

Nos. 11-1310 & 11-1406

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

**MATHEW ENTERPRISE, INC.
D/B/A STEVENS CREEK CHRYSLER JEEP DODGE**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 1101**

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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d/b/a STEVENS CREEK CHRYSLER JEEP)	
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)	& 11-1406
v.)	
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)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, LOCAL LODGE 1101)	
)	
Intervenor)	
_____)	

**THE BOARD’S CERTIFICATE AS TO
PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) respectfully submits the following Certificate as to Parties, Rulings, and Related Cases:

A. Parties and Amici

Mathew Enterprise, Inc., d/b/a Stevens Creek Chrysler Jeep Dodge was the Respondent before the Board and is the Petitioner and Cross-Respondent before the Court. The Board is the Respondent and Cross-

Petitioner before the Court; its General Counsel was a party before the Board. The International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 1101 was the charging party before the Board and is the intervenor before the Court.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on August 25, 2011, reported at 357 NLRB No. 57.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC
this 3rd day of May, 2012

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GLOSSARY

- “A. ” Joint Deferred Appendix
- “the Act” National Labor Relations Act, 29 U.S.C. § 151 et seq.,
as amended
- “Add.” Addendum
- “the Board” National Labor Relations Board
- “Br.” Company’s opening brief
- “the Company” Mathew Enterprise, Inc., d/b/a Stevens Creek Chrysler
Jeep Dodge
- “the Union” International Association of Machinists and Aerospace
Workers, AFL-CIO, Local Lodge 1101

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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 this Court on the petition of Mathew Enterprise, Inc.,
doing business as Stevens Creek Chrysler Jeep Dodge (“the Company”) to review,

and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Supplemental Order in *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, 2011 WL 3781995 (August 25, 2011) (A. 27-39),¹ which affirms and adds terms to the Board’s underlying Order, reported at 353 NLRB 1294 (2009) (A. 14-26).

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This 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 for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. The Board’s Supplemental Order is final with respect to all parties.

The Company filed its petition for review on September 6, 2011, and the Board filed its cross-application to enforce the Board’s Supplemental Order on October 24, 2011. There is no time limit in the Act for seeking enforcement or review of Board orders. The International Association of Machinists & Aerospace

¹ “A.” citations are to the Joint Appendix. “Br.” refers to the Company’s opening brief. “Add.” refers to the addendum to the brief consisting of three pages of the transcript that the Board unintentionally omitted from the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Workers, AFL-CIO, Local Lodge 1101 (“the Union”), the charging party before the Board, has intervened in this proceeding on the Board’s behalf.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE ISSUES

1. The Court is jurisdictionally barred by Section 10(e) of the Act (29 U.S.C. § 160(e)) from reviewing any issue not raised before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982). The Board is entitled to summary enforcement of such uncontested violations of the Act. *See, e.g., Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006). Is the Board entitled to summary enforcement of those portions of its Supplemental Order finding that the Company committed a number of violations to which the Company filed no exceptions?

2. If substantial evidence supports the Board’s finding that an employee’s union activity was a “motivating factor” in a discharge, the Board’s conclusion that the employer violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) & (1)) must be affirmed unless the record, considered as a whole, compels the Board to accept the employer’s affirmative defense that the employee would have been discharged even in the absence of protected union activity.

NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 401-03 (1983); *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980). Does substantial evidence support the Board's finding that the Company discharged Patrick Rocha because of his union activity, thus violating Section 8(a)(3) and (1) of the Act?

3. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610, 613-14 (1969), the Supreme Court affirmed the Board's authority to order an employer to bargain with a union where the union had secured authorization cards from a majority of employees and where the employer committed the kind of unfair labor practices that render the likelihood of a fair and free election unlikely. Here, did the Board act within its broad remedial discretion in ordering the Company to bargain with the Union? And does substantial evidence support the Board's finding that once the bargaining order took effect, the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) & (1)) when it refused to furnish information requested by the Union, and unilaterally eliminated the lube technician job and thereby terminated the employment of Steve Rother?

STATEMENT OF THE CASE

On April 20, 2009, the Board (Chairman Liebman and Member Schaumber) issued a Decision and Order affirming the administrative law judge's findings, in the absence of exceptions, that the Company violated Section 8(a)(1) of the Act by soliciting employees to withdraw their union cards; threatening an employee that

he was “blackballed” and would not be hired because of the Union; granting unannounced wage increases to eight employees in a bargaining unit of thirteen employees to deter support for the Union; making threats of job loss and plant closure; interrogating employees about their union activities; and creating the impression that the employees’ protected activities were under surveillance.

(A. 14 & n.3, 15 & n.8.) The Board also remanded the case to the judge, instructing him to resolve several unaddressed Section 8(a)(1) complaint allegations that turned on the credibility of witnesses, and to assess certain evidence in reconsidering whether the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Patrick Rocha. (A. 18.) Finally, in light of the additional violations found by the Board, and any further the violations that the judge might find on remand, the Board instructed the judge to reevaluate the appropriateness of issuing a *Gissel* bargaining order. (A. 19.)

On July 29, 2009, the administrative law judge issued a supplemental decision finding additional violations of Section 8(a)(1) and affirming his earlier dismissal of the allegation that the Company unlawfully discharged Rocha and his denial of a *Gissel* bargaining order. (A. 36-39.) On August 25, 2011, the Board (Chairman Liebman, Members Becker and Pearce) issued a Supplemental Decision and Order (A. 27-39). In the interim, the Supreme Court had held, in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), that the two-member Board did not

have authority to issue decisions when there were no other sitting Board members. Accordingly, in the Supplemental Decision and Order the Board affirmed the judge's initial rulings, findings, and conclusions and adopted his recommended Order, and affirmed the two-member Board remand order, for the reasons stated in the initial Decision and Order, which the Board incorporated by reference. (A. 27.) And in the absence of exceptions, the Board adopted the judge's findings that the Company violated Section 8(a)(1) by interrogating Patrick Rocha during his hiring interview and by threatening employee Alque Baybayan that his wage rate would decrease if employees selected the Union as their bargaining representative. (A. 27 & n.4.)

In disagreement with the judge, however, the Board found that the Company discharged Rocha in violation of Section 8(a)(3) and (1) of the Act. (A. 28.) And based on all of the violations found, the Board concluded that a *Gissel* bargaining order was necessary to remedy the Company's unlawful conduct. (A. 28.) Finally, the Board found that after the Company's bargaining obligation attached, it violated Section 8(a)(5) and (1) by unilaterally eliminating the position of a unit employee and by refusing to provide the Union with requested information. (A. 28.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

In December 2006, the Company began operating a car dealership in San Jose, California, after the previous dealership—Chris' Dodge World—closed its doors the month before. (A. 20; 40-42.) The Union, which had represented technicians at Chris' Dodge World, began an organizing drive once the new dealership opened. (A. 28; 46.) By March 2007, the Company had a workforce of 13 technicians. (A. 32.)

Among the initial automobile service technicians ("technicians") that the Company hired were two from Chris' Dodge World: Rick Avelar and Jeff Wells. (A. 20; 40.) In December 2006, Avelar met with union business representative Richard Breckenridge and signed a union authorization card. (A. 20; 47-49, 103-07, 302.) And in January 2007, Wells met with Breckenridge and signed an authorization card. (A. 20; 50-53, 303.)

B. The Company Informs Employees They Must Obtain Withdrawal Cards from the Union as a Condition of Employment

Immediately after Avelar was hired, Service Manager Mike Frontella told him that he needed to obtain a withdrawal card from the Union. (A. 20; 101.) As a result, Avelar signed a withdrawal card and, on his first day of work, gave it to Frontella, who made a copy and returned the original to Avelar. (A. 20, 22; 102.)

In January, after the Company hired technician Paul Seefeld, Frontella told him that the Company required that employees obtain a withdrawal card before starting work. (A. 20, 22; 82.)

C. The Company Asks Patrick Rocha During His Interview Whether He Is a Member of the Union

In December 2006, the Company interviewed Patrick Rocha to fill a technician position. During the interview, Parts and Service Director Chris Nickerson, who recognized Rocha from another dealership, asked whether he was still a member of the Union. (A. 14, 15, 24, 35; 88, 89, 119.) Rocha responded that he was on withdrawal from the Union. (A. 24, 35; 89.) Nickerson replied that the dealership would be a nonunion shop. (A. 24, 35; 89, 119.)

D. The Company Threatens Higgins That He Was Blackballed Because He Is Union Business Representative Breckenridge's Cousin

In December 2006, Mark Higgins, who had worked at Chris's Dodge World, applied to work for the Company as a technician. Higgins is Union Business Agent Breckenridge's cousin. (A. 22; 43.) Although Higgins was a good technician, Zaheri decided not to hire him. (A. 22; 43-44, 155, 158, 258-60.) Higgins sought work from the Company again in March 2007. Garcia told Higgins he wanted to hire him but could not. (A. 22; 136.) Higgins asked if he was blackballed because he was Breckenridge's cousin. Garcia responded "pretty much, so." (A. 21, 22; 126.)

E. A Group of Technicians Meets With a Union Representative During Lunch on March 2, After Which the Company Demands To Know Who Was Present and Threatens To Decrease Employees Wages if the Union Represents the Employees

On Friday, March 2, 2007, 9 of the Company's 13 technicians met with Breckenridge at a local restaurant during lunchtime. (A. 20; 55-56.) Breckenridge asked the employees to fill out authorization cards, which he explained would be used to indicate the employees' support for the Union, to request bargaining, and to petition the Board for an election. (A. 20; 57-58,105-06.) Avelar and Wells had previously signed authorization cards; the seven other employees signed cards during the lunch. (A. 20.)²

After the employees returned to the dealership, Ron Adamson, a technician opposed to the Union, questioned Lane about the union meeting. (A. 21, 68.) Adamson then left the shop floor and, when he returned, informed Lane that Service Manager James Garcia wanted to speak to him. (A. 21, 68.) Lane went to Garcia's office, where Garcia asked for the names of those who attended the lunch; whether it was a union meeting; whether Lane signed a union card; who had signed union cards; and who were the union organizers. When Lane refused to answer, Garcia said that, if the Company was picketed, a lot of people would get in trouble

² Rick Avelar (A. 132-33, 309); Alque Baybayan (A. 137-39, 304); Manuel Blanco (A. 143-44, 305); Gilbert Bumagat (A. 83, 306); Michael Lane (A. 66-67, 308); Patrick Rocha (A. 97-98, 307); Stephen Rother (A. 132-33, 309); Paul Seefeld (A. 83, 306); and Jeff Wells (A. 51-53, 125, 304)..

or fired and that “heads would roll.” (A. 21, 22; 69-72.) Garcia further threatened that he would “run the shop with three people if he had to shut it down.” (A. 21, 22; 77.) Garcia insisted that company owner Mathew Zaheri would never let the shop be unionized; that he would shut the doors instead. (A. 21, 22; 70-71.)

During this conversation, Garcia received a phone call and Lane overheard Garcia say “Chris, I am talking to Mike Lane, trying to get information about this meeting.” (A. 21, 22; 69.) Lane also overheard Garcia say that if he found out that technician Patrick Rocha and other employees organized the meeting he would “blow them out.” (A. 21, 28; 70.)

That same afternoon Garcia separately called Seefeld and Blanco into his office to question them about the lunch meeting. Garcia asked each of them whether he had attended the lunch, if a union representative was present, and whether he had signed an authorization card. (A. 16, 21; 84-86, 144-45.) Garcia did not state how he knew there had been a union meeting. (A. 16; 86, 144.)

The following Monday, March 5, Garcia called Baybayan into his office and demanded to know if he attended the lunch and if he signed an authorization card. (A. 21, 27, 37; 139-40.) Garcia stated that if the employees selected the Union, Baybayan’s wage rate would go down. (A. 21, 27, 37; 140.) Once again, Garcia did not state how he knew that there had been a union meeting. (A. 16; 139-40.)

That same day, Nickerson telephoned Lane and asked who was behind the Union's organizing drive. (A. 15; 73.)

F. The Company Discharges Rocha Within Days After the March 2 Union Lunch

Patrick Rocha attended the Union lunch on Friday, March 2 and signed an authorization card. Garcia threatened to "blow [Rocha] out" if he learned Rocha had a hand in organizing the meeting. (A. 24, 28; 69-70.) When Rocha reported to work on Tuesday, March 6, the Company made good on its threat and discharged him. (A. 28; 90.)

G. The Company Interrogates the Technicians During a Shop Meeting

On May 11, during a regularly scheduled shop meeting, Zaheri asked employees who had paid for the pizza provided at a union meeting held on May 9. (A. 15-16, 32; 294, 295, 296.) Zaheri did not state how he knew there had been another union meeting. (A. 16; 294.)

H. The Company Grants Employees Unannounced Wage Increases

Effective May 14, 2007, the Company granted eight technicians unannounced wage increases. (A. 21, 23.³) These increases were not given

³ In its decision, the Board states that eight technicians received wage increases, but only lists (A. 21) the following seven employees as having received increases: Dave Ring and Manuel Blanco each received a \$2 per hour raise. Ron Adamson, Jeff Wells, and Rick Avelar each received a \$1 per hour raise. Paul Seefeld and Erick Gonzales each received a \$.75 cents per hour raise. (A. 21; 86, 110-11, 118,

pursuant to any past practice, nor were they planned and settled upon prior to the advent of the union activity. (A. 23-24; 80, 111, 136, 142, 147, 214-15.)

I. After the Union Submits a Demand for Recognition Based On Authorization Cards from a Majority of Employees, the Company Eliminates its Lube Technician Position and Refuses To Furnish the Union With Requested Information

Having obtained authorization cards from 9 of the 13 technicians, on May 16 the Union sent a letter to the Company 16 requesting that the Company recognize and bargain with the Union and maintain the status quo. (A. 21, 33; 310, Add. 1-3.) That same day the Union filed a representation petition with the Board. (A. 21, 28; 59.)

On August 20, 2007, the Union asked the Company to produce a list of bargaining-unit employees, including their wage rates, dates of hire, classifications, as well as personnel policies and fringe benefits. (A. 33; 314.) The Company refused to furnish that information. (A. 33; 315.)

On October 15, 2007, the Company unilaterally eliminated its lube technician position, which was held by Steve Rother. (A. 33; 60, 134, 313.) The lube technician worked alongside technicians and performed many of the same tasks, including oil changes, tire rotations, and brake inspections. (A. 34; 112-117,

123-24, 146, 213-14.) The record also establishes that an eighth employee, Emmanuel Gonzalez, received an increase of \$1.50. (A. 214.)

127-28, 129-30, 135.) After Rother was laid off, the technicians absorbed the work that he had performed. (A. 34; 141.)

THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Company committed a number of unfair labor practices in response to the Union's efforts to organize the Company's technicians. Specifically, the Board found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- interrogating employees about their union activities or the union activities of fellow employees;
- soliciting and requiring employees holding union membership to withdraw their union membership;
- threatening employees with plant closure, wage decreases, and job loss because of their support of the Union;
- threatening an applicant for employment that it would not hire a person affiliated with the Union;
- granting wage increases to employees in order to dissuade them from supporting the Union; and
- creating the impression of surveillance of employees' union activities.

The Board also found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) & (1)) by discharging Rocha for engaging in protected union activities. (A. 34.) Furthermore, the Board found that a bargaining order was necessary to effectuate the rights of employees as expressed

through their authorization cards and dispel the coercive atmosphere created by the Company. Accordingly, it ordered the Company, upon request, to bargain with the Union as the exclusive collective-bargaining representative of the unit employees. (A. 28, 34.)

The Board found that the Company's bargaining obligation commenced on May 16, when the Union requested recognition based on a majority showing of support. (A. 20.) Accordingly, the Board also found that after that date the Company refused to recognize the Union, and bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) & (1)) by refusing to provide the Union with requested information necessary to prepare for collective bargaining and by unilaterally eliminating the lube technician position, resulting in the discharge of Rother. (A. 28.)

The Board's Order requires the Company to cease and desist from engaging in 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 by Section 7 of the Act. (A. 34-35.) Affirmatively, in addition to the bargaining order, the Board's Order requires the Company to rescind the unlawful unilateral elimination of the lube technician position and reinstate Rother to that position; to reinstate Rocha to his former job or to a substantially equivalent position; to make Rother and Rocha whole; to remove from its files any reference

to the elimination of Rother's position or to Rocha's discharge; to provide the Union with the information it had requested on August 20, 2007; and to post a remedial notice and distribute the notice electronically if it customarily communicates with its employees by such means. (A. 35.)

SUMMARY OF ARGUMENT

Upon opening for business in December 2006, the Company embarked on a campaign to prevent its technicians from forming a union. The Company does not challenge the Board's findings that it committed numerous unfair labor practices over the following months. It required its first-hired technicians to obtain withdrawal cards from the union as a condition of employment, explaining that the shop would be nonunion. And it unlawfully interrogated an applicant about whether or not he was a union member, and threatened another applicant that he was blackballed because he is the cousin of a union business representative. Then, after learning that the employees had met with a union business representative over lunch, the Company unlawfully interrogated several employees and threatened that if the employees voted in favor of a union, "heads would roll," the dealership might close, and wages could be reduced. The Company also engaged in additional unlawful interrogations and granted a majority of unit employees an unannounced wage increase to deter support for the Union. The Board is entitled to summary enforcement of these uncontested findings.

In the midst of this campaign, and within days after the union lunch, the Company discharged employee Patrick Rocha. Although the Company insists that it decided, before learning of his union activities, to discharge Rocha based on performance and attendance issues, the Board reasonably rejected this explanation, finding that the weight of the record evidence established that the Company only made the decision to discharge him after learning of his involvement with the Union. Accordingly, the Board found that the Company's asserted reasons for discharging Rocha were pretexts, and that its decision to discharge Rocha was because of his union activity in violation of Section 8(a)(3) and (1) of the Act.

The Board found that gravity and coercive impact of these violations, which included three "hallmark" violations, were heightened by the small size of the 13-employee unit and the fact that the violations were committed by top management officials. Based on these findings, the Board found that its traditional remedies were insufficient to erase the coercive effects of these violations and ensure a fair election, and thus a bargaining order was necessary. Because the bargaining order attached on May 16, 2007, when the Union submitted to the Company a demand for recognition based on authorization cards it had received from a majority of the employees, the Board found that the Company refused to bargain with the Union when it refused to furnish the Union with information it had requested and when it

unilaterally eliminated the lube technician position and terminated the employment of Steve Rother.

Because the Board's findings were reasonable and supported by substantial evidence, the Board asks this Court to enforce the Order in full and to dismiss the Company's petition for review.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

The Board noted (A. 14, 15 n.8, 27 & n.4) that the Company did not file exceptions to the judge's findings that the Company violated Section 8(a)(1) of the Act by engaging in a number of prohibited actions. Specifically, the Board held that the Company violated Section 8(a)(1) of the Act by:

- Soliciting and requiring employees to renounce union membership by obtaining union withdrawal cards;⁴
- Interrogating an applicant during his hiring interview as to whether he was a union member;⁵
- Threatening an applicant that he was "blackballed" and would not be hired because of the Union;⁶

⁴ *Bridgeway Oldsmobile, Inc.*, 281 NLRB 1246, 1246 (1986), *enforced mem.*, 933 F.2d 1015 (9th Cir. 1991) (Table).

⁵ *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

⁶ *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 546 (D.C. Cir. 2006).

- Granting unannounced wage increases to a majority of the bargaining unit to deter support for the Union;⁷
- Threatening an employee that his wage rate would decrease if employees selected the Union as their bargaining representative;⁸
- Interrogating employees about their union activities;⁹
- Threatening employees that “heads would roll” and that employees would get in trouble and possibly lose their jobs if the dealership was picketed or organized;¹⁰
- Threatening that if it learned Rocha or another employee organized the March 2 union meeting, that Garcia would “blow them out”;¹¹ and
- Threatening to close the dealership if employees selected the Union to represent them.¹²

Because the Company failed to challenge these findings before the Board, the Court is jurisdictionally barred from reviewing them. 29 U.S.C. § 160(e) (“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.”). *See also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982); *accord Highlands Hosp. Corp. v. NLRB*, 508

⁷ *Skyline Distribs., a Div. of Acme Markets, Inc. v. NLRB*, 99 F.3d 403, 407 (D.C. Cir. 1996).

⁸ *Progressive Elec., Inc.*, 453 F.3d at 544.

⁹ *Perdue Farms, Inc.*, 144 F.3d at 835.

¹⁰ *Progressive Elec., Inc.*, 453 F.3d at 544.

¹¹ *Ibid.*

¹² *Ibid.*

F.3d 28, 32 (D.C. Cir. 2007). Accordingly, the Board is entitled to summary enforcement of its Order with respect to these violations. *See, e.g., Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006) (uncontested violations of the Act summarily enforced); *Allied Mech. Servs., Inc. v. NLRB*, No. 10-1328, 2012 WL 516608, at *6 (D.C. Cir. Feb. 17, 2012).

Although these violations are uncontested, they do not disappear from the case. Rather, they provide the background against which the Court considers the Board's remaining findings. *See Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *United States Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991); *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982)).

II. THE COMPANY VIOLATED THE ACT BY DISCHARGING ROCHA BASED ON HIS UNION ACTIVITIES

A. An Employer Violates the Act by Discharging an Employee for Engaging in Protected Union Activity

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 these guarantees 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.” Furthermore, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer “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.” An employer thus violates Section 8(a)(3) and (1) by discharging or taking other adverse employment actions against employees for engaging in union activity. *See 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).

The critical inquiry in such cases is whether the employer’s actions were unlawfully motivated. *See Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988). In *Transportation Management Corp.*, 462 U.S. 393, the Supreme Court approved the test for determining motivation in unlawful discrimination cases, which was first articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under the *Wright Line* test, the Board first determines whether the General Counsel has met its initial burden of demonstrating that an employee’s union activity was a “motivating factor” in a discharge. In doing so, the Board “may rely on both direct and circumstantial evidence to establish an employer’s motive, considering such factors as the employer’s knowledge of the employee’s union activities, the employer’s hostility

toward the union, and the timing of the employer's action." *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Of particular relevance here, evidence that an employer has violated Section 8(a)(1) of the Act supports an inference of union animus. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996).

If such improper motivation is found, the burden shifts to the employer to establish, as an affirmative defense, that it would have discharged the employee even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *Wright Line*, 251 NLRB at 1089. An employer fails to prove that it would have discharged the employee even absent the employee's union activity when, for example, the record shows that the employer's justification for the discharge is pretextual. *See Wright Line*, 251 NLRB at 1084; *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230-32 (D.C. Cir. 1995).

On review, the Court accords adjudications by the Board "a very high degree of deference." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011). The Board's findings of fact are adjudged under the well-established substantial evidence test, which "gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder." *Allied Mech. Servs., Inc. v. NLRB*, No. 10-1328, 2012 WL 516608, at *13 (D.C. Cir. Feb.

17, 2012) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998)). And the Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002); accord *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). Moreover, the Board’s determination of motive is “give[n] even greater deference” by the Court. See *Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 756 (D.C. Cir. 2000). Thus, the “Board is to be reversed only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Allied Mech. Servs., Inc.* 2012 WL 516608, at *14 (citing *Bally’s Park Place*, 646 F.3d at 935).

The Court owes the Board’s findings the same degree of deference even when, as here, the Board disagrees with the administrative law judge, provided that the Board has considered the judge’s position along with the record evidence. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) (“the ‘substantial evidence’ standard is not modified in any way when the Board and its examiner disagree”). After all, as this Court recently explained, “in the end it is the Board that is ‘entrusted by Congress with the responsibility for making findings under the statute.’” *Bally’s Park Place, Inc.*, 646 F.3d at 935 n.4 (quoting *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)).

B. Substantial Evidence Supports the Board’s Findings that the Company Terminated Patrick Rocha Because He Engaged in Union Activity and that the Company’s Asserted Defense was Pretextual

Ample evidence supports the Board’s finding that the Company was unlawfully motivated when it discharged Rocha on March 6. The Company was aware, on March 2, that employees attended a lunch where the Union was discussed and where employees signed union authorization cards. As shown above (p. 10), Garcia called Lane into his office shortly after the lunch, where Garcia unlawfully interrogated Lane about who attended the lunch and who signed authorization cards, and unlawfully threatened him by stating that if the shop were organized “heads would roll,” that people would get in trouble or be fired, and that he would “run the shop with three people if he had to shut it down.” Garcia also unlawfully interrogated several other employees that afternoon as well as the following Monday, March 5. Not only was the Company aware that Rocha was among the employees who attended the lunch, but it suspected that he played a role in organizing it, as Garcia revealed when he threatened to “blow [him] out” if he discovered Rocha had organized the meeting. This evidence led the Board (A. 24, 28) to decisively find that the General Counsel satisfied its initial burden under *Wright Line* of showing that Rocha engaged in union activity, the Company knew of that activity, and the Company harbored animus against the protected activity.

In its attempt to establish its affirmative defense under *Wright Line* that it would have discharged Rocha absent his union activity, the Company has steadfastly maintained that it decided to discharge Rocha on February 27, based on performance and attendance issues, before ever learning of the March 2 union meeting. As the Board noted (A. 18 n.16, 29 n.9), if the Company's affirmative defense were to be believed, the facts that support that defense would have also served to defeat the General Counsel's initial burden under *Wright Line*. Yet the administrative law judge found (A. 17, 24) that the Company had been motivated by its animus towards Rocha's union activity when it discharged him and the Company filed no exceptions to that finding.

Just as the General Counsel proved, in satisfying his initial burden under *Wright Line*, that the Company knew of Rocha's involvement in the March 2 union meeting, substantial evidence supports the Board's finding (A. 29-31) that the Company failed to show that it decided to discharge him before learning of the March 2 meeting. Having rejected this key element of the Company's defense, the Board found (A 31) that the Company's stated justification for its discharge of Rocha was pretextual.

In so finding, the Board primarily relied on the Company's own admissions. Company owner Zaheri provided a statement to the General Counsel during the investigatory stage of the Board proceeding in which he explained that the

Company decided to discharge Rocha because Rocha left early on February 28 and March 1 and 2, and that “[o]n the following Monday, 3/5 he did not come in or call and the decision to terminate him was made.” (A. 30; 334.) And in a position statement to the Board, the Company’s counsel, after summarizing Rocha’s work performance and attendance, explained that “[n]o correction of the problems was evident on March 6, 2007, including an early unauthorized departure.

Accordingly, Rocha was terminated on March 6, 2007.” (A. 30; 329.)¹³ The Company thus acknowledged that it had not decided to discharge Rocha until after March 2.¹⁴

The Board also found (A. 30) that additional record evidence undermined the Company’s position that the discharge decision predated Rocha’s union activity. Garcia’s March 2 conditional threat that he would “blow [Rocha] out” if he learned that Rocha had organized the union lunch showed that the decision had not yet been made. And the Board rejected the Company’s feeble excuse that it was unable to carry out its plan to discharge Rocha on March 2 because Garcia met

¹³ Based on Rocha’s un rebutted testimony, the Board found (A. 18 & n.13) that the only time Rocha was denied permission to leave early was on March 2.

¹⁴ The Company (Br. 32-33) incorrectly states that the Board also relied on a document (A. 328) submitted to the California Employment Development Department regarding Rocha’s discharge. But although the Board found (A. 18 n.17) that this document was significant to the issue, and indeed the letter supported the Board’s finding, the Board did not rely upon it in its Supplemental Decision and Order.

with a Chrysler representative for part of that morning and early afternoon and because of the ruckus that followed the union lunch. The Board noted (A. 30) that those matters did not prevent Garcia from unlawfully interrogating several employees immediately after the lunch, nor did they explain why Garcia did not fill out the paperwork necessary to issue Rocha his final paycheck that day. Instead, the check was issued on March 5 and Rocha was ultimately discharged when he arrived at work on March 6. Accordingly, substantial evidence supported the Board's finding (A. 31) that the decision was not made until after March 2.

The only evidence that supported the Company's position that the decision to discharge was made on February 27 was Garcia's testimony, which the Board rejected as not credible.¹⁵ After finding (A. 29) that the administrative law judge

¹⁵ The Company argues (Br. 26) that Zaheri "confirmed" that the decision was made prior to March 2, but this argument is without merit. In its underlying decision (A. 18), the Board acknowledged that Garcia and Zaheri testified that the discharge decision was made on February 27, and instructed the judge to take into account the documentary evidence that contradicted that testimony. On remand, the judge explained (A. 37) that "[t]he testimony of Garcia and the documentary evidence convince[d] [him] that the decision to discharge Rocha was made prior to the union meeting of March 2." Thus, the judge did not find support for this finding in Zaheri's testimony, and the Company filed no exception challenging this finding. The Board, in turn, observed that the judge cited two evidentiary bases in his supplemental decision to support his finding that the discharge decision predated the union meeting: (1) Garcia's testimony; and (2) "unspecified 'documentary evidence.'" As set forth above, the Board carefully explained its finding that the documentary evidence contradicted Garcia's testimony and established that the decision was made after March 2. Accordingly, the Board found (A. 29) that Garcia's testimony was the only evidence that supported the judge's decision and rejected that testimony.

implicitly credited Garcia's testimony, the Board acknowledged its general reluctance to reverse such determinations but determined that reversal was warranted here.

The Board found (A. 29-30) that the judge's credibility finding was not based on Garcia's demeanor during the hearing, and was thus undeserving of the deference afforded to demeanor-based credibility determinations. The judge failed to explicitly state whether or not he credited Garcia based on his demeanor despite the fact that the Board specifically instructed the judge (A. 18, 30) that in reanalyzing Rocha's discharge, he was to make clear his credibility determinations and explain the basis of those determinations. Accordingly, by referencing demeanor only in a "boilerplate" footnote discussing his observation of all of the witnesses (A. 37 & n.1), the judge did not insulate his findings as demeanor-based credibility determinations.

Having not received the required explanation from the judge, the Board appropriately engaged in an independent evaluation of the record de novo. (A. 30 (citing *Canteen Corp.*, 202 NLRB 767, 769 (1973))). In doing so, the Board reasonably found that the weight of the evidence, contrary to Garcia's

testimony, established that the Company did not decide to discharge Rocha until after March 2.¹⁶

In challenging this determination, the Company argues (Br. 13) that the judge's credibility determinations "may not be overturned absent the most extraordinary circumstances." But this is not the standard by which the Board assesses an administrative law judge's credibility determinations. The cases relied on by the Company establish that extraordinary circumstances are necessary for a reviewing court, rather than the Board, to reverse a judge's credibility determinations. *See E.N. Bisso & Son, Inc. v. NLRB*, 84 F.3d 1443, 1444 (D.C. Cir. 1984); *Amalgamated Clothing & Textile Workers Union, AFL-CIO, CLC v. NLRB*, 736 F.2d 1559, 1562-63 (D.C. Cir. 1984); *see also U-Haul Co. of Nevada v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007). The Board, by contrast, is "empowered to resolve questions of credibility differently from the administrative law judge." *Danzansky-Goldberg Memorial Chapels, Inc.*, 272 NLRB 903, 906 (1984) (citing *Darling, Inc.*, 267 NLRB 476, 477 (1983)). Here, the weight of the

¹⁶ Given the Board's finding that Garcia's testimony was inconsistent with the weight of the evidence, even if it were determined that the judge's implicit credibility determination was based on Garcia's demeanor, the result would be the same. As the Board explained, "even demeanor-based credibility findings are not dispositive when the testimony is inconsistent with 'the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.'" (A. 29 (quoting *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 n.9 (2001))).

evidence, including the Company's own admissions about the discharge date, and Garcia's threat that he would "blow [Rocha] out" if he learned that Rocha was involved in the organizing drive, support the Board's decision to reject Garcia's testimony that the discharge decision was made on February 27.

Similarly without merit is the Company's argument (Br. 24 & n.7) that Garcia's testimony was supported by "documentary evidence." Upon review of the record, the Board found (A. 30) that no such evidence existed. While there is evidence related to Rocha's performance and attendance, those documents are silent with respect to the date when the Company made the decision to discharge Rocha. As explained above, and as found by the Board (A. 30), *the only* documents addressing the date of that decision—Zaheri's statement and the Company counsel's position statement—support the Board's finding that the decision was made after March 2.

Because the Company built its entire *Wright Line* defense upon the "critical" fact that it decided to discharge Rocha on February 27, before the March 2 union meeting, once the Board rejected Garcia's testimony, and found that no documentary evidence supported the Company's position, the Board reasonably found (A. 31) that the Company's *Wright Line* defense failed as pretextual. Furthermore, having rejected the Company's assertion that it decided to discharge Rocha before March 2, the Board reasonably found (A. 31) that the Company's

attempt to backdate the discharge decision was itself evidence that the Company's asserted reasons for discharging Rocha were pretextual. Backdating the decision, the Board explained, showed that the Company did not believe that Rocha's performance and attendance issues adequately explained its decision to discharge Rocha almost immediately after learning of his union activities. Accordingly, given the General Counsel's "compelling" *Wright Line* case, and the fact that the Company failed to establish that it would have discharged Rocha absent his union activity, substantial evidence supports the Board's finding that the Company's decision to discharge Rocha violated Section 8(a)(3) and (1) of the Act.

The Company challenges this finding by devoting considerable attention to addressing Rocha's attendance and productivity. But this is of no moment because, even if such issues existed, the tipping point for the Company came when it learned of Rocha's March 2 union activity. Indeed, the Board acknowledged (A. 31) that the Company might have had legitimate reasons for discharging Rocha. Nevertheless, it correctly explained that the Company failed to meet its *Wright Line* burden of establishing that it was motivated by those reasons, rather than Rocha's union activity, when discharging him. This finding in no way undermines the right of an employer to "control the attendance and productivity of its employees," as the Company implies (Br. 15), but rather is consistent with Board caselaw, as enforced by this Court, which establishes that "the employer must

‘prove . . . that despite any anti-union animus, [it] *would* have fired [the employee], not that it *could* have done so.’” *See Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929, 937 n.5 (D.C. Cir. 2011) (quoting *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir.1998)).

Moreover, the Company’s attempt to undermine the Board’s finding by pointing out (Br. 32) that it did not discharge other union activists, including Lane and Avelar, is unhelpful. It has long been clear “that a discriminatory motive, otherwise established, is not disproved by an employer’s proof that it did not weed out all union adherents.” *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 316 n.19 (D.C. Cir. 1989) (quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964)). Discharging a single union supporter, particularly in a small unit, is more than sufficient to send a message to unit employees. And it is unsurprising that the Company would send that message by discharging a union supporter such as Rocha, whose record may not have been unblemished, thus providing a basis, albeit a pretextual one, for justifying the discharge.

In sum, in hindsight the Company can argue about why it could have discharged Rocha for legitimate reasons. But substantial evidence supports the Board’s findings that the Company made the decision to discharge Rocha only after, and immediately upon learning of, his union activity.

III. THE BOARD REASONABLY EXERCISED ITS BROAD DISCRETION IN ORDERING THE COMPANY TO BARGAIN WITH THE UNION AS A REMEDY FOR ITS NUMEROUS AND HIGHLY COERCIVE UNFAIR LABOR PRACTICES

The Board found that the Company engaged in three hallmark violations of the Act—threatening job loss and plant closure, discharging union supporter Rocha, and granting unannounced wage increases to a majority of the bargaining unit—as well as a host of additional coercive violations. The impact of these violations, most of which were committed by high-ranking company officials, resonated even more powerfully in this small unit of only 13 employees. As a result, the Board reasonably found (A. 33) that the possibility of erasing the effects of the Company’s unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight, and thus ordered the Company to bargain with the Union. In light of the bargaining order, which took effect May 16, 2007, the Board reasonably found (A. 33-34) that the Company refused to bargain with the Union when it refused to furnish the Union with information it had requested as the employees exclusive bargaining representative and when it unilaterally eliminated the lube technician position and terminated Rother, who encumbered that position.

A. The Board Enjoys Broad Discretion To Order an Employer To Bargain with a Union To Remedy Unfair Labor Practices that Undermine Majority Strength and Impede the Election Process

In Section 1 of the Act (29 U.S.C. § 151), Congress declared that it is “the policy of the United States to eliminate the causes of certain substantial

obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining” To that end, collective-bargaining relationships may lawfully be based upon a voluntary count of signed union authorization cards, although Board-supervised elections have been the preferred method for establishing such relationships. *See NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1303-04 (D.C. Cir. 1988). Consistent with those principles, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610, 613-14 (1969), the Supreme Court affirmed the Board’s authority to order an employer to bargain with a union where the union had secured authorization cards from a majority of employees and where the employer committed the kind of unfair labor practices that render the likelihood of a fair and free election unlikely. *Id.* at 614.

It is not necessary, as a precondition to issuing a bargaining order, for the Board to find that the unfair labor practices actually destroyed the union’s majority support or that the possibility of a fair election be reduced to zero. Rather, a bargaining order is proper “[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order” *Id.* at 614-15; *accord Amalgamated*

Clothing Workers of America v. NLRB, 527 F.2d 803, 807 (D.C. Cir. 1975)

(“*Gissel* does not require a finding that no other remedy could suffice, only that the bargaining order better protects employees’ expressed union preference.”); *Allied Mech. Servs., Inc. v. NLRB*, No. 10-1328, 2012 WL 516608, at *8 (D.C. Cir. Feb. 17, 2012).

This Court has explained that the Board may issue a bargaining order if it has substantial evidence that (1) “the Union, at some time, . . . had majority support within the bargaining unit”; (2) “the employer’s unfair practices . . . had the tendency to undermine majority strength and impede the election process”; and (3) “the Board [has] determine[d] that the possibility of erasing the effects of past practices and of ensuring a fair rerun election by the use of traditional remedies is slight and that employee sentiment once expressed in favor of the Union would be better protected by a bargaining order.” *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 104 (D.C. Cir. 2000). Furthermore, the Court “require[s] the Board to ‘explicitly balance’ several factors to determine whether the need for a bargaining order outweighs employees’ section 7 rights to a representation election. *Id.* (quoting *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000)). These factors include whether or not the employer engaged in “deliberate” or “calculated” unfair labor practices that threaten “a significant economic interest, such as retention of jobs . . . ,” or that are “acts of reprisal, particularly discharge,”

or are “[p]romises to correct the grievance that led to union organization,” and “most significantly . . . that involve a series of unfair labor practices rather than a single act of illegality.” *Traction Wholesale Ctr. Co.*, 216 F.3d at 106 (quoting *Skyline Distribs., a Div. of Acme Markets, Inc. v. NLRB*, 99 F.3d 403, 411 (D.C. Cir. 1996)).

In determining whether to issue a bargaining order, “the Board draws on a fund of knowledge and expertise all its own” and relies on “its expert estimate as to effects on the election process of unfair labor practices of varying intensity.” *Gissel*, 395 U.S. at 612 n.32. Consequently, “[i]t is for the Board and not the courts” to determine whether a bargaining order is appropriate, and the Board’s “choice must . . . be given special respect by reviewing courts.” *Id.*; *see also Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s remedial authority is a “broad discretionary one, subject to limited judicial review”).

B. The Company’s Pervasive and Flagrant Unfair Labor Practices Had a Strong Tendency To Undermine the Union’s Majority Support, Rendering the Possibility of a Fair Election Slight

The Board reasonably found (A. 33) that the Company’s unlawful conduct not only undermined the majority support enjoyed by the Union,¹⁷ but did so in

¹⁷ The Company did not except to the administrative law judge’s finding that the Union obtained authorization cards from a majority (9 out of 13) of the unit employees. (A. 31 n.11.)

such a way as to render traditional remedies insufficient to erase the coercive impact of that conduct, necessitating a bargaining order. Because the Board exercised this remedial authority only after engaging in a detailed and balanced analysis of the individual circumstances of this case, this Court should uphold that decision.

1. The nature and extent of the Company's unfair labor practices had the tendency to undermine majority strength and impede the election process

There is no question that the Company deliberately engaged in numerous unfair labor practices calculated not only to dispel support for the Union, but to ensure that unit employees would not soon forget the lengths to which the Company would go to make good on its declaration that the shop would remain union free. Immediately upon opening the dealership in early December, the Company began actively, and unlawfully, attempting to preempt the Union from gaining a foothold among its employees. In December and January, the Company instructed several employees that they were required to withdraw from the Union as a condition of employment with the Company. In addition, it interrogated an applicant about his union activities, and repeatedly declared that the shop would be nonunion. Then, in late January, the Company threatened an applicant that he was “blackballed” because he is the cousin of Union Business Representative Breckenridge.

Furthermore, on March 2, upon learning that its employees attended a union meeting during their lunch hour that day, the Company reacted “swiftly and severely.” (A. 32.) The Company immediately unlawfully interrogated employees to find out who attended the union meeting and who signed authorization cards. And in the course of doing so, the Company threatened that the dealership could be closed, resulting in the loss of jobs, if the Union were voted in. As the Board explained (A. 32), this is a “hallmark” violation of the Act that tends to destroy election conditions and persist longer than other unfair labor practices, thus warranting a bargaining order. *See Gissel Packing Co.*, 395 U.S. at 611 n.31 (threats of facility closure are demonstrably “more effective to destroy election conditions for a longer period of time than others”); *Amalgamated Clothing Workers of America*, 527 F.2d at 807.

Moreover, just days after the union meeting, the Company committed its second hallmark violation by discharging Rocha, making good on its threat that it would “blow [him] out” if he was a union organizer. As the Board explained, discharge of an employee due to union activity is perhaps the most flagrant of the hallmark violations “because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work.” (A. 32 (quoting *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980))). Moreover, it likely has “a lasting inhibitive effect on a substantial percentage of the work force,” and

would remain in employees' memories for a long time." (A. 32 (quoting *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (D.C. Cir. 1980))). This is all the more true in a small unit of only 13 employees. See *Traction Wholesale Ctr. Co.*, 216 F.3d at 107-08.

The Company committed a third hallmark violation when it granted unannounced wage increases to a majority of the 13 unit employees. The Board explained (A. 32) that this type of financial inducement is a particularly effective method of garnering support by unit employees because the Board does not traditionally require an employer to withdraw such benefits once granted. See *Coating Prods., Inc. v. NLRB*, 648 F.2d 108, 109 (2d Cir. 1981) (explaining that unlawful wage or benefit increases carry a "lasting inhibitive effect on a substantial percentage of the work force"); *NLRB v. Anchorage Times Publ'g Co.*, 637 F.2d 1359, 1370 (9th Cir. 1981) ("unlikely that those who received [wage increases] . . . will forget" that employer has "final word on wage increases--and decreases").¹⁸

¹⁸ The Company argues (Br. 43) that it had a valid reason for granting these pay raises. But as discussed above (p. 17-19), the Company did not file exceptions to the judge's finding that the Company violated the Act by granting the increases, so the Company is barred by Section 10(e) of the Act from obtaining review of the finding that the wage increases were unlawful. 29 U.S.C. § 160(e) ("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."). See also *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

The Company compounded the impact of these egregious hallmark violations by engaging in other unlawful acts, which included threatening a wage cut if the Union was voted in, creating the impression that employees' union activities were under surveillance, and interrogating employees during a shop meeting. As explained by the Board (A. 33), through these violations the Company conveyed the message to all employees that supporting the Union would not be tolerated and that employees risked the same fate as Rocha if they persisted in engaging in union activity.

The Board also reasonably found (A. 33) that the serious and pervasive nature of these violations was heightened by additional factors, including the number of employees affected, the identity and positions of the management officials who committed these acts, and the extent of dissemination of the violations. In a unit as small as 13 employees, these unlawful acts, including several hallmark violations, had a particularly strong tendency to undermine the Union's majority support. *See Traction Wholesale Ctr. Co.*, 216 F.3d at 107-08 (“threats to close . . . warehouse and . . . discriminatory discharge . . . , were not only hallmark violations of the most pernicious type, but given the small size of the unit, likely not to have been forgotten” (internal quotations omitted)).

Moreover, because the Company's highest officials committed the unfair labor practices, the severity of the violations was magnified and employees were

even more unlikely to forget them. Company owner Zaheri committed some of the violations himself, including interrogating employees and granting the wage increases, and had a hand in others, including the discharge of Rocha. And Nickerson and Garcia, the second- and third-ranking management officials, were each responsible for committing other violations. (A. 33 & n.12.) This participation by the Company's highest officials further supported the Board's finding that a fair election was no longer possible. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1176 (D.C. Cir. 1993); *Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330 (D.C. Cir. 1989) (finding employer's misconduct was egregious because it "was committed by the highest management officials and was directed at virtually every employee in the bargaining unit").

Finally, with respect to the dissemination of the violations, the Board explained (A. 33) that, at the May 11 shop meeting, all of the employees were subject to interrogation and given the impression that their union activities were under surveillance. Moreover, more than half received the unlawful wage increases, and all of the employees were plainly aware that Rocha was discharged. The Company argues (Br. 41) that there was no evidence of dissemination and that the Company only threatened one employee that bringing in the union would result in job losses and would lead the owner to close the dealership. But it is reasonable to assume that expressions of an employer's attitude—and, particularly, hallmark

unfair labor practices such as threats of plant closure and job loss, and the discharge of a union supporter—are “rapidly disseminated around a plant during the struggle of organization.” *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 485 (10th Cir. 1967) (quoting *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 179 (2d Cir. 1965)); *cf. Amazing Stores, Inc. v. NLRB*, 887 F.2d 328, 330 (D.C. Cir. 1989) (upholding Board’s finding that “since the misconduct was committed by the highest management officials and was directed at virtually every employee in the bargaining unit, it was foreseeable that new employees would learn of the past [violations] and be deterred from seeking Union representation”).

The Company maintains that the nature and extent of its unfair labor practices do not warrant a bargaining order. The starting point of its argument, however, is the erroneous assertion (Br. 41) that the discharge of Rocha was lawful. But as discussed above (Section II), ample evidence supports the Board’s finding that the Company discharged Rocha because of his union activity. The Company then attempts (Br. 41, 52) to compare the facts of this case to the other Board decisions that the judge relied on to find that a bargaining order was not warranted. Of course, when the judge drew those comparisons, not only had he found that the Company’s decision to discharge Rocha was lawful, but he had not properly addressed other allegations that were ultimately found to violate the Act. These other violations included the Company’s unlawful interrogation of Rocha

during his hiring interview about whether he was a union member; the unlawful interrogation of several other employees after the March 2 union meeting; the threat to decrease wages if the union were voted in; and the creation of the impression that employees' union activities were under surveillance. When the quantity and severity of the Company's violations eventually emerged, the need for a bargaining order came into sharp focus and rendered the judge's early comparison to other cases inapposite.

Equally fallible is the Company's brazen declaration (Br. 39) that the effects of the 8(a)(1) violations were "minimal." The Company argues that, because it committed some unfair labor practices before authorization cards were signed, its actions did not dissuade unit members from signing cards. But none of the hallmark violations were committed before the authorization cards were signed. Moreover, this Court has firmly rejected this argument, explaining that "[f]orbid[ding] the Board from considering such conduct sets an artificial time barrier and ignores the possible cumulative effect of antiunion activity." *Davis Supermarkets, Inc.*, 2 F.3d at 1175 (quoting *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981)).

The Company then changes tack and argues (Br. 39-40, 41) that, because all of the unfair labor practices occurred before the Union filed its representation petition, the Union must have felt that it could still get a fair election despite the

unfair labor practices. The Company errs by reading too much into the Union's decision to file an election petition. At the same time as the Union filed its election petition, it also separately asked the Company for voluntary recognition, given that it had secured authorization cards from a majority of the employees. The Union's decision to simultaneously pursue both of these avenues for recognition was simply designed to preserve the Union's rights and options, and cannot be read as any kind of admission by the Union that a fair election could likely be held.

2. The Board reasonably found that its traditional remedies are not sufficient to erase the effects of the Company's unfair labor practices ensuring a fair election

Having firmly established the pernicious nature of the Company's unfair labor practices, the Board reasonably found (A. 33) that traditional remedies of reinstating Rocha with backpay, promising to refrain from such violations in the future, and posting a remedial notice, were necessary but not sufficient "to dispel the coercive atmosphere that this Respondent has labored so assiduously to create." Given the small size of the unit, the "grav[e] and coercive impact" of the Company's numerous unlawful actions, and the fact that the Company's highest management officials committed those violations, this finding is well supported and consistent with recent decisions of this Court. *See Traction Wholesale Ctr. Co.*, 216 F.3d at 106 (enforcing bargaining order where employer interrogated employees, threatened to close shop and cut jobs, discharged union supporter,

offered to correct grievances, and promised increased benefits); *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 826-28 (D.C. Cir. 2001) (enforcing bargaining order where employer discharged two union advocates, threatened employees with bodily harm and plant closure, interrogated employees, and abruptly changed its disciplinary policy).

The Board then took account (A. 33) of the employees' Section 7 rights balanced against the need for a bargaining order, as well as the sufficiency of traditional remedies. The Board explained (A. 33) that the Section 7 rights of the majority of employees who signed authorization cards is protected by the bargaining order, whereas the rights of any employees who may be opposed, by contrast, are protected by their right to seek decertification of the Union under Section 9(c)(1) of the Act. Because the Board's finding that a bargaining order is necessary is "largely within the special competence of the Board," this Court should defer to the Board's expertise regarding this determination. *Davis Supermarkets, Inc.*, 2 F.3d at 1175-76 (citing *Rd. Sprinkler Fitters Local Union No. 669 v. NLRB*, 681 F.2d 11, 24 (D.C. Cir. 1982)).

Although the Company acknowledges (Br. 55) that it failed to argue before the Board that changed circumstances have rendered a bargaining order unnecessary, it nevertheless attempts to place extra-record evidence of changed circumstances before the Court. But under Section 10(e) of the Act, the

Company's failure to present this argument to the Board, or to establish extraordinary circumstances preventing it from doing so, leaves this Court without jurisdiction to consider this newly-minted contention. 29 U.S.C. § 160(e)); *see also Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

Moreover, the Company could have asked the Board to reopen the record in order to consider evidence of changed circumstances, but it did not. Accordingly, the issue is not properly before this Court. *See Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 442 (D.C. Cir. 2004) (declining to address change in management where employer never properly moved to reopen record to place related evidence before the Board); *Traction Wholesale Ctr. Co.*, 216 F.3d at 108; *see also Cogburn Health Ctr., Inc. v. NLRB*, 437 F.3d 1266, 1274 (D.C. Cir. 2006) ("the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices" (internal citation omitted)).

C. Because the Bargaining Order Attached on May 17, 2006, the Company Violated the Act by Refusing To Furnish the Union with Information It Had Requested and by Unilaterally Eliminating the Lube Technician Position and Terminating Rother

Consistent with Board precedent that has been approved by this Court, the Board found (A. 33) that the bargaining order attached on May 16, 2007, when the Union submitted to the Company a demand for recognition based on authorization

cards it had received from a majority of the employees. *See Traction Wholesale Ctr. Co.*, 328 NLRB 1058 (1999), *enforced*, 216 F.3d 92 (D.C. Cir. 2000). Such retroactivity erases any benefit that the Company acquired as a result of its unlawful activity. *See Power, Inc. v. NLRB*, 40 F.3d 409, 422 (D.C. Cir. 1994). The bargaining obligation can thus “give rise to additional Section 8(a)(5) charges of unlawful refusal to bargain from that date forward.” *Id.*

An employer with a bargaining obligation violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) & (1)) by refusing to furnish information that is relevant to and necessary for the Union’s performance of its statutory function as the unit employees’ exclusive collective-bargaining representative. *See New York & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011). Accordingly, the Board reasonably found (A. 33) that the Company violated the Act when it refused the Union’s request to produce a list of bargaining-unit employees, including their wage rates, dates of hire, classifications, as well as personnel policies and fringe benefits.

The Company argues (Br. 60) that even if the bargaining order is upheld, the Company should not be found to have violated Section 8(a)(5) because, when it denied the Union’s request for information, there was no bargaining relationship. But this misconstrues the nature of a bargaining order. The Board has firmly rejected the argument that bargaining orders should be prospective. In *Trading*

Port, Inc., 219 NLRB 298, 301 (1975), the Board explained that an employer cannot violate the Act with impunity, in the face of a union's majority showing of support, then claim that it has no obligation to bargain with the union until after a bargaining order issues. *See also Rd. Sprinkler Fitters Local Union No. 669*, 681 F.2d at 24-25 (approving retroactive application of bargaining orders).

An employer with a bargaining obligation also violates Section 8(a)(5) and (1) of the Act by unilaterally making changes in terms and conditions of employment. *See Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 137 (D.C. Cir. 1999). The Board has established that unilaterally eliminating a unit position and redistributing those duties to other positions in the same bargaining unit without giving the union proper notice and an opportunity to bargain violates Section 8(a)(5) of the Act. *See Bloomfield Health Care Ctr.*, 352 NLRB 252, 255 (2008), *enforced*, 372 F. App'x 118, 121 (2d Cir. 2010) (Summary Order). Thus the Board here reasonably found (A. 34) that, by eliminating the lube technician job classification and terminating Rother, without first bargaining with the Union, the Company violated Section 8(a)(5) and (1) of the Act.

In challenging this finding, the Company relies (Br. 59) on cases which, as the Board explained (A. 34 n.14), do not support its position. In *Geiger Ready-Mix Co.*, 323 NLRB 507 (1997), *enforced*, 87 F.3d 1363, 1370-71 (D.C. Cir. 1996), *Kohler Co.*, 292 NLRB 716, 720 (1989), and *Wire Products Manufacturing Co.*,

328 NLRB 855, 856 (1999), the Board found that unilaterally assigning bargaining unit work to nonbargaining unit employees violates Section 8(a)(5) of the Act. These cases do not establish, as the Company here suggests (Br. 58-59), that an employer may unilaterally eliminate bargaining unit classifications and reassign that work to other bargaining-unit classifications. As discussed above, such conduct has been found to violate the Act. *See Bloomfield Health Care Ctr.*, 352 NLRB at 255.

The Board also reasonably rejected the Company's argument (Br. 56-57) that the lube technician position was not in the bargaining unit. Although Rother was only qualified to perform a subset of the work performed by the technicians, the work he performed—oil changes, tire rotations, and brake inspections—was also performed by the technicians. Further, the Board found (A. 34) that, because the Company asserted that the technicians absorbed this work once the Company eliminated the lube technician position, it conceded that the lube technician performed bargaining-unit work.

Finally, the Company argues (Br. 58) that some technicians wanted to perform the work that would otherwise have gone to the lube technician. But an employer cannot defend against an unlawful refusal to bargain by arguing that some employees liked or even sought the change. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962).

CONCLUSION

For the foregoing reasons, 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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May 2012

ADDENDUM

1 is Mr. Riddle was a service writer and that might explain why
2 his card was not submitted to the Board.

3 MR. BERKLEY: I think it was at the previous employer.
4 Maybe I'm wrong. Well, that is correct.

5 ADMINISTRATIVE LAW JUDGE POLLACK: Okay, so that might
6 explain why it wasn't submitted. But you don't have to be an
7 expert to testify that you're familiar with the signature, so
8 I'll receive GC 13.

9 (General Counsel Exhibit 13 was received in evidence.)

10 MS. VIX: Thank you, Your Honor.

11 Q BY MS. VIX: Did you make a demand for recognition?

12 A Yes, I did.

13 Q When was that?

14 A On May 16th.

15 Q And where?

16 A At the employer's facility. Actually, at Jim Garcia's
17 office, at the employer's facility.

18 Q Who was present?

19 A Present at that was Jim Garcia, myself, and my area
20 director, Jim Swanze.

21 Q Do you remember what time of day you went over to
22 the --

23 A It was about midday.

24 Q Midday. What was said?

25 A I had a letter for -- a demand letter for recognition. I

1 kind of walked through that letter, as I handed it to him, and
2 said that the technicians -- we have a majority status and the
3 technicians wanted us to represent them.

4 Q Okay.

5 MS. VIX: I'd like to approach the witness, again, I've
6 got GC Exhibit 14.

7 (General Counsel Exhibit 14 was marked for identification.)

8 Q BY MS. VIX: Do you recognize this document?

9 A Yes, I do.

10 Q What is it?

11 A This is the demand letter that we handed Jim Garcia.

12 Q Okay. And this is on May 16th?

13 A On May 16th, yeah.

14 Q That's your signature at the bottom?

15 A Yes, it is.

16 MS. VIX: Okay, Your Honor, I'd like to move GC Exhibit 14
17 into evidence.

18 ADMINISTRATIVE LAW JUDGE POLLACK: Any objection?

19 MR. BERKLEY: I have a question, Your Honor.

20 ADMINISTRATIVE LAW JUDGE POLLACK: Go ahead.

21 **VOIR DIRE EXAMINATION**

22 Q BY MR. BERKLEY: I note that we have a fax -- do you have
23 a copy before you, Mr. Breckenridge?

24 A Yes, I do.

25 Q At the bottom sort of upside from the text of the letter

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(916) 362-2345

Add. 2

1 there's a fax stamp. Is that sent from you office?

2 A That is our fax number, yes.

3 Q And it's also it's a two page -- apparently two pages were
4 sent. Do you know what the first page was?

5 A The first page would have -- should have been a cover
6 sheet, and this would have been the second page.

7 MR. BERKLEY: Do we have a copy of that cover page for me?

8 MS. VIX: It's probably in the file somewhere, it's the
9 cover letter to the Region.

10 MR. BERKLEY: Well, we seem to be interested in cover
11 pages, so if you wouldn't mind producing it, I would --

12 MS. VIX: I'll find it at lunch, I don't know --

13 MR. BERKLEY: No, I wouldn't expect you to have it handy
14 at the moment.

15 MS. VIX: It's probably in my briefcase.

16 Q BY MR. BERKLEY: You indicate at the top of letter it's
17 hand-delivered and certified return receipt. How does one get
18 a certified return receipt, did you get a receipt from Mr.
19 Garcia at the time?

20 A I hand delivered this document to Jim Garcia.

21 Q Yes.

22 A At the same time I mailed certified copies, for certified
23 return receipt, to Matt, to his place of employment.

24 Q Yes.

25 A And then once that went out, that's the certified return

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

MATHEW ENTERPRISE, INC.)	
d/b/a STEVENS CREEK CHRYSLER JEEP)	
DODGE)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1310
)	& 11-1406
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	20-CA-33367
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, LOCAL LODGE 1101)	
)	
Intervenor)	
)	

STATUTORY ADDENDUM

The following provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, et. seq., are excerpted below pursuant to FRAP 28(f) and Circuit Rule 28(a)(5):

Section 1 (29 U.S.C. § 151)	2
Section 7 (29 U.S.C. § 157)	2
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2
Section 8(a)(3) (29 U.S.C. § 158 (a)(3)).....	2
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	2
Section 9(c)(1) (29 U.S.C. § 159(c)(1))	3
Section 10(a) (29 U.S.C. § 160(a))	3
Section 10(e) (29 U.S.C. § 160(e)).....	3
Section 10(f) (29 U.S.C. 160(f)).....	4

Section 1 of the Act (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.

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

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 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 . . . ;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 9 of the Act (29 U.S.C. § 159): Representatives and Elections.

(c) Hearings on questions affecting commerce; rules and regulations

- (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) subsection (a) of this section; or (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(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

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

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

MATHEW ENTERPRISE, INC.)	
d/b/a STEVENS CREEK CHRYSLER JEEP)	
DODGE)	
)	
Petitioner/Cross-Respondent)	Nos. 11-1310 & 11-1406
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	20-CA-33367
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
MACHINISTS AND AEROSPACE WORKERS,)	
AFL-CIO, LOCAL LODGE 1101)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,498 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

/s/ Linda Dreeben
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(202) 273-2960

Dated at Washington, DC
this 3rd day of May, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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 registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
This 3rd day of May, 2012