Group*, 339 NLRB at 303-04 (president's "thrice-repeated statement to 'remember your bills,' delivered with finger-pointed emphasis, could reasonably be construed" as a threat to close the company).

B. The Company's Defenses Mischaracterize the Credited Evidence and the Applicable Law

The Company's defenses again rely on a subjective interpretation of coercion, mischaracterization of the evidence, and the failure to recognize

applicable law. As fully discussed above, the Company (Br. 11, 23) again misconstrues the Section 8(a)(1) analysis, which is based on the statement's reasonable tendency to chill employees' right to discuss discipline with coworkers. Therefore, the Company's subjective argument, questioning whether Hardin herself was coerced in the exercise of her Section 7 rights, is irrelevant.

The Company manipulates the credited evidence beyond recognition with its claim (Br. 7, 21) that Soliz—the source of the very discipline the employees' were discussing—was simply talking about herself when she made the remark. Nor is it more reasonable to argue that Soliz later only sought to "comfort" Hardin by explaining that, if Hardin was fired, she could get unemployment. To the contrary, Hardin fully understood the import of Soliz's invitation to quit, and shortly after that exchange approached Soliz to let her know that she could not afford to quit. (A. 4; 50.) The Company's argument completely ignores the context and timing of Soliz's statement.

The Board has consistently held that invitations to quit, such as Soliz's, constitute a violation of Section 8(a)(1) of the Act. *See, e.g., NLRB v. Almet*, 987 F.2d 445, 448 (7th Cir. 1993) (general foreman violated the Act by saying to employee, "If it were me, and I had to go to work every day and be that miserable, I'd go out and find another job."); *Rogers Elec., Inc.*, 346 NLRB 508, 515 (2006) (employees who don't like the way the business was run "can just exit"); *McDaniel*

Ford, Inc., 322 NLRB 956, 962 (1997) (giving employees three options to consider, one of which was to resign with 90 days notice); *Stoody Co*., 312 NLRB 1175, 1181 (1993) (observing that if employees wanted to be "so nitpicking," maybe the employer was not the place for them); *Kenrich Petrochems.*, 294 NLRB 519, 531 (1989) (asking employee why she did not go cry somewhere else); *L.A. Baker Elec., Inc*., 265 NLRB 1579, 1579-80 (1983) (telling employee that if he thought he could do better, he could go elsewhere).[6]

In sum, under the Board's well-established, objective test, the Company violated the Act when team lead Soliz invited employees to quit in response to their protected, concerted activity.

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[6] The Company's reliance (Br. 20, 21) on *Wyco Metal Products*, 183 NLRB 901, 917 (1970) (where a supervisor told complaining employees that "if I didn't like it, and if it made me sick working here, if it was me[,] I wouldn't work. I would leave"), is misplaced. That election objections case, which involved several unfair labor practice violations by an employer who supported one union against the rival union, resulted in the Board ordering a second election. *Id*. at 904. As the judge noted (A. 5) the *Wyco* trial examiner "cited no authority for his conclusion that such statements were not coercive and it is not clear . . . whether the Board upheld these conclusions." Additionally, *Wyco* has never subsequently been cited for the proposition that the Company advances.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition for review and enforce the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

August 2011

ADDENDUM

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

> Employees shall have 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)) provides in relevant part:

> It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in relevant parts:

> The Board shall have power to petition any court of appeals of the United States. . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . .
>
> 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.

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

> Any person aggrieved by a final order of the Board . . . may obtain a review of such order . . . in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

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Petitioner/Cross-Respondent	*	Nos. 11-1053
	*	11-1097
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATION BOARD	*	21-CA-39100
	*	21-CA-38882
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
UNITED FOOD AND COMMERCIAL WORKERS OF AMERICA INTERNATIONAL UNION, REGION 8---WESTERN	*	
	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 6,920 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 4th day of August, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 4th day of August, 2011