Nos. 11-1282, 11-1321

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 675

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

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 11-1282 & 11-1321
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-22914 & 28-CA-22915
Respondent/Cross-Petitioner	)	
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 675	)	
Intervenor	)	

THE BOARD'S 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") certify the following:

(A) Parties and Amici: Medco Health Solutions of Las Vegas, Inc. ("the Company"), petitioner/cross-respondent herein, was a 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. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and

Service Workers International Union, Local 675 ("the Union"), intervenor herein, 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 in Case Nos. 28-CA-22914 and 28-CA-22915, issued on July 26, 2011, and reported at 357 NLRB No. 25.

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

/s/ David Habenstreit
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Dated at Washington, DC
this 13th day of March 2012

TABLE OF CONTENTS

Headings **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

[*] Authorities upon which we chiefly rely are marked with asterisks

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

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

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Statutes: **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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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 JURISDICTION

This case is before the Court on the petition of Medco Health Solutions of Las Vegas, Inc. ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, an order of the Board finding that the Company violated Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), as amended (29 U.S.C. §§ 151, 158(a)(1) and (5)). The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 675 ("the Union") has intervened on behalf of the Board.

The Board's Decision and Order, issued on July 26, 2011, and reported at 357 NLRB No. 25 (A 593-603),[1] is a final order with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to remedy unfair labor practices. The Company filed its petition for review on August 11, 2011. The Board filed its cross-application for enforcement on September 13, 2011. Both filings were timely, as the Act places no time limitation on such filings. This Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows a person aggrieved by a final order of the Board to file a petition for review in this Court.

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[1] Citations are to the Appendix filed on February 27, 2012. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

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 prohibiting an employee from wearing a T-shirt with a slogan protesting an employee incentive program, by making an implied threat to that employee, and by maintaining an overly broad work rule prohibiting clothing with certain messages that it applied to restrain Section 7 activity.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by changing its dress code rules without bargaining with the Union.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting an employee from wearing a T-shirt with a slogan protesting a company employee incentive program, making an implied threat to that same employee, and maintaining an overly broad work rule prohibiting employees from wearing clothing with messages that were provocative, insulting, or confrontational. The complaint further alleged that the Company violated

Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing its dress code without bargaining with the Union. Following a hearing, an administrative law judge found the Company violated the Act as alleged. After the Company filed timely exceptions, the Board (Chairman Liebman and Members Becker and Pearce) issued its Decision and Order, affirming the judge's unfair labor practice rulings, findings, and conclusions.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Overview: The Company Runs an Automated Pharmacy; the Union Represents Two Units of Employees; the Company Maintains a Rule Prohibiting Certain Clothing; the Company Conducts Client Tours and Notifies Employees of Tours in Advance

The Company sells and distributes pharmaceuticals out of several facilities nationwide, including a mail-order pharmacy and call center in Las Vegas, Nevada. (A 597; 45-47.) At the pharmacy, prescriptions are filled through an automated process and mailed without any face-to-face interaction between the Company's employees and the consumers. (A 597; 46, 48, 146, 233.)

The Union represents a unit of coverage review representatives and pharmacy technicians as well as a separate unit of pharmacists at the Las Vegas facility. (A 597; 45-46.) The Union began representing the pharmacists' unit following a stipulated election in August 2009 that ousted the Guild for Professional Pharmacists as the representative of that unit. (A 597; 82, 430.) The

Company and the Union first met in late August to discuss an upcoming shift bid. At that meeting, Union representative Dave Campbell informed the Company that it was obligated to maintain the status quo until a collective-bargaining agreement was in place between the parties. (A 602; 398.)

The Company maintains a dress code applicable to all employees with the following rule: "Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate." (A 598; 63, 429.)

The Company offers tours of its facility to representatives of existing and prospective customers approximately once or twice per week. (A 597; 147-48, 267.) Each tour follows a set route through the facility, insuring that clients cannot see any confidential information at employee workstations. (A 597; 81, 234-35, 281, 318.) Employees are notified in advance of tours by means of a video monitor at the employee entrance. (A 597; 79, 234, 267, 368.)

B. The Company Gives Out WOW Awards at the Discretion of Management for Various Employee Actions; the Company Awards Certificates and Lanyards at a Weekly Ceremony; the Company Maintains a Wall Recognizing Awardees in Its Cafeteria

In the summer of 2009, the Company implemented an employee incentive program that it calls "WOW." (A 598; 47.) The Company describes the program as a "movement focused on building trusting relationships by delivering platinum level service through each and every process, generating pleasant member

surprises, and increasing the level of satisfaction for our members." (A 598; 502.) As the Company stated when introducing the program, "[e]very employee has the opportunity to participate" and is encouraged to "tak[e] advantage of these opportunities." (A 598; 503.)

Employees qualify for a WOW award in a variety of ways. Employees are nominated for compliments on service that may come from customers, peers, or management, taking ownership of a complex situation, facilitating resolution of a customer issue, making a safety save, or suggesting a system or process improvement recommendation. (A 598; 48, 128.) While nominations can come from any source, management decides whether a WOW is awarded. (A 598; 49-50, 302.) A Company employee administers the WOW program as her full-time job. (A 598; 123, 300.)

The award is a certificate and lanyard given at a weekly recognition ceremony attended by employees on paid time. (A 598; 152, 228-29, 302.) The ceremonies, at which Company Vice President/General Manager Thomas Shanahan presents the awards, last from 20 to 45 minutes and light refreshments are served. (A 598; 54, 228-29, 301-02.) Additionally, the Company recognizes several WOW award levels for recipients of multiple WOW awards ranging from a "white belt" for the 1st through 5th awards to a "black belt" for the 31st award. (A 598; 300, 506.) For each color-coded level, the employee receives a correspondingly-colored lanyard. (A 598; 52, 242, 300.)

Recognition is also exhibited on a "Wall of WOW" in the cafeteria that displays recent recipients and the reasons they received the award. (A 598; 152, 352-53.) When rolling out the WOW program, the Company told its employees its plan to "list individual names of people that consistently exhibit WOW behaviors." (A 598; 503.) The Wall of WOW is a stop on the facility tours. (A 598; 80, 332.)

C. Unit Employees and Employees at Other Company Facilities Express Discontent with the WOW Program; Union Representative Osterman Gets a Union T-Shirt with a Slogan Protesting the WOW Program

Unit employees complained to Union representatives Marissa Osterman and Michael Shore about having to attend the WOW ceremonies. Employees said that the program was a waste of money, that the program was unfair, and that they were just doing their normal jobs. Employees complained that they did not want to get up in front of people to receive the certificates. (A 599; 250-51, 276.)

In early 2010, Osterman attended a union-sponsored conference for union representatives at company facilities across the country. (A 599; 276.) Based on a sense of general discontent with the WOW program nationwide, Union officials at the conference planned to conduct a survey among employees about the program and present the findings to the Company. (A 599; 279.)

While at the conference, Osterman got a T-shirt from a local union representing company employees in Pittsburgh. (A 599; 249, 276.) The Pittsburgh employees designed the T-shirt as part of a union protest of the WOW program at

the Pittsburgh facility. (A 599; 276-77, 279.) The T-shirt has a union logo on the front and on the back reads, "I don't need a WOW to do my job." (A 599; 238, 311.)

D. Employee Shore Wears the T-Shirt to Work; Shore Receives Support from His Coworkers; Company Managers Tell Shore To Remove the T-Shirt and That If He Does Not Like the WOW Program, Maybe the Company Is Not the Place for Him; Shore Changes His Shirt and Returns to Work

Osterman gave the T-shirt to co-union steward Shore. (A 598-99; 280.) Shore, who was a coverage review representative, wore the T-shirt to work on February 12, 2010. (A 599, 232, 238, 243.) Fellow employees reacted to the T-shirt by giving Shore a thumbs-up and a pat on the back, while others commented that the WOW program was crap, and some asked if they could get the same T-shirt. (A 599; 244.)

After hearing about the T-shirt from a member of management who saw Shore wearing it in the cafeteria, Shanahan spoke to Human Resources Director Michele Agnew. (A 599; 69-70.) They called Shore into a meeting with Osterman present. (A 599; 165.) Shore was wearing a Company-issued blue smock and Agnew asked him to take it off and turn around so they could see the back of his T-shirt. (A 599; 68, 246, 273.) When Shanahan expressed disappointment that Shore was wearing the T-shirt, Shore said that the shirt expressed his opinion of the WOW program and he should be able to wear it. (A 599; 68, 77, 247, 272, 313.) Agnew and Shanahan told Shore that the shirt was insulting and they expected him

to remove it. (A 599; 77, 247, 313.) Shanahan told Shore that if he did not like the WOW program there was plenty of work out there and maybe the Company was not the place for him. (A 599; 314.) Shore went to his car, changed shirts, and went back to work. (A 599; 248.)

E. The Parties Bargain for a Contract in the Pharmacists' Unit; The Company Alters Its Dress Code To Require Pharmacists To Wear Lab Coats Every Day; the Company Informs the Union and Employees of the New Policy in November; the Union Requests Bargaining; the Company Agrees To Meet On December 10 To Discuss the Change But States that It Does Not Intend to Bargain

In September 2009, the Company and the Union began bargaining for a contract in the pharmacists' unit, employing a prior, expired contract with the Guild as a starting point for their continuing negotiations. (A 597; 101, 413, 419.) The parties reached agreement on a contract on December 7, which the membership ratified on December 14. (A 597; 188.) With the exception of wage rates and stock options, the contract's provisions were retroactive to September 1. (A 597; 188.)

The Company informed the Union of a new dress code policy on November 19, 2009, when it showed pharmacist and union chair William Webb a draft memo announcing the change in dress code. (A 600; 87, 192, 320, 371, 496.) The memo stated that, effective January 1, 2010, the Company would require pharmacists to wear white lab coats at all times and all other employees to dress in business casual attire on scheduled tour days. (A 800; 85, 370, 496.) Prior to that

time, the practice was for pharmacists to wear the lab coats only on days that tours were scheduled and for employees to dress in a more casual manner all the time, including T-shirts, shorts, jeans, and sweatshirts on tour days. (A 600; 85, 377.)

At the November 19 meeting, the Company also mentioned providing short-sleeve lab coats for the pharmacists. (A 595; 391.) Shanahan advised Webb that he should let the Company know by noon on November 20 if the Union had any questions or concerns. (A 601; 192, 321.) The Company issued the memo to employees on November 20. (A 601; 93, 193.)

On December 9, after Webb consulted with Union officials, the Union requested bargaining over the issue. (A 601; 95, 374, 497.) The Company responded the same day, agreeing to discuss the upcoming dress code change but stating that the Company did not believe it was a mandatory subject of bargaining. (A 601; 96.)

The Company and the Union met on December 10. At the time of this meeting, the parties' collective-bargaining agreement was not yet in effect because it had not been ratified by the membership. (A 601; 99.) The Company opened the meeting by announcing that it was not there to bargain. (A 601; 96, 324, 375.) The Union raised concerns about uneven temperatures in the facility and the heat in some areas during the summer. (A 601; 98.) The Company indicated again that it would make short-sleeve lab coats available to the pharmacists. (A 601; 99, 326, 389.) The Union questioned the need for the new policy, especially on non-tour

days, and continued to object to the dress code changes, while the Company remained adamant that the policy would be implemented as written. (A 601; 98, 347-49, 376.) On February 12, 2010, the Union filed a grievance over the dress code changes, which the Company denied as untimely. (A 601; 327, 380-81, 498-99.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by prohibiting employee Shore from wearing a T-shirt with a slogan protesting the WOW employee incentive program, by making an implied threat to Shore, and by maintaining an overly broad work rule prohibiting employees from wearing clothing with messages that were provocative, insulting, or confrontational that it applied to restrain Section 7 activity. The Board also agreed with the judge that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing its dress code.

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order directs the Company to rescind the overly broad dress code rule and notify employees that it has done so, to bargain in good faith with the Union upon request, and to post a remedial notice.

SUMMARY OF ARGUMENT

This case encompasses the Company's unlawful responses to protected activity in two discrete situations at its Las Vegas facility. In one instance, the Company violated Section 8(a)(1) of the Act by its actions in response to an employee who wore a union T-shirt protesting an employee incentive program. In the other instance, the Company violated Section 8(a)(5) and (1) by its actions in response to when the Union's request for bargaining over a proposed change to the dress code rules.

When employee and union representative Shore wore a T-shirt to work with a union logo on the front and a slogan on the back stating "I don't need a WOW to do my job," the Company unlawfully prohibited Shore from wearing the T-shirt at work, deeming it insulting to the WOW employee incentive program. The Company does not deny taking this action against Shore, nor does it deny that employees have the right to wear union insignia at work barring special circumstances. The Company's attempts to paint its action as a lawful response fail because, as the Board found based on substantial evidence in the record, Shore acted concertedly by bringing a group complaint to the attention of management and his actions were protected as a protest related to a term and condition of employment—the WOW program. Additionally, the Company failed to meet its burden of showing special circumstances justifying its ban on the T-shirt,

especially given its admission that it would ban the T-shirt even on days when no customer tours of the facility took place.

The Company mounts no serious defense to the Board's finding that it unlawfully made an implied threat of discharge when the Company Vice President/General Manager admittedly told Shore that "maybe this wasn't the place for him." Likewise, the Company relies on arguments about special circumstances, expressly rejected by the Board, to defend against the Board's finding that it maintained an overly broad work rule by applying a dress code rule against provocative, insulting, or confrontational clothing to Shore's protected activity.

Substantial evidence also supports the Board's other unfair-labor-practice finding, that the Company violated its statutory bargaining obligation by unilaterally implementing new dress code rules that require pharmacists to wear lab coats at all times. The credited evidence establishes that the Company overtly refused to bargain over the change, opening a meeting to discuss the matter by stating that it was not going to bargain over the issue. The Board reasonably found that the Company failed to show that the Union clearly and unmistakably waived bargaining under the Company's two proffered theories. The Board further found that the parties did not reach impasse on the dress code change, in large part because the Company refused to bargain in the first place, making an impasse impossible.

STANDARD OF REVIEW

The Court's review of the Board's unfair labor practice findings "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). 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 contrary to law. *Int'l Transp. Serv. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006). Furthermore, the Court will abide the Board's interpretation of the Act if it is "reasonable and consistent with controlling precedent." *Tribune Publ. Co. v. NLRB*, 564 F.3d 1330, 1332 (D.C. Cir. 2009) (citing *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (additional citations omitted).

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). Substantial evidence encompasses "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *Accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005). The Court will not reverse a judge's credibility determinations unless those determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Federated Logistics*, 400 F.3d at 924 (quoting *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003)). *See also E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (Board hearing officer is

"'uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict'").

A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. *Accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). The Board's application of the law to the facts is also reviewed under the substantial evidence standard. *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). *Accord United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEE SHORE FROM WEARING A T-SHIRT WITH A SLOGAN PROTESTING A COMPANY EMPLOYEE INCENTIVE PROGRAM, BY MAKING AN IMPLIED THREAT TO SHORE, AND BY MAINTAINING AN OVERLY BROAD WORK RULE PROHIBITING CLOTHING WITH CERTAIN MESSAGES THAT IT APPLIED TO RESTRAIN SECTION 7 ACTIVITY

A. Principles of Employee Rights in Section 7 of the Act

Section 7 of the Act (29 U.S.C. § 157) guarantees the right of employees "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 . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that right by providing that an employer violates the Act when an employer's conduct "has a reasonable tendency to coerce or to interfere with" an employee's Section 7 rights given the totality of the circumstances. *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001)). Proof of animus or actual coercion is unnecessary. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Section 7 encompasses the rights of employees to communicate with other employees regarding wages and other terms and conditions of employment. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Indeed, the workplace is a "uniquely

appropriate" place for such communications. *Republic Aviation v. NLRB*, 324 U.S. 793, 802 n.6 (1945).

Specifically, rules restricting the wearing of clothing with union insignia are presumptively unlawful in the absence of an employer's showing of special circumstances to justify the ban. *See id.* at 801-03; *Waterbury Hotel Mgmt. LLC v. NLRB*, 314 F.3d 645, 655 (D.C. Cir. 2003). The employer has the burden of presenting substantial evidence of the special circumstances that it asserts support a ban on union clothing. *See Mead Corp.*, 314 NLRB 732, 733 & n.4 (1994), *enforced*, 73 F.3d 74 (6th Cir. 1996); *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988); *Am. Fed'n of Gov't Employees*, 278 NLRB 378, 385 (1986).

Additionally, Section 8(a)(1) prohibits coercive statements that threaten employees with job loss in retaliation for their protected activities. *Progressive Elec.*, 453 F.3d at 544. It is well-settled that a coercive threat may be implied as well as stated expressly. *National By-Products, Inc. v. NLRB*, 931 F.2d 445, 451 (7th Cir. 1991). *Accord Tasty Baking*, 254 F.2d at 124-25 (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context).

The Board, with Court approval, may find that an employer's maintenance of an overly broad work rule violates Section 8(a)(1) of the Act even if it does not explicitly restrict Section 7 activity. *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647

(2004)). An employer's rule will violate Section 8(a)(1) upon a showing of any one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647.

B. The Company Unlawfully Prohibited Shore from Wearing His Union T-Shirt Protesting the WOW Program

The Board reasonably found (A 593) that by wearing the union T-shirt with the slogan "I don't need a WOW to do my job," Shore was engaged in concerted activity protected by the Act. By prohibiting Shore from wearing the T-shirt, the Company violated Section 8(a)(1) of the Act because it restricted Shore in the exercise of the rights guaranteed him by Section 7 of the Act. Substantial evidence supports the Board's finding (A 600) that Shore's T-shirt was a "union supported protest of a working condition." In turn, Shore's wearing of the T-shirt was "designed to engender support among employees to protest the WOW program." (A 600.) Thus, Shore's choice of attire was protected by the Act.

1. Shore was engaged in concerted, protected activity when he wore the T-shirt

The Board found, based on substantial evidence (A 599), that Shore's wearing of the T-shirt was concerted, protected activity within the meaning of Section 7 of the Act. As this Court has stated, concerted activity "encompasses . . . individual employees bringing truly group complaints to the attention of

management." *Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir. 1987). Shore's action met the "touchstone for concerted activity" because there was a "relationship between [Shore's] actions and [his] fellow employees." *Int'l Transp. Serv. v. NLRB*, 449 F.3d 160, 163 (D.C. Cir. 2006).

Substantial record evidence established that there was "widespread discontent" with the WOW program among company employees in Las Vegas where Shore worked and other company facilities, including Pittsburgh. (A 593 n.4; 250-51, 276-79.) Shore had previously heard complaints about the WOW program in his role as union steward. (A 599; 250-51.) Indeed, general discontent with the WOW program by company employees nationwide was discussed at the Union's national conference, where the Pittsburgh employees handed out T-shirts, complete with a union insignia, that they had designed as a union protest of the program. (A 599; 279.) By wearing the employee-designed union T-shirt, Shore was, the Board found, "making common cause not only with Las Vegas employees who shared his dislike for the program, but with employees from other facilities who shared the sentiments expressed on the T-shirt." (A 593 n.4.) *See Hillhaven Highland House*, 336 NLRB 646, 649 (2001) (employees working for the same employer at different locations "will often have common interests and concerns . . . that may be addressed by concerted action"), *enforced sub nom., First Healthcare Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003). *See also ITT Indust. v. NLRB*, 413 F.3d 64, 71 (D.C. Cir. 2005) (employees at different employer facilities may "seek

strength in numbers to increase the power of their union and ultimately to improve their own working conditions").

As the Board found (A 599), Shore "openly displayed the T-shirt and its message to fellow employees" thus making it "clear to [the Company] that the message on the T-shirt was connected to the Union and designed to enlist employee support for the message." Shore's fellow employee's responded to and supported the "I don't need a WOW to do my job" message, providing further evidence that Shore's display of the T-shirt was designed to elicit such a response. (A 599; 244.) Thus, the Board concluded (A 593) that all of the circumstances surrounding Shore's wearing of the T-shirt "separately and together, render Shore's activity concerted."

The Company does not dispute that it instructed Shore to remove the T-shirt and not wear it to work again. In doing so, the Company unlawfully restricted Shore from making a "passive inoffensive advertisement of organizational aims and interests" that did not interfere with the employer's production or discipline. *Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357, 358-59 (7th Cir. 1956). Thus, as the Board found (A 600), by prohibiting employees from wearing clothing displaying union insignia and a message protesting a working condition, the Company violated Section 8(a)(1) of the Act. *See Republic Aviation*, 324 U.S. at 803 (the Act protects an employee's right to wear union insignia because

"prohibitions against the wearing of insignia must fall as interferences with union organization").

2. The Company has failed to justify its interference with Shore's protected Section 7 activity

The Company presents three arguments for overturning the Board's finding that it violated Section 8(a)(1) of the Act, none of which are sufficient to show that the Board's conclusion was "arbitrary" or "contrary to law." *See Int'l Transp. Serv.*, 449 F.3d at 163. First, the Company contends that Shore was not engaged in concerted activity when he wore the T-shirt. Second, the Company asserts that the WOW program is not a term and condition of employment and, therefore, protesting it was not protected activity. Finally, the Company claims that there are special circumstances to justify its ban on the T-shirt. Each of these arguments fail.

First, as shown above and despite the Company's attempted refutation (Br 20-22), the Board's finding that Shore engaged in concerted activity when he wore the T-shirt is supported by substantial evidence. Not only had Shore heard complaints about the program while acting as a union representative, complaints that were widely shared among union-represented employees throughout the Company's facilities nationwide, but he also received positive feedback about the T-shirt's slogan from his peers when he wore it. Furthermore, Shore openly displayed the shirt to his fellow employees in the cafeteria; indeed, that was how

management learned of it. (A 599; 69-70, 165.) Given Shore's open display of the T-shirt, other employees' engagement with its message, as well as Shore's solidarity with the discontent not only of the Las Vegas employees but also those employees at the Pittsburgh facility who designed the T-shirt, the Company's claim (Br 20) that Shore was the only employee who wore the T-shirt in Las Vegas fails to show his activity was not concerted.

Thus, unlike the lone employee in *Manimark Corp. v. NLRB*, 7 F.3d 547, 550 (6th Cir. 1993), where "the evidence was too thin" to support a finding that an employee "expressing a purely personal complaint" about his own commission was acting on anyone else's behalf, here the evidence fully supports Shore's concerted activity. In *Manimark*, the complaining employee never told his fellow employees, many of whom he had "alienated" with his abrasive behavior, that he brought any complaints to management. *Id.* at 549-50. In contrast, Shore represented his fellow employees as a union steward and listened to their complaints about the WOW program. When Shore demonstrated their shared discontent by openly wearing the employee-designed T-shirt, his fellow employees expressed support for its message and, in at least one instance, asked for the same T-shirt. *See Ajax Paving Indust. v. NLRB*, 713 F.2d 1214, 1218 (6th Cir. 1983) (individual employee who expressed a group concern about paychecks being short held to have acted concertedly, where coworker he later told of his statement indicated that he would have liked to "join the effort"). As the Board found (A

593), "at a minimum," union representative Shore wore the T-shirt as "a logical outgrowth of concerted activity" that "brought a group complaint [about the WOW program] to management's attention." *See Prill*, 835 F.2d at 1484.

Second, the Company's argument that the WOW employee incentive program is not a term or condition of employment that can be the subject of protected activity is contradicted by the record evidence. The WOW program was "intended to create an incentive for employees to work harder or be more productive." (A 594 n.6.) Employees participated in the weekly WOW program ceremonies, where high level management officials handed out awards, for "substantial periods" of paid work time. (A 598-99; 54, 152, 228-29, 301-02.) Additionally, management retained complete discretion over which employees received awards. (A 598; 49-50, 302.) As the Board found (A 594), these factors, taken together, make Shore's protest of the WOW program "related to terms and conditions of employment and . . . therefore protected activity." *See, e.g.*, *PHT, Inc. v. NLRB*, 920 F.2d 71, 73 (D.C. Cir. 1990)("[e]mployee protests to improve working conditions have long been held protected activity") (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)).

As the Company states (Br 26-27), citing *Vemco, Inc. v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996), employee concerted action unrelated to working conditions is not protected by the Act. For example, in *Vemco*, employees walked out rather than wait the hour that it would have taken for their work area to be cleared after a

weekend floor painting job. *Id.* The employees were not expected to work under any altered conditions, and did not walk out in protest of any company policy. *Id.* at 530-31. Here, the WOW program was not a one-time situation; it was a weekly feature of their work lives, structured by Company policy. It was this program that was the focus of the protest slogan on the T-shirt.

The Company has cited no case supporting its argument that protest of the WOW program is not protected activity either because the recipients receive no monetary awards or because the program is not directly connected to discipline, wages, or promotions. As the Board stated (A 594 n.6.), criticism of the WOW program—which was intended to give employees an incentive to work harder at their jobs—relates to terms and conditions of employment.

The Company's reliance (Br 23, 27) on *New River Industries v. NLRB,* 945 F.2d 1290 (4th Cir. 1991), to support its claim that the WOW program is not a condition of employment is misplaced. In that case, after an employer gave free ice cream cones to employees to celebrate an agreement with a supplier, two employees wrote a letter belittling the gesture. *Id.* at 1292. The court held that the letters did not constitute protected activity because an isolated instance of a free ice cream cone was not a term or condition of employment. *Id.* at 1292, 1294. The Company relies (Br 27) on this case for the proposition that a one-time gift or expression of appreciation from management is not a term or condition of employment. However, it is readily apparent that the WOW program is much

more than a one-time gesture—the Company has devoted a full-time employee to overseeing the program, maintains complete discretion to give awards to some nominees and not others, holds award ceremonies weekly on paid time with refreshments, maintains a progressive system of recognition for multiple WOW awards, and prominently displays the winners' achievements. (A 598; 54, 123, 228, 300-02.)

In a related vein, the Company mistakenly characterizes (Br 23) Shore's wearing of the T-shirt as a "criticism of management" and thus not related to a term or condition of employment. While certain Company managers may have taken Shore's message personally because of their devotion to the WOW program, as the Board found (A 599), and the T-shirt's slogan supports, the message was directed not at any particular managers but at the WOW program. The Board reasonably concluded (A 599) that the Company's pride in the WOW program "does not deprive employees of the right under the Act to view it differently and protest it."

In its third and final argument regarding the T-shirt, the Company asserts (Br 29-32) that special circumstances justify its ban on the shirt because the shirt was disparaging to the Company's business and could interfere with customer relationships. Nonetheless, the Company failed to meet its burden of demonstrating any special circumstances. (A 594.) *See Waterbury Hotel*, 314 F.3d at 655 (employer has burden of showing special circumstances to justify ban

on wearing union insignia). Special circumstances may include safety, ensuring harmonious employee relations, and protecting an employer's product or image. *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982). However, "customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees." *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 61 (D.C. Cir. 2009) (quoting *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999)).

As the Company points out (Br 23-24), the employer in *Southwestern Bell Telephone*, 200 NLRB 667 (1972), was able to meet its burden of showing special circumstances to justify a clothing ban. There, the Board determined that the employer could lawfully prohibit employees from wearing shirts with the slogan "Ma Bell is a Cheap Mother" in order to maintain discipline in the plant given the "derisive and profane construction" of the slogan. 200 NLRB at 670. In sharp contrast to the "obscene slogan" (A 594 n.8) in that case, Shore's T-shirt contained no such "thinly veiled obscenity" (A 599) and thus, the concerns about discipline and production were not present as they were in *Southwestern*.

The Company's reliance (Br 30-31) on *Noah's New York Bagels*, 324 NLRB 266 (1997), fares no better. The employee slogan on a T-shirt in *Noah's Bagels* was "If its [sic] not Union, its [sic] not kosher." 324 NLRB at 275. The employer strictly observed kosher laws, made kosher products, and maintained a lawful policy against employees wearing shirts mocking its kosher products. *Id.* Thus,

the Board determined that the employer could lawfully require an employee to remove a T-shirt that violated the employer's lawful policy designed to protect its kosher brand. *Id.* (Additionally, the employer had to permit the wearing of union insignia because no special circumstances were shown to justify such a ban. *Id.*) While Shanahan may have viewed Shore's T-shirt as a "direct insult" to both the Company and the WOW program (Br 29), the Company is unable to show that it had a lawful policy designed to protect its "WOW" brand or that a perceived "insult" met its burden of showing special circumstances.

The Company asserts (Br 31) that customer tours of the facility constitute a special circumstance justifying an outright ban on the T-shirt. The Company claims (Br 31) that the "potential" that customers would see the T-shirt was "a significant factor" in the Company's objection to it.[2] However, Agnew's testimony put the lie to this claim as she conceded that even if Shore wore the T-shirt only on non-tour days, the Company still would have prohibited him from wearing it because the shirt was insulting to the Company and therefore violated its dress code. (A 599; 81, 229, 247, 275.)

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[2] The record evidence refutes the validity of this claim as customer tours were not a daily occurrence and employees knew about them in advance. (A 597; 79, 148-49, 267.) Likewise, the Company's assertion (Br 7) that a tour "could" potentially go through the coverage review department where Shore worked is belied by the evidence that his work area was not a standard tour destination. (A 597; 81, 234, 281, 318.)

Moreover, the Company offered no evidence that the T-shirt's slogan reasonably raised "the genuine possibility of harm to the customer relationship." *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004) (finding ban on "Don't Cheat about the Meat!" T-shirts and hats, referring to a grocery store's stocking of pre-packaged meat, justified in retail setting because employer had legitimate concern about protecting its customer relationships). Simply, as the Board stated (A 599), the fact that the Company highlighted the WOW program to customers and potential customers does not "deprive employees of the right to visibly challenge the program." In sum, the Company's reliance (Br 30) on the principle that it can ban wearing clothing that disparages its business and interferes with customer relations fails both because no such interference has been shown, and because the Company forbade Shore from wearing the T-shirt irrespective of whether any customer could see it. *See USF Red Star*, 339 NLRB 389, 391 (2003) (an employer's prohibition on wearing union buttons was unlawful "regardless of whether such a prohibition may have been permissible" if limited to times when drivers were at customer facilities because the employer's prohibition included the employees' wearing of the button inside employer's terminal).

C. The Board Found Based on Substantial Evidence that the Company Unlawfully Made an Implied Threat to Shore Regarding His Continued Employment

The Board found that the Company violated Section 8(a)(1) of the Act by telling Shore, as the Company admits it did (Br 9), that if he could not support the

Company's programs "[m]aybe this wasn't the place for him." (A 599; 314.) Consequently, the Board relied on the well-settled principle that "an employer's invitation to an employee to quit in response to their exercise of protected concerted activity is coercive, because it conveys to employees that . . . engaging in . . . concerted activities and their continued employment are not compatible, and implicitly threatens discharge." *McDaniel Ford*, 322 NLRB 956, 956 n.1 (1997). Additionally, "[t]he presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981) (quoting *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977)). As the Board found (A 594), the Company's statement was thus an unlawful implied threat of discharge. *See Jupiter Medical Ctr. Pavilion*, 346 NLRB 650, 651 (2006) (employer violated Section 8(a)(1) by making implied threat of discharge to employee by suggesting that she leave rather than engage in union activity).

The Company's only attempt (Br 27 n.3) to refute the Board's finding that the implied threat constitutes a violation of Section 8(a)(1) relies on an erroneous distinction of *Jupiter Medical Center*. The Company distinguishes that case on the ground that Shore was threatened for a reason other than protesting a term and condition of employment, that is, a reason other than protected activity. This

argument relies entirely on the premise that the WOW program was not a term and condition of employment which, as shown above (pp. 24-26), is false.

D. The Board Found that the Company Unlawfully Maintained an Overly Broad Work Rule Prohibiting Employees from Wearing Provocative, Insulting, or Confrontational Clothing By Applying that Rule To Restrain Shore's Protected Activity

The Board reasonably found (A 594) that, in applying its prohibition on certain clothing to restrain Section 7 activity, the Company violated Section 8(a)(1) of the Act by maintaining an overly broad work rule. As discussed, the Company's rule prohibited employees from wearing clothing with messages that were provocative, insulting, or confrontational. Here, the Company applied its rule to forbid the purportedly "insulting" T-shirt that Shore wore, thus unlawfully restricting Shore's protected activity. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board stated that a work rule violates Section 8(a)(1) "upon a showing of *one* of the following"—employees could reasonably construe the rule to prohibit Section 7 activity, the rule was promulgated in response to union activity, *or* the rule is *applied* to prohibit Section 7 activity. *Id.* at 647 (emphasis added). Here, the Company applied its dress code rule forbidding "insulting" clothing to Shore's T-shirt with its slogan protesting the WOW program. Thus, the Board reasonably found (A 594) that the Company violated Section 8(a)(1) by

"applying [its rule] to restrain Section 7 activity" and ordered rescission of the rule.[3]

The Company's challenge to this finding of a violation by the Board amounts simply to an argument (Br 28-32) that special circumstances justified its application of the rule to Shore's T-shirt.[4] The Board's rejection of that argument is fully addressed above (pp. 27-30). The Company presents no additional justification for its application of the rule to Shore's protected concerted activity. Furthermore, the Company does not dispute that a work rule which does not explicitly restrict Section 7 activity violates the Act when it is applied, as here, to prohibit such activity.

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[3] The Board (A 594) found it unnecessary to reach the issue of whether employees could reasonably read the rule to restrict Section 7 activity, because resolution of the issue would not affect the remedy.

[4] The Company's contention (Br 28) that the Board ignored a stipulation at the hearing, that the Company allows employees to wear shirts with union logos, is wrong. The Board explicitly addressed the stipulation, and found it "irrelevant" to the question of whether Shore's action was concerted protected activity. (A 593 n.3.) Moreover, the Board found it added nothing to the Company's "special circumstances" defense. The Board did not base its finding of an overly broad work rule on any prohibition, either stated or enforced, against wearing shirts with union logos.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CHANGING ITS DRESS CODE RULES WITHOUT BARGAINING WITH THE UNION

A. Principles of an Employer's Obligation to Bargain

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ." Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." An employer that is party to a collective-bargaining relationship violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing a term or condition of employment without first providing the union with notice and an opportunity to bargain.[5] *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Wayneview Care Ctr. v. NLRB*, __ F.3d __ , 2011 WL 6450764 at *4 (D.C. Cir. Dec. 23, 2011). Dress codes for represented employees

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[5] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." Section 7 (29 U.S.C. § 157), in turn, grants employees "the right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." A violation of Section 8(a)(5) constitutes a derivative violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004).

are a mandatory subject of bargaining. *See Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468, 479 (6th Cir. 2002); *Yellow Enterprise Systems*, 342 NLRB 804, 827 (2004).

Thus, an employer violates Section 8(a)(5) and (1) of the Act by unilaterally changing terms and conditions of employment in the absence of a bona fide impasse in good-faith negotiations. *See Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (citing *Katz*, 369 U.S. at 743). *Accord United States Testing Co. v. NLRB*, 160 F.3d 14, 22 (D.C. Cir. 1999); *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).

B. The Company Unlawfully Failed to Meet Its Obligation to Bargain Over Dress Code Changes Which are a Mandatory Subject of Bargaining

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing its dress code. In response to the Union's December 9 request to bargain, the Company responded that the dress code was not a mandatory subject of bargaining.[6] The following day, when it met with the

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[6] The Board does not dispute the Company's statement (Br 35) that it gave the Union sufficient notice of the proposed rule change to allow a reasonable opportunity to bargain. Indeed, the Union used the time between notice of the

Union, the Company again refused to bargain, opening the meeting "by announcing it was not there to bargain." (A 595.) The Board concluded (A 595) that the Company's statements were an "overt refusal to bargain" over the changes. As the Board found (A 595), while the Company "listen[ed] to concerns about a change," following the Union's request for bargaining, it did so "without being willing to bargain over the change" and instead blatantly refused.

The Company argues (Br 35-37) that it did not refuse to bargain. It claims (Br 35) that the Board based its conclusion that the Company failed to bargain solely on the Company's erroneous December 9 statement that the dress code was not a mandatory subject of bargaining.[7] (A 601; 96.) The Company is wrong. In fact, the Board did exactly what the Company submits it was required to do and examined the totality of the circumstances in finding that the Company failed to bargain in good faith. Thus, the Board relied not merely on the statement that the dress code was not a mandatory subject of bargaining, but also on the Company's announcement at the outset of the December 10 meeting that it was not there to bargain. (A 601; 96, 324, 375.) As the Board found, both statements "expressed substantive legal positions." Moreover, as the Board found, the Company's "supposed concession" at the December 10 meeting to provide short-sleeve lab

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policy and its effective date to make a bargaining request. The Union's request fell weeks before the policy was to take effect.

[7] Before this Court, the Company no longer denies that its dress code is a mandatory subject of bargaining.

coats had already been mentioned on November 19 when the Company presented union representative Webb with the proposed dress code changes and, thus, did not demonstrate a willingness to bargain. (A 595; 391.) Instead, by refusing to address the Union's concerns about whether the policy was necessary on non-tour days or at all, the Company maintained an "unwavering position." (A 595.) By refusing to bargain over a mandatory subject with the employees' representative and instead making the changes unilaterally, the Company violated Section 8(a)(5) and (1) of the Act.

The Board properly rejected the Company's two related arguments, repeated to this Court, that the Union waived bargaining. First, the Company asserts the Union waived bargaining based on a management-rights clause in the expired Guild contract. The Company relies (Br 32-34 & n.4) on a purported agreement, at the parties' first meeting in August 2009, to follow the Guild contract until a new agreement was reached, citing the testimony of Agnew and Shanahan. However, the Board rejected this claim because the judge expressly declined to credit Agnew and Shanahan on the issue, finding that "[t]heir testimony was ambiguous and their demeanor was unconvincing." (A 602.) Thus, the Company's reliance (Br 32) on that testimony to the Court is misplaced.[8] *See Federated Logistics & Operations v.*

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[8] The Company's claim (Br 10) that Union representative Dave Campbell "confirmed at the hearing" that the parties would operate under the terms of the Guild contract is not supported by substantial evidence in the record (including

NLRB, 400 F.3d 920, 923 (D.C. Cir. 2005) (judge's credibility determinations are upheld unless "hopelessly incredible, self-contradictory, or patently unsupportable"); *E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1996) (judge is "'uniquely well-placed to draw conclusions about credibility when testimony [is] in conflict'"). Indeed, the Company did not otherwise consider itself bound to the terms of the expired Guild contract, as evidenced by Agnew's refusal to allow the Union's representatives to conduct union business on paid time, as provided in the expired Guild contract. (A 602; 402.) Thus, the Board reasonably found (A 602) that the Guild contract was not in effect during the period in question.

Next, the Company asserts (Br 35) that the Union waived bargaining through past practice, arising from the management-rights clause, regarding work rules. The Company had the burden of proving that any such waiver was "clear and unmistakable," and it failed to do so. *See Southern Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357 (D.C. Cir. 2008) (while a union can waive its right to bargain about a matter, "courts require clear and unmistakable evidence of waiver and have tended to construe waivers narrowly"); *Caterpillar, Inc.*, 355 NLRB No.

Campbell's own testimony) and was therefore rejected by the Board. (A 602; 398.) Rather, Campbell stated at the August 2009 meeting that the Company was obligated to maintain the status quo until a new contract was reached. (A 602; 398.) Additionally, Agnew conceded that while she could not remember what Campbell said, he may have only stated the Company's legal obligation to maintain the status quo. (A 602; 119.)

91, slip op. at 2 (2010) (employer asserting waiver of bargaining based on past practice has burden of proof), *enforced*, 2011 WL 2555757 (D.C. Cir. May 31, 2011). The Company contends (Br 35) that under past practice, the Company gave the Union 24-hour notice of a rule change and, if the Union did not object within those 24 hours, the Company made the rule change.[9] The Board rejected (A 602) this contention as "puzzling" because the language of the management-rights clause, on which the Company relies (Br 33-34), says nothing of the kind. Rather, it permits the Company, "within 24 hours" of notice that the Union deems a rule change "inconsistent with the provisions" of the contract, to "withdraw the rule . . . ." (A 602; 479.) There is no similar burden placed on the Union to take any action within 24 hours of notice of a rule change. Moreover, even if the Company had been able to establish that the above-described past practice existed with respect to prior rule changes, it would not excuse the Company's failure to bargain after the Union requested bargaining over this new rule change. *See Caterpillar, Inc.*, 355 NLRB No. 91, slip op. at 3 (a union's "acquiescence in previous unilateral changes

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[9] The management-rights provision reads as follows: "The promulgation and enforcement of rules and regulations not inconsistent with the provisions of this Agreement are vested in the [Company], provided that if the [Union] deems any such rule or regulation to be inconsistent with the provisions of this Agreement, it shall so notify the [Company]. Within twenty-four (24) hours of notice to such effect, the [Company] may withdraw the rule or regulation." (A 602; 479.)

does not operate as a waiver of its right to bargain over such changes for all time") (quoting *Owens-Corning Fiberglas Corp.*, 282 NLRB 609, 609 n.1 (1987)).

Finally, having already reasonably found that the Company had refused to bargain with the Union over the dress code change at their December 10 meeting, the Board (A 602) had little difficulty rejecting the Company's contention (Br 37-40) that it not only had bargained with the Union at the December 10 meeting, but had done so to impasse, thereby justifying its implementation of the change. As shown, at that meeting, the Company unequivocally stated that it was not there to bargain. Consistent with that statement, and belying its current contention that it bargained to impasse, the Company did not notify the Union that it believed the parties were at impasse following the December 10 meeting. (A 601; 138, 361-62.) Nor did the Company make that assertion upon receipt of a grievance filed by the Union over the issue. (A 601; 105-11, 138, 498-99.)

As the Board explained (A 602), where the employer is refusing to bargain over an issue, it is "axiomatic" that an impasse cannot exist "in the face of prior unremedied refusal-to-bargain violations." Indeed, this Court has stated that 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. *Wayneview*, 2011 WL 6450764 at *4 (quoting *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967)) (emphasis added). *Accord Teamsters Local 175 v. NLRB*, 788

F.2d 27, 30 (D.C. Cir. 1986). In the absence of good faith negotiations, therefore, there can be no valid impasse.

The Company failed to bargain in good faith with the Union over a mandatory subject of bargaining after the Union made a request to bargain. The Company failed to meet its burden of showing that the Union clearly and unmistakably waived bargaining, or that the parties engaged in bargaining and reached impasse. Thus, the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the dress code rules.

CONCLUSION

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

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March 2012

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, et seq.):

Section 7 (29 U.S.C. § 157):

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

Section 8(a)(1) (29 U.S.C. § 158(a)(1)):

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

Section 8(a)(5) (29 U.S.C. § 158(a)(5)):

It shall be an unfair labor practice for an employer –
(5) to refuse to bargain collectively with the representatives of his employees . . . .

Section 8(d) (29 U.S.C. § 158(d)):

Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .

Section 10(e) (29 U.S.C. § 160(e)):

The Board shall have power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The 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) (29 U.S.C. § 160(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 . . . .

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEDCO HEALTH SOLUTIONS OF LAS VEGAS, INC.	)	
Petitioner/Cross-Respondent	)	Nos. 11-1282 & 11-1321
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-22914 & 28-CA-22915
Respondent/Cross-Petitioner	)	
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 675	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 9,427 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

/s/ David Habenstreit
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Dated at Washington, DC
this 13th day of March 2012

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Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit

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Dated at Washington, DC
this 13th day of March 2012