Nos. 11-1326, 11-1398

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLAGSTAFF MEDICAL CENTER

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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v.	)	**Nos. 11-1326**
	)	**11-1398**
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties: Flagstaff Medical Center ("FMC") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. The Communication Workers of America, Local Union 7019, AFL-CIO ("the Union"), was the charging party before the Board. The Board's General Counsel was also a party before the Board.

B. Rulings Under Review: This case is before the Court on FMC's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on August 26, 2011 and reported at 357 NLRB No. 65.

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

/s/ Linda Dreeben
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Dated at Washington, D.C.
this 25th day of April 2012

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MISCELLANEOUS:

GLOSSARY

"FMC"	Flagstaff Medical Center
"Board"	National Labor Relations Board
"Act"	National Labor Relations Act (29 U.S.C. §§ 151, et seq.)
"Union"	Communication Workers of America, Local Union 7109, AFL-CIO
"Br."	FMC's opening brief to this Court
"Tr."	Transcript of unfair labor practice hearing
"GCX"	General Counsel Exhibits
"RX"	Respondent Exhibits
"EVS"	Environmental Services Department
"GLES"	Global Labor Employment Strategies
"CNA"	California Nurses Association

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Flagstaff Medical Center ("FMC") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order issued against FMC finding that FMC committed numerous unfair labor practices during a union organizing campaign.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board's Decision and Order issued on August 26, 2011, and is reported at 357 NLRB No. 65. (JA 487-521.)[1] The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). FMC filed its petition for review on September 14, 2011. The Board filed its cross-application for enforcement on October 13, 2011. The petition for review and the cross-application for enforcement are timely; the Act contains no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the unchallenged portions of its Order.

2. Whether substantial evidence supports the Board's finding that FMC's president unlawfully threatened employees that selecting union representation

[1] Record references in this final brief are as follows: "JA" references are to the Joint Appendix submitted by FMC. "Br." refers to FMC's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

would be futile because he "would not negotiate" with the Union.

3. Whether substantial evidence supports the Board's findings that FMC violated Section 8(a)(3) and (1) of the Act by altering Laverne Gorney's work schedule and by discharging Michael Conant in retaliation for their union support.

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

Acting on charges filed by the Communications Workers of America, Local Union 7019, AFL-CIO ("the Union"), the Board's General Counsel issued a complaint alleging that FMC committed numerous unfair labor practices during a union organizing campaign.[2] (JA 502.) Following a hearing, an administrative law judge issued a decision, dismissing some allegations and finding merit to others.

Both FMC and the General Counsel filed exceptions with the Board challenging some but not all of the judge's findings. (JA 497; 522-37.) Before the Board, the Hospital did not challenge judge's findings that it violated Section

[2] The complaint also included Sodexho America, LLC, a company that provided management services to FMC, as a joint employer. However, the administrative law judge found (JA 503), and the Board affirmed (JA 488, 494-96), that Sodexho and FMC were not joint employers. That finding is not challenged on appeal; therefore, Sodexho is not a participant here.

8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by prohibiting employees from discussing their wages; surveilling and restricting employees' union activity in the emergency department break room; creating the impression of surveillance by statements made to employee Barbara Mesa; and threatening employees Melissa Demmer and Mesa with unspecified reprisals. (JA 487 n.1.)

The Board issued a Decision and Order, affirming portions of the judge's decision and reversing others. (JA 487-502.) The Board agreed with the judge's recommendations that FMC committed numerous unfair labor practice violations by interrogating and threatening employees. Pertinent to this appeal, the Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) disagreed with the judge and found that FMC violated Section 8(a)(1) of the Act by threatening employees that unionization is futile. (JA 488, 491-92.) The Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) also found, contrary to the judge, that FMC violated Section 8(a)(3) and (1) of the Act by changing Laverne Gorney's schedule and by firing Michael Conant. (JA 488, 491-94.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Overview; FMC's Official Position Regarding Unionization

FMC is a not-for-profit hospital in Flagstaff, Arizona employing about 2,000 workers. (JA 503.) It is one of three hospitals in a health care system organized under a corporate parent, Northern Alliance Healthcare ("NAH"). (JA 503.) NAH's official position regarding unions is that employees working at their hospitals should not be represented. (JA 46-47; 365.) This anti-union position is posted on FMC's intranet website, which states that "unions are not necessary to protect the best interests of . . . employees." (JA 48; 365.) The posting also lists the "disadvantages" of unionization, including the "expense of union dues and assessment" and "the limitation of management's freedom to recognize the individual abilities and needs of each employee." The posting further asserts that unions cause an "adverse effect upon the availability, continuity, and cost of patient care." (JA 365.) FMC provides a copy of this policy to all its newly hired employees. (JA 48.)

B. The Union Commences an Organizing Campaign

Starting in October 2006, the Union commenced a campaign to organize employees in two of FMC's ancillary services departments – environmental services ("EVS" or "housekeeping") and the nutrition services/dietary department.

(JA 503.) Approximately 64 EVS employees provide cleaning and linen services throughout FMC. (JA 503.) The dietary department has about 30 employees who provide food services, including operating the kitchen and cafeteria. (JA 503; 49.) The dietary department also employs nutrition assistants and dieticians who provide food services to patients. (JA 503; 49.)

The Union's organization campaign was not the first time that a union attempted to organize hospital employees. In early 2006, the California Nurses Association ("CNA") led a campaign to organize FMC's nurses. (JA 503.) FMC responded to that campaign by hiring a union-avoidance consulting firm, Global Labor Employment Strategies ("GLES"), which operated out of an office space at FMC. (JA 59, 296.) The CNA lost the June 2006 election and then filed objections to the employer's conduct; the Board sustained the objections and ordered a new election. (JA 488 n.11; 324.)

Upon learning of the Union's campaign, two GLES employees, Annette Raggette and Bill Jonas, met with supervisors to train them on union organization campaigns. Raggette and Jonas asked supervisors to report employees under their supervision who appeared to support the Union. (JA 59-62, 129-33.) At least two supervisors followed this instruction and provided names of union supporters to Raggette and Jones during the Union's campaign, as well as an email detailing

employees' anecdotal experiences with unions. (JA 129-33, 176-78, 354-55, 363, 380.)

C. Dietary Department Director Jeanine Drake and Supervisor Auggie Robledo Interrogate Employee Lydia Sandoval

Jeanine Drake is the Dietary Department Director. (JA 23.) In March 2007, Drake engaged in a work-time conversation with Lydia Sandoval, a nutrition aide in the dietary department. (JA 508, 232.) During this conversation, Drake told Sandoval that she thought the nurses were "foolish" to support the CNA. (JA 508; 233.) Drake then asked Sandoval her opinion regarding the Union, and Sandoval stated that she would support the Union. (JA 508; 233-34.) Drake next questioned Sandoval about what she thought a union could do for the employees that FMC "couldn't or wasn't doing." (JA 508; 233-34.) Sandoval responded that she thought the Union "would be better for everybody." (JA 489, 508; 234.)

In approximately March or April, following her conversation with Drake, Sandoval had a conversation with her supervisor, Auggie Robledo, in his office. (JA 509; 235.) Robledo told Sandoval that he wanted to ask her something and that he wanted the conversation to be kept between him and Sandoval. (JA 509; 236.) He said that he had never worked for a union and wanted to know what it was like. (JA 509; 236.) Robledo then quizzed Sandoval about what the Union did for employees. (JA 509; 236.) Sandoval responded that the Union represented employees, and she discussed how the Union might have supported her during a

recent conflict with a co-worker. (JA 509; 237.) Robledo questioned Sandoval if she felt that FMC had that many problems that it was necessary to bring the Union to FMC. Sandoval responded "yes, definitely." (JA 509; 237.)

D. The EVS Director Instructs a Supervisor To Warn Employee Barbara Mesa that She Is Exceeding Her Break Time When She Talks to the Union Representative

Starting in March 2007, Barbara Mesa, a housekeeper, became "very active" in the union campaign, hanging up flyers and talking to people about the Union. (JA 298.) During the campaign, Mesa typically spent most of her breaks and her lunch periods sitting with union representatives at a table in the cafeteria. One day in early April, Bernice Valencia, Mesa's supervisor, approached Mesa, who was sitting at the Union's usual cafeteria table. Valencia told Mesa that Vivian Kasey, the EVS Director, instructed Valencia "to tell you that you are exceeding your breaks in the cafeteria, with those Union people." (JA 518; 299.) Mesa denied that she had exceeded her break time, and Valencia agreed with Mesa that she had not done so. (JA 518; 300.)

E. A Dietary Department Supervisor Threatens Employees that Unionization Would Cause Them To Lose Scheduling Flexibility

In June, several employees, including nutrition assistant Heather Craig and her supervisor, Lisa Dominquez, were conversing in the dietary department office. Craig raised the subject of the Union, stating that she thought union representation

would benefit the employees. (JA 492.) Dominquez responded that she had just returned from a meeting with Dietary Department Director Drake, who told Dominquez that if the employees voted for the Union "[they] would no longer be able to switch shifts and that [their] schedules would be set." (JA 492; 196-97.) FMC has a practice of permitting employees to trade shifts, and employees regularly availed themselves of that practice. Craig asked Dominquez if she was serious, and Dominiquez reiterated that Drake had made the comment. (JA 492; 197.)

F. The Dietary Director Schedules Laverne Gorney To Work A "Very Unusual" Amount of Weekend Shifts

Laverne Gorney has worked at FMC for over 10 years, most recently as a dishwasher. (JA 494, 515.) On May 26, Gorney appeared in a pro-union advertisement in the *Arizona Daily Sun* giving a thumbs-up sign. (JA 494; 291, 372.) This paper is sold in a kiosk located outside FMC's entrance, and FMC receives several daily courtesy copies. Drake, Gorney's supervisor, admitted that she saw this ad and knew that the employees pictured in the ad were union supporters. (JA 179-80.) After Drake learned that Gorney supported the Union, she added Gorney's name to a list she had prepared of employees she believed were pro-union. Drake then provided that list to GLES representatives. (JA 175-78.) In late July, Gorney started wearing a union pin to work. (JA 172.)

"For many years" before June 2007, Gorney customarily worked Monday through Friday, only occasionally working a weekend shift. (JA 515; 280.) However, in June 2007, around the time that Gorney began her open union activity, Gorney's schedule changed. (JA 494, 515; 281.) Thereafter, from June through November, Drake assigned Gorney numerous weekend shifts. (JA 442-46.) These weekend shifts marked a "very unusual" change to Gorney's schedule, as the administrative law judge found. (JA 494 n. 2, 515; 282.)

Gorney asked her supervisor, Auggie Robledo, why "all of a sudden" her work schedule was different. (JA 282.) Robledo replied that the change was because "Jeanine [Drake] said so." (JA 282.)

G. FMC's President Tells Employees that He Will Not Bargain with the Union

On June 29, FMC's president, William Bradel, and Roger Schuler, the vice-president for ancillary services, conducted a meeting with about 30 dietary department employees. (JA 491, 516; 325.) During the meeting, Bradel and Schuler asked employees whether they had any issues or problems, and several employees raised employment-related concerns about various subjects. (JA 491; 331-33.) Bradel assured employees that FMC "would be [following] through" on the employees' suggestions and concerns. (JA 333.) Reminding employees that he was "the leader of the hospital," Bradel told employees that he appreciated

direct contact with them and that it was valuable in building their relationship. (JA 491, 506; 333.)

Bradel also told employees that he knew about the "union activity in [their] department," and that he was aware of Scott Barnes, the union representative who had been spending time in the cafeteria. (JA 506.) Bradel warned that direct communication would be difficult if the employees elected a union and that a union was not "necessary." (JA 491, 506; 333.) Employee Shawn White responded that the employees felt that they "need[ed] representation." (JA 334.) Bradel replied that, if there was a union, "[he] would not be negotiating with the union" or "the employees won't be negotiating with [him]." (JA 491, 506; 334-35.)

H. The EVS Director Warns Employee Melissa Demmer that Unions Are Corrupt and Can Get Her in Trouble

In mid-July, employees Barbara Mesa and Melissa Demmer were sitting together at a table in the cafeteria eating lunch with union representative Barnes. EVS Director Vivian Kasey approached their table, looked directly at Demmer, and said "[b]e careful who you hang around," adding that "unions are corrupt" and could "get you in trouble." (JA 518; 182.) Demmer responded that most unions are beneficial to employees. (JA 518; 182.) Mesa, defending Demmer, stated that Demmer was an intelligent person and could make an informed decision. (JA 518; 182.) Kasey then whispered in Demmer's ear that Demmer "should come see

[Kasey] in her office about this" and left the cafeteria. (JA 518; 182.) Demmer did not know what to respond, and the conversation was very "uncomfortable." (JA 182-83.)

I. FMC Discharges Union Supporter Michael Conant

FMC maintains a written attendance policy providing that "[m]ore than three (3) occurrences for unscheduled absences within a six (6) month time period may result in counseling and departmental follow-up." (JA 492; 373.) The policy defines "unscheduled absence" as "[n]ot reporting to work or working less than 50 percent of a scheduled shift. An absence is considered to be unscheduled if it has not been properly approved." (JA 373.) The policy is a no-fault policy, meaning that excuses such as illnesses did not transform the unscheduled absence into a scheduled or excused absence. (JA 373.) The policy also contains the following table (JA 492; 373) setting forth disciplinary action for various unscheduled absences:

Occurrences	Action
4 occurrences in any rolling 6 month period, or 7 in any 12 month period	Verbal warning. Discussion of extenuating circumstances or medical problems employee may be experiencing.
5 occurrences in any rolling 6 month period, or 8 in any 12 month period	Written warning. Discussion of absenteeism; recommend EAP if appropriate.
6 occurrences in any rolling 6 month period, or 9 in any 12 month period	Final Warning. Discussion of possible extenuating circumstances with employee and Human Resources; possible 3 day suspension without pay.
7 occurrences in any rolling 6 month period, or 10 in any 12 month period	Termination.

Michael Conant was a housekeeper in FMC's EVS department. Over the course of his two-year employment with FMC, Conant has received several corrective actions concerning his attendance, detailed below:

Occurrence	Discipline
4 unscheduled absences in a rolling 6 month period (2/2/06, 5/14/06, 5/23/06, 7/24/06)	Verbal warning received in July 2006
9 unscheduled absences in a 6-month period (5/14/06, 5/23/06, 7/24/06, 9/15/06, 9/17/06, 9/26/06, 10/10/06, 10/24/06, 10/30/06)	Written warning received in November 2006
1 unscheduled absence mid-January 2007	No discipline
7 unscheduled absences in a 6-month period (9/15/06, 9/17/06, 9/26/06, 10/10/06, 10/24/06, 10/30/06, 1/16/07, 2/7/07)	3-day suspension on 2/9/07
3 unscheduled absences on 5/18/07, 6/13/07 & 6/14/07, 7/3/07	No discipline

(JA 492; 376-79.)

In early July, Conant started wearing his union pin to work every day, and he began sitting with union representative Barnes in the cafeteria. (JA 260-62.) On July 27, he had his twelfth unscheduled absence in a rolling year. (JA 492.) Joe Brown, who had recently replaced Vivian Kasey as EVS director, learned of Conant's latest attendance infraction from his secretary, Alice Colorado, who was responsible for tracking and monitoring employee attendance for the EVS department. (JA 136.) Brown reviewed Conant's file and determined that the latest infraction warranted discharge. (JA 138.) He then gave Conant's file to Human Resources Director Janet McNeese to review, recommending that FMC discharge Conant. (JA 138.) In turn, McNeese passed the file on to Vice-President Roger Schuler, telling him that Conant's absences warranted termination. (JA 92-94.) Schuler relayed his agreement with the termination recommendation to Brown. (JA 94-95, 126.)

On August 1, Conant met with Brown in Brown's office. At that time, Brown informed Conant that he was being discharged, and he gave Conant a supervisory action form to sign. (JA 493, 519; 140.) This form provided that Conant was being discharged for violating FMC's attendance policy for having 12 unscheduled absences within a 12-month time period. (JA 374.) The form also stated that "Michael received a final warning and 3-day suspension for absenteeism

on 2/9/07. Since that time, he has received four more absences. Because of the final warning and the continued absenteeism Michael will be terminated." (JA 374.)

J. The Dietary Department Director Asks a New Employee To Identify a Union Supporter and then Threatens the New Employee with a Lay-Off if the Union Wins the Election

On August 16, Dietary Department Director Drake was leading Mattie Martinez, a recently hired employee, through an orientation process. (JA 513.) Drake showed Martinez the dietary department's and the Union's bulletin boards, told Martinez that both sides had information to read, and that the Union would make a lot of claims that were not true. (JA 513; 198.) Drake asked Martinez if anyone had talked to her about the Union. (*Id*.) When Martinez replied in the affirmative, Drake asked Martinez to identify that person. (*Id*.) Martinez did not want to reveal that she supported the Union, nor did she want to reveal the identity of the person who spoke to her about the Union. Martinez therefore lied about the identity, naming an employee that Martinez believed was against the Union. (*Id*.) Martinez's response surprised Drake, and Drake told Martinez that she thought the named employee was anti-union. (*Id*.) Drake then asked Martinez if anyone else had spoken to her about the Union. Martinez said no. (*Id*.)

Martinez and Drake had another conversation during Martinez's first few days as an FMC employee. During this conversation, Drake told Martinez that if

the Union came in, "people would have to be let go." (JA 514; 199.) Martinez, as the last person hired, understood Drake to be conveying the message that Martinez should not support the Union because Martinez would be the first fired. (JA 200-01.)

K. A Supervisor Restricts Pro-Union Employees' Access to a Break Room, Contrary to FMC's Solicitation Policy; Another Supervisor Monitors the Employees' Activities in the Break Room as They Try To Discuss the Union with Their Co-Workers

On August 19, employees Ed Gorney and Shawn White, both wearing their employee identification cards and their union buttons and lanyards, went to the emergency department break room to distribute union literature, to hang union flyers, and to speak to employees about signing a union petition. (JA 514; 103-04.) Theresa Caughey, an emergency charge nurse, approached Gorney and White and told them that they were not allowed in the break room. (JA 105-06.) A security officer then arrived and told Gorney and White to leave, which they did. (JA 107.) However, the guard soon realized that he had wrongly interpreted FMC's solicitation policy, and he allowed Gorney and White to return to the break room to pass out literature and obtain signatures on a petition. (JA 514.)

Two days later, White returned to the emergency department break room, accompanied by employee Paula Souers, again to talk to employees about the Union and to obtain petition signatures. (JA 514; 112-13.) Both were wearing their employee identification cards and their union buttons and lanyards. (JA 112.)

After setting some union fliers on the couch, supervisor Ashley Peak approached and asked why they were in the break room. (JA 113.) White and Souers responded that they wanted to put up a flyer and talk to employees about the Union. Peak told them that this was not allowed. White then recounted the incident that had occurred two days earlier and told Peak to call a security officer if she had any questions. (JA 114.) Peak responded that because employees' personal belongings were in the room, she did not feel comfortable leaving White and Souers unattended. (JA 114.) Peak therefore remained in the room, 10 feet away from White and Souers, "basically monitor[ing]" them, according to White. (JA 514; 115.) Some time later, supervisor Lindy Turley came into the break room and joined Peak in monitoring White and Souers. (JA 514; 116.) Realizing that employees would not approach them with Turley and Peak present, White and Souers left the break room. (JA 514; 115-16.)

L. The Dietary Department Director and a Supervisor Instruct Employees Not To Discuss Wages with Each Other

Heather Craig, a nutrition assistant, had a conversation with another employee, Sarah Klein-Mark, about a co-worker who had the same work experience as Craig but who earned more than Craig. (JA 98.) Klein-Mark asked Drake about the issue. Drake told Klein-Mark that she would investigate the pay discrepancy, but that "employees shouldn't be talking about their wages with each

other." (JA 510; 99.) Klein-Mark told Craig that Drake prohibited discussing wages. (JA 99.)

Auggie Robledo, supervisor for the dietary department, has a similar policy prohibiting discussion of wages. When Robledo gives employees their evaluations, he tells them that their evaluations and raises are confidential and that employees should keep that information to themselves. (JA 210.) Robledo also tells employees that he is not going to divulge the information to other employees, and that "it is up to them to keep that information to themselves." (JA 211.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, Members Pearce and Hayes)[3] found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating employee Lydia Sandoval on two separate occasions, by interrogating employee Mattie Martinez, and by threatening Martinez with layoffs. The Board also adopted, in the absence of exceptions, the judge's numerous other unfair labor practice findings. (JA 487 n.1.)

The Board disagreed with some of the judge's other recommendations. Specifically, the Board (Chairman Liebman, Members Pearce and Hayes) found

[3] Member Hayes found it unnecessary to pass on the allegations regarding Sandoval as any such violations would be cumulative and would not affect the remedy.

that FMC violated Section 8(a)(1) of the Act by threatening to eliminate the employees' scheduling flexibility if they unionized. The Board (Chairman Liebman and Member Pearce; Member Hayes dissenting) also found that FMC violated Section 8(a)(1) of the Act by threatening that unionization would be futile, and that FMC violated Section 8(a)(3) and (1) of the Act by altering Laverne Gorney's schedule and terminating Michael Conant in retaliation for their union support.

The Board's Order requires FMC 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 the rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires FMC to rescind the unlawful change to Gorney's schedule, to reinstate Conant to his former, or a substantially equivalent, position and to make him whole for any losses suffered as a result of the discrimination against him, and to expunge from Gorney's and Conant's records all references to the unlawful schedule change and discharge, respectively. Finally, the Order requires FMC to post a remedial notice and to distribute such a notice electronically. (JA 497-98.)

SUMMARY OF ARGUMENT

Faced with a union organizing campaign in FMC's environmental services and nutrition services departments – just months after another union campaign involving their nursing staff – FMC, which has a published policy opposing unionization, responded to organizing efforts with a series of unlawful acts designed to discourage unionization. Much of this conduct is uncontested. Specifically, FMC does not contest that it prohibited employees from discussing their wages, surveilled and restricted employees' union activity, threatened employees with unspecified reprisals and layoffs, and interrogated employees regarding their union sympathies. Out of the numerous unfair labor practices found, FMC contests only three violations before this Court.

The Board properly found that, during the organizing campaign, FMC's President William Bradel unlawfully threatened employees that selection of the Union would be futile. During a meeting with employees, Bradel responded to an employee's statement that employees needed union representation by categorically stating that he "would not be negotiating with the Union." Given Bradel's position of authority, the context of the remark at the point in the meeting, and the myriad ways FMC had already violated the employee's statutory rights, the employees could reasonably view Bradel's statement as a coercive threat of futility.

Substantial evidence also supports the Board's findings that FMC altered Laverne Gorney's schedule and fired Michael Conant because of their open union support. FMC's numerous uncontested violations and its express instructions to supervisors to report union activity, supports the Board's findings that FMC was aware of Gorney's and Conant's support for the Union. Such evidence further supports the Board's findings that the adverse actions taken against them were the direct result of FMC's evident union animus.

The Board properly found that this animus prompted FMC to alter Gorney's schedule by requiring her to work more weekend shifts. Substantial record evidence supports the judge and the Board's conclusion that it was "very unusual" for Gorney to work weekend shifts. However, soon after Gorney began openly supporting the Union, her supervisor began scheduling her for numerous weekend shifts. Gorney went from working only three weekend shifts in a 6-month period to working 23 weekend shifts in the same period of time. FMC failed to demonstrate a legitimate, nondiscriminatory reason for this change in Gorney's schedule.

While Conant admittedly had a poor attendance record, FMC had tolerated his infractions. However, after Conant wore his union pin daily for an entire month, began sitting with the union representative at lunch time, and was listed by his supervisor as a union supporter, FMC's tolerance suddenly ceased. FMC failed

to show that its discharge was the result of anything but union animus, and the record evidence belies FMC's claim that the discharge was the result of a consistent application of its attendance policy. Such evidence shows that both before and after Conant's discharge, FMC's application of its policy was haphazard and random.

STANDARD OF REVIEW

This Court "accords a very high degree of deference to administrative adjudications by the [Board]." *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the findings of the Board unless they are "unsupported by substantial evidence in the record considered as a whole," or unless the Board "acted arbitrarily or otherwise erred in applying established law to fact." *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). "Substantial evidence" for purposes of this Court's review of factual findings, consists of "such relevant evidence as a reasonable mind might accept to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court accordingly may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.* at 488.

The Court gives even greater deference to the Board's determinations on questions of motive, because most evidence of motive is circumstantial. *Bally's*

Park Place, Inc. v. NLRB, 646 F.3d 929, 939 (D.C. Cir. 2011). Moreover, the Court will accept an administrative law judge's credibility determinations that are adopted by the Board unless they are "'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capitol Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998)).

Further, where, as here, "the Board has disagreed with the [administrative law judge] . . . the standard of review with respect to the substantiality of the evidence does not change." *Local 72, Int'l Bh'd of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000). Although "the Board, when it disagrees with the [administrative law judge], must make clear the basis of its disagreement," in the end it is the Board that is "entrusted by Congress with the responsibility for making findings under the statute." *Id.* at 15.

ARGUMENT

I. THE COURT SHOULD SUMMARILY ENFORCE THE BOARD'S ORDER REGARDING THE NUMEROUS UNCHALLENGED VIOLATIONS OF THE ACT

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). An employer that does not file exceptions

with the Board to an administrative law judge's findings is thus jurisdictionally barred from obtaining appellate review of those findings. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord W&M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008); *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

FMC did not contest many of the administrative law judge's findings before the Board. (JA 487 n.1.) Specifically, FMC failed to except to the judge's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by: (1) prohibiting employees from discussing their wages with each other; (2) creating the impression of surveillance of union activities by statements made to employee Barbara Mesa; (3) threatening employees Melissa Demers and Mesa with unspecified reprisals; and (4) surveilling and restricting employees' union activity in the emergency department break room. (JA 487 n.1.) As FMC waived its right to contest these violations, the Board is entitled to summary enforcement of these portions of its Order.

Additionally, consistent with Rule 28 of the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived. Fed. R. App. P. 28(a)(9)(A). When an employer does not challenge in its initial brief the Board's findings regarding a violation of the Act, those unchallenged issues are waived on appeal, and the

Board is entitled to summary enforcement. *See New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007); *Public Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n.3 (10th Cir. 2003). The Board found that FMC violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by (1) interrogating employee Lydia Sandoval about what a union could do for employees that FMC was not already doing; (2) interrogating Sandoval on a separate occasion about whether it was necessary to bring a union into FMC; (3) threatening employees with the loss of scheduling flexibility; (4) threatening employee Mattie Martinez with a layoff if the Union was elected; and (5) interrogating Mattie Martinez about whether anyone had talked to her about the Union. (JA 487-88.)

In its brief, FMC does not challenge any of these findings. Therefore, FMC has waived its right to later raise these issues, and the Board is entitled to summary enforcement on these portions of its Order. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (merely referring to matter in the opening brief is insufficient). *See also Bd. of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (issues not raised until reply brief are waived).

Moreover, courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the [remaining] issues are considered." *NLRB*

v. Clark Manor Nursing Home, 671 F.2d 657, 660 (1st Cir. 1982). *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc). *See also NLRB v. Pace Manor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983) ("It is against the background [of uncontested violations] that we consider the Board's remaining findings.").

II. FMC'S PRESIDENT UNLAWFULLY THREATENED EMPLOYEES THAT SELECTING UNION REPRESENTATION WOULD BE FUTILE BECAUSE HE "WOULD NOT NEGOTIATE" WITH THE UNION

A. The Act Prohibits an Employer From Engaging in Activity That Would Reasonably Tend To Coerce Employees' Exercise of their Rights

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir.

1991). Proof of animus or actual coercion is unnecessary. *Avecor*, 931 F.2d at 931-32; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

An employer's statements "must be judged by their likely import to [the] employees." *C&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978). *Accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (assessing the legality of employer statements based on whether employees would "reasonably perceive" them as threats). The critical inquiry, then, is what an employee would reasonably have inferred from the employer's statements or actions when viewed in context. *See, e.g., Tasty Baking Co.*, 254 F.3d 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). "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. Chem.*, 473 F.2d 374, 381 (5th Cir. 1973).

When evaluating an employer's statement, the Board considers "the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the 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). This Court recognizes "'the Board's competence . . . to judge the impact of utterances made in the context of the employer-employee

relationship.'" *Progressive Elec.*, 453 F.3d at 544 (quoting *Gissel*, 395 U.S. at 620.)

It is well settled that comments that management will not negotiate with a union convey a message that voting for the union would be futile and are therefore unlawful threats. *See Trump Marina Assoc., LLC*, 355 NLRB No. 208, 2010 WL 3835567 (Sep. 30, 2010) (incorporating 353 NLRB No. 93, 2009 WL 400100, at *1 (Feb. 17, 2009) (comments to employees that management would not negotiate violates Section 8(a)(1) by conveying message that voting for the union is futile), *enforced*, 445 F. App'x 362 (D.C. Cir. 2011); *Garvey Marine, Inc.*, 328 NLRB 991, 1010 (1999) (employer's categorical statement that it would not negotiate with the union if it became the designated bargaining agent was unlawful threat of futility), *enforced on other grounds*, 245 F.3d 819 (D.C. Cir. 2001). Such threats not to bargain are "patently coercive," *Garvey Marine*, 328 NLRB at 1010, because they admonish employees that they would exercise their Section 7 rights in vain as a collective-bargaining agreement will never be obtained. *See Equip. Trucking Co.*, 336 NLRB 277, 283 (2001) (citing *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992)). *Accord Federated Logistics & Operators v. NLRB*, 400 F.3d 920, 925 (D.C. Cir. 2005) (unlawful threats that selecting the union would be futile).

B. The Board Properly Found that President Bradel Threatened Employees that Choosing Union Representation Would Be Futile

The Board reasonably found that President Bradel's categorical statement that he would not negotiate with the Union was an unlawful threat of futility. During a meeting with dietary department employees at the height of the Union's campaign, Bradel told employees that he knew about the union activity, and that a union would make direct contact with employees "difficult." (JA 491; 333.) Employee Shawn White responded immediately, stating that the employees needed union representation. (JA 491; 334.) Bradel replied that "if there was a union, 'I would not be negotiating with the union' or 'you won't be negotiating with me.'" (JA 491; 334.)

An examination of the context in which Bradel's comment occurred demonstrates the statement's coercive nature and supports the Board's finding (JA 491) that employees "could have reasonably construed Bradel's statement as indicating that FMC would not bargain with the Union." As President, Bradel is FMC's highest ranking official. At the meeting, he reminded employees that he was the "leader of the hospital" and his statement that he "would not be negotiating with the union" was made in direct response to an employee's assertion that the employees needed union representation. Moreover, the statement was made in a working environment already riddled with unfair labor practices that included unlawful interrogations, surveillance, and threats, which serve to increase the

coercive nature of Bradel's statement. The Board properly dismissed (JA 491) the argument that employees would view this statement as Bradel simply discussing the identity of FMC representatives that would participate in negotiation sessions, especially in light of the fact that the remark "was not made in the midst of a discussion of who, amongst FMC officials, would be sitting at the bargaining table." Given Bradel's position at FMC, the statement that prompted his comment, and the anti-union atmosphere that pervaded FMC, the context of Bradel's remark supports the Board's determination that employees would "naturally interpret" it as a "comment on the futility of the union representation that an employee had just stated was needed." (JA 491.)

C. FMC's Challenges To the Board's Finding Lack Merit

FMC raises numerous challenges to the Board's determination that Bradel's remark was unlawfully coercive. These challenges are unsupported by either the underlying facts of this case or the applicable law. As a starting point, FMC chastises (Br. 35) the Board for "rejecting the [judge's] credibility determination regarding Bradel's remark." This argument ignores that the Board based its finding solely on Bradel's testimony. Specifically, the Board examined only the words that Bradel testified that he said: "if there was a union, 'I would not be negotiating with the union' or 'you won't be negotiating with me.'" (JA 491; 334.) The Board thus credited Bradel's testimony regarding the words he used and

pointedly did not consider any other witnesses' testimony regarding Bradel's statement.

FMC argues (Br. 29-30) that the Board applied an incorrect standard in evaluating whether Bradel's remark violated Section 8(a)(1) of the Act. FMC is wrong. Board precedent does not require that an employer's statement regarding the futility of selecting a union also include, or be accompanied by, an explicit or implicit threat that the employer will use unlawful means to remain nonunion. *See Equip. Trucking Co.*, 336 NLRB 277, 283 (2001); *Garvey Marine, Inc.*, 328 NLRB 991, 1004, 1018 (1999). While such a statement may increase the coercive impact of a violation, it is not required to find a threat of futility. Rather, the central question under Section 8(a)(1) is whether the employer's conduct tended to interfere with the exercise of Section 7 rights, not whether the employer deliberately sought to interfere with employee rights. *Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). Indeed, this Court, applying the very standard that FMC claims is inapplicable, recently enforced the Board's determination that an employer's statement that "management would not negotiate" with the union, unaccompanied by a threat to use unlawful means, constituted an unlawful threat of futility. *See Trump Marina Assoc., LLC v. NLRB*, 445 F. App'x 362 at *1 (D.C. Cir. 2011) (stating that "applicable standard" to determine a Section 8(a)(1)

violation is whether "under the totality of the circumstances, the employer's conduct had a 'tendency to coerce'").

Thus, FMC's argument (Br. 30) that an employer must accompany its futility threat with a vow to use unlawful means adds an element to a Section 8(a)(1) violation that is not required by applicable Board precedent. Moreover, FMC's argument rings hollow in the face of its own blatant and uncontested malfeasance during the union organizing campaign. As noted, Bradel's remark came at a time when the work environment was already charged with unlawful interrogations, threats, and surveillance. Accordingly, FMC's attempt (Br. 32) to distinguish this case from *Redwing Carriers*, 165 NLRB 60, 82 (1967), by noting that the employer there had "blatantly violated the Act on numerous occasions" is unavailing.

FMC also paints a contradictory picture of Bradel in its attempt to differentiate him from the offending president in *Redwing*. FMC defends Bradel's statements by explaining that, unlike the union-weary president in *Redwing*, Bradel "had little to no experience regarding unions." (Br. 32.) However, earlier in its brief, FMC portrays (Br. 4) its management staff as savvy and well-versed in union organization campaigns, touting its management as having "extensive experience with on-site union organizing and [knowing] well through repeated training and first-hand exposure that employees had legal rights to support and advocate for a

union." FMC seeks to have it both ways and suggests either Bradel is a president whose behavior can be excused because he misspoke out of naiveté or a president who knowledgeably navigated a presentation that respected employees' Section 7 rights while lawfully asserting FMC's position. The Board properly found (JA 491) that neither characterization is correct, and that the more "natur[al] interpret[ation]" of his remark is that employees would reasonably hear it as suggesting that unionization would be futile.

In its efforts to give a more benign interpretation to Bradel's remark, FMC consistently misinterprets settled Board precedent. FMC (Br. 33-34) faults the Board for not embracing Bradel's professed, subjective intent behind his statement. However, the Board properly failed to give this testimony any weight. The test for determining the illegality of an employer's statement is whether the conduct reasonably tended to interfere with an employee's Section 7 rights – judged from the employee's perspective - not the employer's actual intent in making the statement. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). *See also Unbelievable, Inc.*, 323 NLRB 815, 816 (1997) (finding supervisor's statements unlawfully coercive, irrespective of supervisor's intent), *enforced in relevant part*, 118 F.3d 795 (D.C. Cir. 1997). In determining whether a violation occurred, "statements made by management must be judged in the context of the effect they would have on an employee while he is in the employer-employee relationship."

Jay Foods, Inc. v. NLRB, 573 F.2d 438, 444 (7th Cir. 1978). Thus, Bradel's self-serving testimony regarding his intent when making the statement is irrelevant to the Board's determination of whether a violation occurred. *See KSM Indus., Inc.*, 336 NLRB 133, 133 (2001) (coercive effect of supervisor's statement not diminished by his innocuous purpose). Moreover, the dialogue between Bradel and employee White does not suggest that they were discussing the participants at the negotiating table, but rather the need for union representation at all.

FMC appears purposely obtuse by arguing (Br. 32) that because Bradel referred to himself only, and not to FMC more broadly when making his statement, the employees could only reasonably interpret Bradel's comment as stating that he personally, not FMC, would not negotiate. Employees, however, would reasonably believe that Bradel, FMC's president, was speaking for FMC, and not himself, when he stated that he would not negotiate with the Union. *Cf. Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997) (individual is an agent of employer if he has been placed in such a position that employees could reasonably believe that individual spoke for management).

Likewise, FMC (Br. 34) points to employee testimony and claims that it supports the argument that employees could not reasonably interpret Bradel's statements to be threats of futility. However, FMC bases its argument on a selective reading of the record. A thorough review of the employees' testimony

demonstrates that the employees viewed Bradel's statements as precisely that kind of a threat. The employees perceived that Bradel "wasn't real happy" with the idea that employees would unionize and "sneer[ed]" at the thought of the employees "sitting in a meeting with [him]" (JA 241, Sandoval), bluntly stating "if you think you're going to sit down across the table from me and negotiate a contract, you're wrong" (JA 195, Souers). Similarly, others viewed Bradel as stating that "if the [U]nion got in that he wouldn't talk to them" and "he would not meet with any union representatives." (JA 249-50, Mackey.) When employee White tried to refute Bradel's antiunion remarks by reminding Bradel that the Union was made up of his employees and "was not a bunch outsiders," Bradel retorted "that's not how he experienced it." (JA 120-21, White.) Thus, the above testimony belies FMC's optimistic claim (Br. 34) that Bradel's remark left employees with the impression that FMC "would be working with the [U]nion."

In any event, the employees' subjective reaction to Bradel's statement is irrelevant to determining whether a violation occurred. "As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees." *Frontier Tel. of Rochester, Inc.*, 344

NLRB 1270, 1276 (2005). *See also Sunnyside Home Care Project, Inc.*, 308 NLRB 346, 346 (1992).

Finally, FMC asserts that (Br. 29-30) that the Board erred by citing to *Double D Constr. Group, Inc.*, 339 NLRB 303, 303-04 (2003), when it applied the well-established test of "whether the words could reasonably be construed as coercive" in examining Bradel's remark. Instead of that well-established test, FMC argues (Br. 30) that "Board law requires a 'high burden' to demonstrate threats of futility" and that an employer "makes an unlawful threat of futility if it states or implies that it will ensure its non-union status by unlawful means." In support of this proposition, FMC cites *Amersino Marketing Group, LLC*, 351 NLRB 1055, 1061 (2007) and *Ready Mix, Inc.*, 337 NLRB 1189, 1190-91 (2002). To the extent that FMC believes that there are, or should be, two separate standards for evaluating 8(a)(1) conduct when the conduct involves a statement regarding the futility of unionization, it could have brought that argument to the Board's attention. However, FMC chose not to. Instead, for the first time in its opening brief, FMC claims that the Board applied the wrong standard. As discussed above at pp. 24-26, Section 10(e) of the Act (29 U.S.C. § 160(e)) bars judicial review of issues not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Despite the opportunity to raise the issue to the Board, FMC never argued for the application of a different standard or relied on

those cases for that purpose. Its failure to do so renders this Court "powerless" to consider arguments not made to the Board, as "'orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.'" *W&M Prop. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008) (quoting *United States v. L.A. Tucker Lines, Inc.*, 344 U.S. 33, 37 (1952)). *See also EPI Constr. Co. v. NLRB*, 324 F. App'x 6, 8 n.5 (D.C. Cir. 2009) (finding employer's failure to present cases to the Board in the first instance deprives court of jurisdiction to consider the argument).

In any event, as shown (pp. 31-32), the established test for a Section 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. Moreover, the facts of *Ready Mix, Inc.*, 337 NLRB 1189, 1190-91 (2002), and *Amersino Marketing Group, LLC*, 351 NLRB 1055, 1061 (2007) do not compel a different conclusion here. In *Ready-Mix*, 337 NLRB 1189, 1190 (2002), the Board found a manager's statement that the employer "was not unionized" and "had no plans to go union," made in response to inquiries as to whether the employer "was union" or "had plans to go union," was noncoercive and did not violate Section 8(a)(1). Here, unlike the manager in *Ready-Mix*, who went no further than to state the employer's current status, Bradel declared his refusal to negotiate with the

Union in the event that the employees chose representation. Likewise, *Amersino Marketing Group, LLC*, 351 NLRB 1055 (2007), supports the Board's conclusion. In that case, the company president told employees that he would never accept a union and that a union would come into his plant "over his dead body." *Id.* at 1061. Other than the use of decidedly more colorful language, the employer in *Amersino* conveyed the same unlawful message as Bradel – that their unwillingness to accept unionization would make selecting union representation a futile endeavor.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S CONCLUSION THAT FMC VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ALTERING LAVERNE GORNEY'S SCHEDULE AND BY DISCHARGING MICHAEL CONANT IN RETALIATION FOR THEIR UNION ACTIVITY

In the midst of the Union's campaign, FMC took adverse action against two union supporters, Laverne Gorney and Michael Conant, by scheduling Gorney to work more weekend shifts and by firing Conant. Given the timing of these adverse actions, coming almost immediately after Gorney and Conant demonstrated union support, and in the midst of numerous other unfair labor practices, the Board reasonably found that anti-union considerations were motivating factors in FMC's decision to punish these union supporters. FMC has failed to rebut the Board's findings of unlawful motivation and cannot show that, even absent their union activities, it would have altered Gorney's schedule and fired Conant.

A. An Employer Violates the Act by Taking Adverse Action Against Employees in Retaliation for Their Union Activities

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates the Act by discharging or taking other adverse employment actions against employees for engaging in union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).[4]

The legality of an employer's adverse action depends on its motivation. If substantial evidence supports the Board's finding that union activities were a motivating factor in the discipline, the employer's action violates the Act unless the employer proves that it would have taken the same action even in the absence of those activities. *Transp. Mgmnt. Corp.*, 462 U.S. at 395; *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

Unlawful motivation can be inferred from circumstantial as well as direct evidence. *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 651 (D.C. Cir.

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[4] A violation of Section 8(a)(3) of the Act results in a "derivative" violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

2003). Such evidence includes the employer's knowledge of union activities,[5] hostility toward union activities as revealed by the commission of other unfair labor practices,[6] the timing of the adverse action,[7] and the employer's reliance on implausible or shifting reasons for the action.[8]

B. FMC's Numerous Uncontested Unfair Labor Practices Support the Board's Finding of Union Animus

FMC's numerous uncontested Section 8(a)(1) violations and its public opposition to unionization put to rest any question that FMC's union animus motivated adverse actions against both Gorney and Conant. *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 946 (D.C. Cir. 1988) (a company's "open hostility toward [u]nion activity and its 8(a)(1) violations, are clearly sufficient to establish" anti-union animus on the part of that company). It is undisputed that near in time to Gorney's schedule change and Conant's discharge, FMC had forbidden employees to discuss their wages with co-workers, created the impression that its employees were under surveillance, interrogated employees,

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[5] *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

[6] *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

[7] *Tasty Baking Co.*, 254 F.3d at 126; *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1168 (D.C. Cir. 1993).

[8] *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995).

threatened to eliminate employees' scheduling flexibility, warned that selecting the union would be a futile, threatened union supporters with unspecified reprisals, and warned that selecting the Union would result in being laid off. Thus, the adverse actions against Gorney and Conant did not occur in a vacuum, but instead took place in a working environment riddled with unfair labor practices by an employer determined to avoid having unions represent its employees. *See E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 41 (1st Cir. 2004) ("[T]hose [uncontested] findings remain in the case, and [the Court is] free to draw upon them to put the contested violation -- [the employee's] firing -- into proper perspective.").

C. The Board Reasonably Found that FMC Violated Section 8(a)(3) and (1) of the Act by Scheduling Gorney To Work a "Very Unusual" Amount of Weekend Shifts After it Learned of Her Support for the Union

Employee Laverne Gorney had worked for FMC for over ten years, during which time she typically worked a Monday through Friday schedule, while only "occasionally" working a weekend shift. (JA 494.) In fact, FMC did not challenge the judge's finding that the additional weekend assignments were "very unusual" for Gorney. (JA 494 n.20.) However, after Gorney demonstrated her union support, FMC retaliated by scheduling Gorney for numerous weekend shifts starting in June and continuing throughout the rest of the year. Gorney's shift changes also brought a change in duties. During her weekday shift, Gorney had only one task to perform, washing and drying dishes. As the Board found (JA

494), however, on the weekends, Gorney often had to perform various other tasks in addition to dishwashing.

1. Union animus motivated Drake's changes to Gorney's schedule, notably the marked increase in weekend shifts

Substantial evidence supports the Board's finding that FMC increased Gorney's weekend shifts because Gorney was an active and open union supporter. By May 26, Gorney's union support was obvious to FMC management as she appeared in a pro-union advertisement in the *Arizona Daily Sun*, a paper sold in a kiosk outside the hospital and distributed inside the hospital. (JA 372.) In July, she began wearing a union pin to work. Her supervisor, Dietary Director Drake, identified Gorney on a list of union supporters Drake provided to GLES consultants (hired by FMC), after seeing Gorney in the ad and seeing her sit with union representatives in the cafeteria. (JA 175-181.) Moreover, as discussed, the numerous uncontested violations, many of which were committed by Drake, lend additional support to the Board's finding that FMC's action was motivated by union animus.

After Gorney's union support became widely known, Drake began, and continued, to assign Gorney to several weekend shifts throughout the summer and the fall of 2007. The Board agreed with the judge that assigning Gorney so many weekend shifts was "very unusual," and, as noted, FMC did not challenge that

finding. Thus, the Board found ample evidence that union animus motivated the changes to Gorney's shift schedule.

2. FMC's arguments fail to contradict the Board's animus finding

FMC challenges (Br. 50-51) the Board's determination (JA 494) that the timing of Gorney's schedule change – "coming as it did on the heels of her appearance in the pro-union advertisement" – is probative of animus. FMC contends (Br. 49-50) that Gorney's union activity was not the motive behind the schedule change because Gorney appeared in the pro-union ad on May 26, and the June schedule was made the day before, on May 25. However, FMC failed to raise this factual argument to the Board, thereby depriving the Board from considering this issue in the first instance. As such, Section 10(e) of the Act (29 U.S.C. § 160(e)) prevents this Court from considering it. *See S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012) (Section 10(e) renders court without jurisdiction to consider any arguments that were not raised either in exceptions to the Board or in a motion for reconsideration). *See also Public Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1173, 1178 n.3 (10th Cir. 2003) (company waives argument based on factual error by not bringing it to Board's attention and instead raising issue for the first time on appeal); *Glaziers' Local No. 558 v. NLRB*, 408 F.2d 197, 202-03 (D.C. Cir. 1969) (alleged misstatement of fact not brought to Board's attention by motion for reconsideration waived on appeal).

Moreover, the fact that the judge ruled for FMC on this issue did not excuse FMC from bringing it to the Board's attention, either through its response to the General Counsel's brief in support of exceptions or in a motion for reconsideration following the Board's decision. *See NLRB v. GAIU Local 13-B*, 682 F.2d 304, 311-12 (2d Cir. 1982) (party still had obligation to file cross-exceptions regarding evidentiary ruling even though it had prevailed on underlying issue before the judge). *See also Epilepsy Found. v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (failure to move for reconsideration of issue precludes judicial review); 29 C.F.R. § 102.48(d)(1) (providing that any material error included in a Board decision can be contested by a motion for "reconsideration, rehearing, or reopening of the record"). FMC was certainly on notice of the importance of knowledge and animus with regard to the discrimination against Gorney and should have alerted the Board to its perceived factual error. Indeed, the very purpose of Section 10(e) is to "insure against piecemeal appeals to the court by requiring the parties first to give the Board an opportunity to rule upon all material issues in a case." *GAIU Local 13-B*, 682 F.2d at 311. Having failed to bring this factual error to the Board's attention, it cannot argue it now before the Court. *See id.* (failure to bring evidentiary errors to Board's attention through cross exceptions or a petition for rehearing prevents a from asserting them for the first time on appeal).

In any event, the asserted lack of suspicious timing with regard to the June schedule does not defeat the Board's animus finding. Even if FMC did not know of Gorney's union support when it created the June schedule, it certainly knew about it when assigning Gorney the uncontested "unusual amount" of weekend shifts from July through November. Moreover, as Board reasonably found (JA 494), and as set forth above (p. 42), FMC's union animus "is evidenced by its numerous violations of the Act," many committed by Drake, who created Gorney's work schedule.

FMC next claims (Br. 51) that the scheduling change was not the result of animus because Drake "often scheduled Gorney to work weekend shifts" prior to her union activity. This argument fails for two reasons. First, as the Board expressly noted (JA 494 n. 20), FMC never excepted to the judge's finding that weekend assignments were "very unusual" for Gorney.

Second, the evidence belies FMC's claim that working weekend shifts was a normal part of Gorney's scheduled workweek. During the first six months of 2007, Gorney worked a total of three weekend shifts, all in March 2007. (JA 442-76.) After her union support became public, between June 2007 and November 2007, Gorney worked 23 weekend shifts. Also, Gorney worked more weekend shifts in those six months (June 2007-November 2007) than she did for entire year of 2005 or 2006, when she worked a total of 19 shifts and 16 shifts, respectively.

(JA 442-76.) Thus, contrary to FMC's contentions that Drake frequently changed Gorney's schedule, the evidence supports the otherwise undisputed finding that assigning Gorney to work weekend shifts was not routine but was "unusual" prior to her emergence as a union advocate.

FMC next argues (Br. 52) that Gorney's weekend shifts were the result of her agreeing to an increase in work hours from 32 to 40 hours per week. The increase in Gorney's working hours is not the panacea that FMC wishes it to be. First, the increase was meant to reflect the hours that Gorney actually worked. Gorney was one of several employees who complained to Schuler and Bradel at the June 29 meeting that they were budgeted for 32 hours a week – and therefore received reduced benefits – "but consistently worked beyond that." These employees requested that "their budgeted hours . . . be changed to reflect what they were actually working." (JA 74, 173-74, 366-67.) Accordingly, Drake increased Gorney's budgeted hours in response to this request at the beginning of August. (JA 74-75, 351-52, 368-71.) Second, after Gorney's union support became known, her additional eight hours often were scheduled on a weekend rather than on a Friday.

3. FMC failed to demonstrate that it would have required Gorney to work weekends absent her union activity

FMC claims (Br. 53) that, even assuming union animus motivated its scheduling of Gorney's shifts, it met its rebuttal burden by demonstrating a

legitimate business reason for its scheduling policy, which allows FMC to routinely change job routines and schedules. However, the Board properly found (JA 494) this argument lacking because FMC presented only "vague" evidence about "unspecified" schedule changes to "unidentified" employees. In an attempt to be more specific, FMC (Br. 53) points to schedule changes for Lydia Sandoval and Dale Mackey, noting that the Board found (JA 487-88) those schedule changes to be lawful. However, the Board did not find that FMC's policy allowing for schedule changes is unlawful, but rather that FMC cannot apply that otherwise lawful policy for discriminatory reasons. Instead, the Board examined the evidence submitted by FMC for each employee and reached different conclusions. Thus, the Board's finding that FMC did not discriminate against Sandoval and Mackey by changing their schedules does not impute an innocuous intent to FMC's decision to change Gorney's schedule.

D. The Board Reasonably Found that FMC Violated Section 8(a)(3) and (1) of the Act by Discharging Conant Soon after He Demonstrated His Union Support

On August 1, following a month of open union support by Conant, FMC reached back to his absences in May, June and early July - absences that FMC had theretofore ignored - and used them to support Conant's discharge. FMC discharged Conant on the basis of these absences, claiming that he violated FMC's attendance policy that FMC had previously inconsistently enforced. The record

supports the Board's findings that anti-union considerations, and not Conant's attendance record, motivated FMC's decision to discharge Conant, and FMC failed to demonstrate that it would have taken that action absent those considerations.

1. FMC knew of Conant's union support

Conant was an active union supporter. Starting on July 1, Conant started wearing a union pin and wore it daily until his discharge. Conant also frequently sat with the union representative in the cafeteria, whose presence was certainly known to President Bradel as well as several managers. Director of Environmental Services Joe Brown, who recommended Conant's discharge, saw Conant wearing the union pin and admittedly knew Conant supported the Union. (JA 141-42.)

FMC argues (Br. 38-39) that the Vice-President of Ancillary Services, Roger Schuler, whom it characterizes as "the ultimate decision maker" in Conant's discharge, was unaware of Conant's union activity and therefore, the discharge could not have been for discriminatory reasons. However, this argument ignores evidence showing that Schuler was aware of Conant's union support. Indeed, Schuler admitted that, "based on conversations [he] had with [Conant]", he "could guess" that Conant, who "often expressed his dissatisfaction with management and other work related issues," supported the Union. (JA 68.)

Assuming arguendo that Schuler was personally unaware of Conant's union support, his lack of personal knowledge is not determinative, given the substantial

evidence showing that other supervisors and members of management knew of Conant's activity. A supervisor's knowledge of union activities is imputed to the employer unless credited testimony establishes the contrary. *State Plaza, Inc.*, 347 NLRB 755, 756 (2006). Brown, who recommended Conant's termination to Schuler, knew of Conant's support for the Union. (JA 141-42.) Moreover, EVS Supervisor Linda Keeler included Conant's name on the list of known union supporters she provided to GLES, the union avoidance firm hired by FMC. (JA 362-64.) Schuler admitted that he knew that supervisors were keeping such lists. (JA 61-62.) Thus, given that two of his supervisors knew about Conant's union activity, the Board could reasonably impute knowledge to Schuler. *See Chauffeurs Local 633 v. NLRB*, 509 F.2d 490, 497 (D.C. Cir. 1974) (employer does not need to be "morally certain" that employee was union supporter in order to find discriminatory discharge). *See also Texas Aluminum Co. v. NLRB*, 435 F.2d 917, 919 (5th Cir. 1970) (an employer's knowledge of an employee's union activity may be inferred from circumstantial evidence).

2. FMC's undisputed violations of the Act demonstrate union animus

As set forth above, FMC's numerous uncontested Section 8(a)(1) violations put to rest any question of FMC's union animus. *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 946 (D.C. Cir. 1988) (a company's "open hostility

toward [u]nion activity and its 8(a)(1) violations, are clearly sufficient to establish" union animus).

FMC argues (Br. 40) that these uncontested violations are irrelevant to determining animus because they do not involve Conant, Brown, or Schuler. However, Brown's and Schuler's lack of personal involvement in these unlawful acts do not make the violations – or their lingering effects – disappear. An employer's action "must be viewed in the context of [its] other unfair labor practices." *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991). While Brown and Schuler were not involved in these violations, they certainly never denounced them or disciplined the supervisors who engaged in the unlawful acts. *See Parsippanny Hotel Mgmt. Co.*, 99 F.3d 413, 423 (D.C. Cir. 1996) (employer's failure to repudiate lower level supervisors' anti-union comments makes it "reasonable to assume" that those supervisors spoke for the employer). Further, the fact that FMC's president unlawfully threatened employees demonstrates that union animus was not particular to just a small group of supervisors, but instead pervaded FMC. *See id.* ("[I]t is eminently reasonable to assume that high-level corporate managers speak on behalf of the company when they express anti-union animus."). Finally, as this Court has made clear, precedent does not require the General Counsel "to demonstrate a 'nexus' between each item of employer conduct evidencing anti-union animus and a reprisal taken against an

employee." *Id.* Thus, as the Board found (JA 493), "the numerous and varied violations of the Act, which occurred relatively close in time to Conant's discharge, fully supports a finding of antiunion animus."

3. The timing of Conant's discharge, after months of lax enforcement of the attendance policy, and the otherwise inconsistent application of that policy, further demonstrates union animus

The timing of Conant's discharge is also probative of FMC's unlawful motivation. Although Conant's attendance record was certainly not exemplary, the evidence shows that FMC had been willing to overlook that Conant had exceeded the maximum allowable absence quota for certain time periods. For example, in November 2006, Conant had received only a written warning for nine unscheduled absences in a six-month period when, under the attendance policy, he should have been terminated. (JA 492.) Likewise, on February 9, 2007, Conant received a three-day suspension for seven unscheduled absences in a six-month period, despite the fact the attendance policy required discharge for such a violation. (JA 492.)

FMC blames the lax enforcement on former EVS Director Vivian Kasey and argues that when Brown took over, FMC consistently enforced its policy. However, the Board properly found (JA 493) this assertion "is belied by the facts." Following Brown's assumption of duty, Conant had unscheduled absences on May 18, June 13 and June 14, and July 3, which put him at 11 unscheduled absences in

a 12-month period and therefore subject to termination. (JA 493.) Nonetheless, Brown did not discipline Conant for those absences at the time they occurred; instead, it reached back over two months to support his subsequent discharge.

Likewise, FMC's treatment of other employees with attendance issues also contradicts its assertion that strict adherence to its discipline policy required Conant's discharge. On August 27, 2007, Brown issued a three-day suspension to Monika Thompson for nine unscheduled absences in a six-month period, although the policy required termination. (JA 493.) FMC (Br. 43) attempts to explain away this inconsistent enforcement by claiming it was actually acting consistently with the policy, that is, because Thompson had received a written warning, the next step of its policy required suspension rather than termination. However, as the Board points out (JA 493 n.17), the policy does not require sequential imposition of discipline. Indeed, Brown admitted that if he had followed the policy, he could have fired Thompson for this infraction. (JA 493 n.17; 156-57.)

Further examples contradict FMC's assertion that its policy of strict enforcement of the attendance rules required Conant's discharge. On September 26, 2007, FMC gave Theressa Willis a written warning for seven absences in a six-month period, though under FMC's sequential view of the policy, the policy required suspension. (JA 493 n.18; 403, 427.) On July 12, FMC issued Veda Kim a written warning for six absences within a six-month period when the policy

required suspension. (JA 493 n.18; 392, 420.) On September 26 and October 26, FMC gave verbal warnings to Melissa Demers and Joseph Gonzales, respectively, for five absences in a six-month period, when again, the policy required the more harsh punishment of a written warning. (JA 493 n.18; 413, 415-16, 418.) Finally, on December 12, FMC gave Joshua Johnson a verbal warning, instead of a written or final warning, for six absences in a six-month period. (JA 493 n.18; 390, 419.)

FMC claims (Br. 44-45) that the discipline issued the employees discussed above fails to show animus for two reasons: the records concerning those employees were not admitted for comparator purposes, and Brown was not involved in those actions. Both arguments fail.

First, FMC contends (Br. 44-45) that the judge admitted the attendance records and disciplinary actions concerning the other employees "for the limited purpose of showing that people were absent on a particular day and as examples of corrective actions that were administered." Therefore, it claims, the Board cannot use them for comparator purposes. FMC's argument reads the judge's evidentiary restrictions too broadly and misinterprets the Board's use of the examples. The Board did not use the evidence to support that Conant was treated similarly or dissimilarly to other employees; rather, the Board used the records to show that "FMC continued to impose lesser discipline on other employees than that called for by the written policy." (JA 493.) In doing so, the Board abided by the record

use and relied on the evidence to show the absences and the corresponding corrective action.

Second, that Brown was not personally involved in those disciplinary actions does not detract from finding that FMC did not strictly adhere to its attendance policy. The two supervisors involved in those disciplinary actions, Linda Keeler and Rosemary Yazzi, served directly under Brown. (JA 503.) Under agency law, their actions can be attributed to him, and likewise, to FMC. In other words, when Keeler and Yazzi were imposing discipline inconsistent with the written policy, their actions were those of FMC and reflected FMC's accepted practice of issuing less discipline for attendance infractions than the written policy warranted.

FMC (Br. 44) attempts to blame this inconsistent application of its policy on several external factors, including the failure of Brown's secretary to notify him of the absences as well as the "reality of running a hospital." However, these excuses fail to explain away the suspicious timing of its action. Once Conant started wearing his union pin and becoming more involved with union organizers, FMC inexplicably ceased its tolerance of Conant's absences. Therefore, when Conant had his twelfth unscheduled absence on July 27, FMC, after overlooking numerous other absences, declared strict allegiance to its attendance policy and fired him five days later. The Board properly found that the timing of this discharge, coming

after lax enforcement of the attendance policy and on the heels of (or concurrent with) numerous other unfair labor practices, suggested unlawful motivation.

4. FMC did not meet its burden of showing that it would have discharged Conant regardless of his union support

The Board reasonably found (JA 493) that FMC failed to meet its rebuttal burden of demonstrating that it would have taken the same action even in the absence of Conant's union activity. In order to meet its burden, FMC must show that, despite any union animus, "'[it] *would* have fired [Conant], not that it *could* have done so.'" *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 937 (D.C. Cir. 2011) (emphasis in original) (quoting *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C Cir. 1998)). FMC raises no argument warranting a finding that it would have discharged Conant even absent his union activity.

FMC (Br. 39, 47 & n.6) hinges its rebuttal argument solely on Brown's testimony that he had a practice of consistent administration of the attendance policy, and that he followed that practice when discharging Conant. However, without other evidence supporting that assertion, the Board properly gave little weight to this self-serving testimony. *See, e.g., Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 968 (D.C. Cir. 1988) (employer needs to assemble more than its own "bare assertions" that layoffs were not motivated by union animus to rebut evidence showing otherwise).

Moreover, as the Board found, and as discussed above (pp. 52-54), the "record is replete with evidence that FMC did not strictly adhere to its written attendance policy both before and after Conant was discharged." (JA 493.) FMC's attempts to show a consistent application of the policy fall short. It points (Br. 47) to Brown's decision to discharge Dwight Begaye for excessive absences. (JA 149, 433-34.) Begaye, however, was a probationary employee and was not subject to the same policy as Conant. Rather, because of Begaye's probationary status, any disciplinary action against him "was made at the discretion" of his director. (JA 373.) Therefore, Brown was not applying the same policy when he terminated Begaye. FMC (Br. 47-48) points to its discipline of Thompson. However, as discussed above and as the Board noted (JA 493), FMC suspended Thompson, even though strict application of the attendance policy would have warranted discharge. In the end, FMC essentially argues that because it regularly disciplined employees for attendance infractions, its discipline of Conant was in keeping with that practice and therefore lawful. But this argument ignores FMC's failure to consistently conform its discipline to its attendance policy. *See George P. Bailey & Sons, Inc.*, 341 NLRB 751, 756-58 (2004) (evidence that employer tolerated multiple infractions of attendance and phone policy prior to employee's union activity undermines the employer's assertion that it would have terminated employee for policy infractions even absent union activity). *See also Shawnee*

Milling, 265 NLRB 710, 713-14 (1982) (evidence showing that employer did not consistently adhere to its anti-nepotism policy belies employer's defense that it did not hire applicant because his father-in-law, the local union president, was a current employee).

FMC notes (Br. 46) that it should not have to tolerate Conant's attendance infractions in perpetuity. The Board did not find that it had to. However, the Board reasonably found that FMC's sudden intolerance of Conant's infractions, on the heels of his declared union support and in the midst other indisputably unlawful conduct during an organizing campaign, was motivated by union animus, and not a sudden desire to consistently enforce an attendance policy that it had long ignored. Given the lack of any evidence showing a consistent enforcement of its attendance policy, FMC has failed to rebut the Board's finding that even absent Conant's open union support, FMC would have discharged him.

CONCLUSION

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

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April 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FLAGSTAFF MEDICAL CENTER	)	
	)	
Petitioner	)	Nos. 11-1326, 11-1398
	)	
	)	
v.	)	Board Case No.
	)	28-CA-21509
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,721 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 25th day of April 2012

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act as amended

(29 U.S.C.§§ 151 et. seq.):

Sec. 7. [Sec. 157.] Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [Section 158(a)(3) of this title].

Section 8 (a)[Sec.158]: [Unfair labor practices by employer] It shall be

an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

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

Section 10 of the Act (29 U.S.C. § 160 a, c, e, f):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

10(f) [Sec. 160(f)] [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and

enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Relevant portions of the National Labor Relations Board's Rules and Regulations (29 C.F.R.):

Sec. 102.48 (29 C.F.R. 102.48) *Action of the Board upon expiration of time to file exceptions to administrative law judge's decision; decisions by the Board, extraordinary postdecisional motions.*

(d)(1) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

UNITED STATES COURT OF APPEALS
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Petitioner	)	Nos. 11-1326, 11-1398
	)	
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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent	)	

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 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 the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 25th day of April, 2012