Nos. 11-3724 and 11-4066

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

BEACH LANE MANAGEMENT, INC., FSM MANAGEMENT, INC., CARPE DIEM MANAGEMENT, LLC, A SINGLE EMPLOYER

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR REVIEW 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 application of the National Labor Relations Board ("the Board") to enforce, and the cross-petition of Beach Lane Management, Inc., FSM Management, Inc., Carpe Diem Management, LLC, a single employer (collectively "the Company") to review, a Board Order issued against the Company. The Board had subject matter jurisdiction over the unfair

labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board issued its Decision and Order, which is reported at 357 NLRB No. 30, on July 29, 2011.[1]

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the Board's Order is final with respect to all parties and the Company committed the unfair labor practices in New York, New York. The Board filed its application for enforcement on September 19, 2011, and the Company filed its cross-petition for review on September 30. Those filings were timely because the Act imposes no time limits on proceedings for the enforcement or review of Board orders.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company committed numerous unfair labor practices in violation of Section 8(a)(3), (2), and (1) of the Act in response to the union activities of its building superintendents.

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[1] "D&O" references in this proof brief are to the Board's Decision and Order. "Tr." refers to the transcript of the hearing held before the administrative law judge. "GCX" and "RX" refer respectively to the exhibits admitted on behalf of the General Counsel and the Company at the hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) by of the Act by refusing to offer supplemental repair work to four of its building superintendents because of their union activities.

STATEMENT OF THE CASE

In 2003, four of the Company's building superintendents, Manuel Nina, Eugenio de los Santos, Domingo Medina, and Bolivar Millet, led an effort to organize the Company's superintendents and porters on behalf of Local 32, Service Employees International Union ("Local 32"). Based on several unfair labor practice charges filed by the Union, de los Santos and Millet, and another individual, the Board's General Counsel issued a consolidated complaint alleging that the Company committed numerous violations of Section 8(a)(3), (2), and (1) of the Act (29 U.S.C. §158(a)(3), (2) and (1)) in response to the organizing campaign. (D&O 2 & n.1; GCX 1(eee).) After a hearing, an administrative law judge issued a recommended decision finding that the Company had committed the alleged unfair labor practices. (D&O 2-54.) On review, the Board affirmed the judge's rulings, findings, and conclusions, as modified. (D&O 1-2.)

Before the Court, the Company does not contest the bulk of those findings, which include multiple violations of providing unlawful assistance to an alternate union, Factory and Building Employees Union Local 187 ("Local 187"),

threatening the superintendents who were the union leaders with discharge, directing them to resign and offering them money to resign, as well as issuing a discriminatory warning to one and soliciting complaints from building tenants about another. (D&O 1, 1 n.2, 43.) The Company also does not contest that it unlawfully imposed more onerous working conditions on three of those superintendents by increasing their workloads, changing their schedules, and requiring that they get permission to leave the premises, and scrutinizing their work more closely, or that it then discharged them, as well as the fourth union leader. Nor does the Company contest the Board's findings that after reinstating the four superintendents pursuant to a Board settlement agreement, it then unlawfully discharged three of them a second time, after the fourth had resigned. (D&O 1, 1 n.2, 43.)

In the face of those many admitted unfair labor practices, which demonstrate its persistent and unwavering effort to thwart the employees' union activities, the Company raises a small handful of challenges. Specifically, the Company disputes the Board's findings that it violated Section 8(a)(3) and (1) of the Act by refusing to offer supplemental repair work to three of the superintendents in the months prior to discharging all four of them, and then again later to all four superintendents after their reinstatement. In addition, the Company belatedly raises challenges to two portions of the Board's remedial Order that are not

properly before the Court. The facts supporting the Board's findings are outlined below, followed by a summary of its Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Structure; Its Policy of Assigning Supplemental Repair Work to the Superintendent of the Building Where the Work Is Needed

The Company is headquarted in Hartsdale, New York, and manages over 100 residential rental apartment buildings in the greater New York area. (D&O 3; Tr. 97, 112, 282-83, 288, GCX 1(eee) par. 2(a), 1(ggg) par. 2, RX 2, 3, 9 pp. 1-2.) Mark Scharfman is the Company's president and chief operating officer. (D&O 3; Tr. 97-98, RX 9 p. 1.) The Company employs building managers, superintendents, and porters. Each building manager oversees approximately 10 to 15 buildings and the superintendents, each of whom is assigned to an individual building. (D&O 4; Tr. 99-103, 294-97, 2867.) The building superintendents work 5 days a week maintaining their assigned building, responding to tenant complaints, and performing repairs to the apartments. (D&O 3-4, 13; Tr. 321, 1337, 2071.) The larger buildings have porters paid for by the Company. The porters sweep and mop the hallways, and take out the garbage. (D&O 3, 16, 22, 26; Tr. 294, 320.)

The Company's superintendents include Manuel Nina, Eugenio de los Santos, Domingo Medina, and Bolivar Millet. Nina, who began working for the Company in 1993, and Millet, who began working in 1997, worked in larger

buildings in The Bronx that had porters, but they also personally paid for additional helpers. (D&O 4, 11, 22, 26, 37; Tr. 644-47, 1620-24, 1883-84, 2221-22.) De los Santos, who began working for the Company in 1995, and Medina, who began working in 2000, worked in smaller buildings in Manhattan, and employed porters at their own expense. (D&O 4, 11, 16, 18, 37; Tr. 1336-41, 2103, 2071.)

For additional pay, the superintendents performed supplemental repair work for which they often received more money than they received in base salary. The supplemental repair work included painting, installing tiles, sinks and tubs, as well as remodeling kitchens and bathrooms. (D&O 3, 13, 14, 16, 20, 26, 36; Tr. 1338-39, 1422-28, 1672-73, 1694-1702, 1914-17, 2095-2103, 2261-62, 2271-72, 2704-08.) Traditionally, the Company offered supplemental repair work to the superintendent who worked in the building where the repairs were needed. (D&O 13, 14, 19, 20, 22, 27, 28, 35; Tr. 798, 804, 1003-07, 1241, 2581, 2627-28, 2704-07, 2920.)

B. In March 2003, Superintendents Nina, de los Santos, Medina, and Millet Lead an Effort To Have the Superintendents and Porters Join Local 32; the Company Monitors Their Union Activities

In 2001 and 2002, Nina, de los Santos, Medina, and Millet, became interested in being represented by Local 32 because they wanted the Company to provide medical insurance and to offer more money for supplemental repair work.

(D&O 4, 16, 18, 22; Tr. 1479-80, 1624-25, 2103-04.) In January 2003, the organizing began in earnest when the four superintendents and approximately twelve others met with Local 32 representatives. Over the next month, the four superintendents visited the Company's apartment buildings and solicited its superintendents and porters to sign authorization cards for Local 32. (D&O 4, 5, 16, 18; Tr. 1342-51, 1490-91, 1625-27, 1640, 2105-06, 2225-26.) Also in January, the Company began paying dues to Local 187, Factory and Building Employees Union ("Local 187") on behalf of Medina and Millet, without deducting the dues from their paychecks, and despite the fact that there is no record that either had ever signed a dues check-off authorization for Local 187. (D&O 12; Tr. 244-66, GCX 25-34.)

In early March, President Scharfman initiated a meeting with Nina, in which he told Nina that he knew of his plans to hold a union meeting in his apartment. Scharfman directed Nina to call him because he was going to solve Nina's "problem[s,]" and to tell other employees who had "issue[s]" that they "had to call" him. (D&O 4, 5, 26; Tr. 1627-29.) On March 3, President Scharfman directed Property Manager Robert Bryant to go to Nina's apartment and "get information" about a Local 32 meeting he had heard was scheduled for that day at Nina's apartment. Bryant then called Property Manager Steven Burrell and asked him to accompany him as a "witness" because he did not know all the

superintendents. Bryant also told Burrell that there was "unrest" due to union activity, that Scharfman wanted all the superintendents to sign cards for Local 187 rather than Local 32, and that Nina was one of the "principal people . . . trying to stir the superintendents to sign for [Local 32]." (D&O 4, 5, 37; Tr. 968-70.)

Nina proceeded to hold a union meeting in his apartment on March 3. Attendees included de los Santos, Medina, Millet, over thirty other superintendents and porters, and Local 32 representatives. During the meeting, Nina heard a knock on the door. When Nina opened the door, he saw Managers Bryant and Burrell, who then tried to look inside the apartment to see who was attending the union meeting. (D&O 4, 16, 18, 22, 26, 34; Tr. 1351-54, 1629-31, 2106-08, 2223.)

On March 4, Manager Bryant informed President Scharfman about the union meeting. (D&O 5; Tr. 2695-96.) Bryant also told de los Santos that he knew about the meeting, and that "nothing" was going to happen with Local 32 because Scharfman was going to give Nina, the leader of the union effort, money to quit his job. De los Santos replied that Nina was not the sole union leader, but that it had "four heads," and that the others would continue the union campaign. He then stated that the employees wanted medical benefits, a better base salary, and more money for supplemental repair work. (D&O 5, 16, 34; Tr. 1354-58.)

On March 9, President Scharfman met de los Santos to discuss the concerns that de los Santos had earlier raised with Manager Bryant. Scharfman told de los

Santos that he knew of his organizing activities for Local 32. He directed de los Santos to talk to "[y]our union," Local 187, and stated that he would sell the buildings if Local 32's organizing effort succeeded. De los Santos insisted that that Local 187 was not a real union. (D&O 5, 16, 34; Tr. 1360-67, 1419.) On March 10, Scharfman met with Nina. Scharfman referenced the March 3 union meeting, and said that he would give Nina "anything" he wanted to "avoid" that happening again. Scharfman also told Nina that Local 187 "is your union." (D&O 5, 6, 34, 39; Tr. 1632-36.)

Shortly thereafter, the Company gave money to Nina to assist him with his medical bills and paid him for prior supplemental repair work. (D&O 6, 41; Tr. 1636-37.) Around this time, Nina, de los Santos, Medina, and Millet all received unscheduled raises retroactive to 2002. (D&O 5, 6, 16, 22, 34; Tr. 117-26, 367-70, 982, 1361, 1369, 1637-38, 2109, 2225, GCX 3-6, 67, 70.) Also, Manager Bryant, at Scharfman's direction, began keeping a log book on superintendent Nina to document anything that would warrant firing him. (D&O 26, 37; Tr. 1000-02.) Bryant told Manager Burrell that because of Nina's union activities, Scharfman had directed Bryant to "micromanage" Nina, and to visit his building frequently in order to "justify Nina's eventual termination." (D&O 26, 37; Tr. 1000-02.)

C. In May and June 2003, the Superintendents Continue Their Union Organizing; the Company Imposes More Onerous Working Conditions on Nina, de los Santos, and Millet, and Refuses To Offer Them Supplemental Repair Work; the Company Issues a Warning to Nina

On May 7, 2003, President Scharfman and Managers Bryant and Haney Ramirez initiated a meeting with Nina, de los Santos, Medina, and Millet. (D&O 7; Tr. 1377-80, 1640-45, 2113-15, 2227-28.) Bryant told them that the meeting "was for the heads." (D&O 7, 18, 34; Tr. 1387, 1644, 2115.) Scharfman asked why, after he had tried to resolve their issues, they are "still doing things behind his back." (D&O 7; Tr. 1643-45.) The superintendents stated that they wanted more money for supplemental repair work, and complained that superintendent Reyes Marte, who did not support Local 32, received more supplemental repair work. They also complained that the Company had failed to pay them for completed supplemental repair work, or paid them less than the agreed-upon price. (D&O 7, 34; Tr. 840-44, 1377-80, 1383-84, 1644-46, 2228-29, 2271, 2818.) Scharfman said he would "fix the problem[s,]" but warned that if they "were traitors against him, [they] would have to wait for the consequences." (D&O 7, 34; Tr. 2228.)

Scharfman then stated that many of the supplemental repair jobs would now require a contractor's license, which none of them had. (D&O 8, 14, 36; Tr. 1380, 1515-16, 1612-13, 2387-88.) He also informed the four superintendents that they would have to start performing floor buffing and certain plumbing work without

receiving extra pay (D&O 8, 37; Tr. 1381-82, 1514, 1616, 2115, 2117, 2230, 2237-38), and start performing their porters' job duties during the porters' two days off (D&O 8; Tr. 2238-39). In reply to Scharfman's statement that Local 187 is "your union," and that they could not have a different union, the superintendents stated that Local 187 was not their union. (D&O 7; Tr. 1384, 2231.)

When de los Santos was leaving the meeting, he told President Scharfman that Scharfman was disrespecting him by giving supplemental repair work to superintendent Miguel Soto, who was apparently supplying the Company with information about Local 32's organizing drive. In response, Scharfman offered him Soto's current repair work. De los Santos replied that he did not want work already given to Soto, but reiterated that it should have been offered to him. Scharfman then offered de los Santos an amount of money that convinced him to take the work. Scharfman warned, however, that it would be the last renovation ever offered to him. (D&O 8, 14, 36; Tr. 1388-89, 1429-30, 1521, 1613-14.)

On May 8, President Scharfman called de los Santos and asked, "who was on his side and who wasn't on his side." De los Santos purposely lied. Scharfman then told de los Santos to call Joseph D'Onofrio, the president of Local 187. (D&O 8; Tr. 1389-91.) On May 9, Scharfman again called de los Santos. Scharfman stated that he knew de los Santos supported Local 32, and advised him that the superintendents already have a union, Local 187. (D&O 8; Tr. 1392-95.)

Then, on about May 12, President Scharfman called Nina and asked him to "name his price" for a renovation job. This was the first time Nina had been given the opportunity to set the price for renovation work. Nina replied that he did not want special treatment. (D&O 8-9, 26; Tr. 1662-64, 1914, 2032-35.)

On May 14, Medina held a union meeting in his apartment that was attended by de los Santos, Millet, and Nina, and more than thirty other superintendents, porters, and Local 32 representatives. (D&O 9; Tr. 1396-97, 1659-62, 2121-22, 2234-35, GCX 66, 71.) Over the next month, the four superintendents led protest meetings in front of Nina's building, and at a downtown office building. They also distributed pamphlets for Local 32, picketed Scharfman's home, visited city council members, and conducted an interview on a radio program. (D&O 9, 16, 30; Tr. 1702-08, 2122-26.)

Between mid-May and mid-June, President Scharfman told Manager Bryant that the superintendents were not to leave their buildings during the workday. (D&O 10, 37; Tr. 2722-27, 2756.) Scharfman also told Nina that he was not authorized to leave his building during working hours, that Manager Bryant would "continuously" monitor Nina's building, and that he would also be required to do the porter's cleaning work when the porter was off duty. (D&O 8, 10, 29, 30, 37; Tr. 1667-68, 1670-73.) Similarly, Bryant told both de los Santos and Nina that they would need permission to leave their buildings during the workday. (D&O

10, 11, 29-30, 37; Tr. 1420-22, 2239-40, 2728-29.) Bryant also told de los Santos that Scharfman was "getting tired" of the "situation," and would "have a reaction" (D&O 9, 29; Tr. 1418-19), and told Nina that "an action brings a reaction." (D&O 9, 41; Tr. 1684.) Thereafter, the managers, including Bryant, more frequently stopped at the buildings that they oversaw. (D&O 10, 29-30, 37; Tr. 1240-41, 1255, 1420-21, 1541-43, 1673, 1688-90, 2113-14, 2722.)

On June 13, Nina received a warning letter stating that he had abandoned his building and that tenants were increasingly dissatisfied with the upkeep of his building. (D&O 29; RX 15.) Previously, no company official had expressed concerns about his job performance. (D&O 29, 41; Tr. 1672-75.) In early August, Larry Wornum replaced Bryant as Nina's manager, and Wornum began visiting Nina's building even more frequently than Bryant. (D&O 30; Tr. 1691-94.)

D. In June 2003, Company Managers Solicit Employees To Sign Cards for Local 187, Then Warn That Employees Actively Supporting Local 32 Will Get Less Supplemental Repair Work

In June, Senior Manager Bernard de Chalus told Manager Jose Canales that most of the superintendents and porters were trying to join Local 32, which he stated was not a good union. De Chalus gave Canales cards for Local 187, and asked him to have the employees sign them. Canales solicited 10 superintendents, 2 of whom signed cards. (D&O 6, 12, 38; Tr. 1229-37.) Thereafter, superintendent Marte asked Manager Burrell to accompany him when he solicited

superintendents to sign cards for Local 187. Together they solicited about 10 superintendents. Several of the solicitations took place in the presence of Local 187 President D'Onofrio, who told the superintendents that President Scharfman had sent him to solicit them. Burrell told the superintendents that Scharfman would be "very pleased" if they signed cards for Local 187, but that there "could be a problem" if they signed up with Local 32. They warned that superintendents who were active in Local 32 would not be given supplemental repair work. (D&O 12, 38; Tr. 983-95, 1232-37, 2822-23.)

E. Between July and November 2003, the Superintendents Continue Their Organizing Activities for Local 32; the Company Offers Millet Money to Quit, Tells Millet that He Will Not Receive Supplemental Repair Work, and Discharges Nina

In July 2003, Manager David Alvarado told Millet that President Scharfman wanted to know how much money he wanted to quit his job. Millet replied that he had done nothing wrong to warrant being asked to resign. (D&O 9, 16; Tr. 2247, 2251-52.) In August, the Company began deducting dues for Local 187 from Medina's and Millet's paychecks despite having received no authorization forms from them. (D&O 12, 37, 39; Tr. 2711, GCX 25.) On August 27, the Company filed an unfair labor practice charge with the Board against Local 32, asserting that Local 32, and its agents, including Nina, had restrained and coerced employees by soliciting for Local 32 and discouraging membership in Local 187. (D&O 30, 41; GCX 7.) Sometime in 2003, Scharfman told Manager Burrell that there was a

change in policy and all supplemental repair work had to be cleared through him. (D&O 15, 27, 35; Tr. 973-77, 1003, 1012.)

On September 2, an article appeared in the Spanish language newspaper *Hoy* regarding the superintendents' organizing drive for Local 32. President Scharfman saw the article, which included a picture of de los Santos, Millet, Medina, and Nina. The article stated that Medina and Nina were leading the effort to have the Company's superintendents and porters join Local 32, and that the Company was trying to impose on them a "phantom union," Local 187. (D&O 9, 16, 18, 34; Tr. 275, 1243, 1703, 2242-44, GCX 37.)

On about September 3, Scharfman asked Millet if he had signed a card for Local 187, and stated that signing a card for Local 187 would solve Millet's "problems." Scharfman also stated that Millet would not receive supplemental repair work because he was not timely performing his regular work, and warned Millet that the Company would fire him if his performance did not improve. This was the first time that Scharfman had raised concerns about Millet's work. (D&O 9; Tr. 2244-47.)

On October 14, over 40 members of the New York City Council wrote to President Scharfman asking that he "work with Local 32 in addressing the needs" of the superintendents. (D&O 10; Tr. GCX 13.) On October 24, the Company discharged Nina for alleged poor work performance. (D&O 30; Tr. GCX 16.)

Thereafter, Nina continued to engage in activities on behalf of Local 32. (D&O 31; Tr. 1727-30, 2254, GCX 73.)

F. In April 2004, de los Santos, Medina, and Millet Give the Company Letters Stating that They Do Not Authorize the Deduction of Local 187 Dues from Their Pay; in October, the Company Fires Them for Failing to Pay Dues to Local 187

On April 12, 2004, de los Santos, Medina, and Millet wrote identical letters to Local 187 making clear that they did not authorize the deduction of dues from their pay. The Company received copies of those letters and ceased collecting dues from their wages. (D&O 12, 38; Tr. 1432, 1562-63, 2126-30, 2255, GCX 17.) A few weeks later, the three superintendents met with Local 187 President D'Onofrio, who urged them to sign cards for Local 187. (D&O 12; Tr. 1432-44, 2127-30.)

In October, Local 187 sent letters to the Company stating that "after several attempts" by Local 187, superintendents de los Santos, Medina, and Millet, "ha[ve] failed and refused to submit payments to Local 187," and asking it to discharge them "immediately." (D&O 12, 18; RX 19-20.) On October 29, the Company sent letters to the three superintendents stating that it was discharging them based on Local 187's request. (D&O 12-13, 16, 23; RX 21.)

G. In April 2005, the Company Enters Into a Board Settlement Agreement To Return Nina, de los Santos, Medina, and Millet to Work; Thereafter, the Company Offers Them Money To Quit, Issues an Order that They Will Not Perform Supplemental Repair Work, and Solicits Complaints About Millet's Work

In April 2005, Local 32, the Company and the Board's Regional Director entered into a Settlement Agreement of a Board complaint that had issued in March 2005 alleging that the Company had taken a variety of unlawful actions in response to the superintendents' union activities. (GCX 1 (oo), (rr).) The Company agreed to pay backpay to Nina, de los Santos, Medina, and Millet, to reinstate them "to their former positions, or substantially equivalent positions, with full seniority rights and privileges," and to "not deprive employees of supplemental repair work or fail to pay employees for repair work because of their" union activities. (D&O 13, 23; Tr. GCX 1(rr), GCX 95, RX 24.) Later that month, de los Santos, Medina, and Millet returned to work, but Nina was not reinstated until November because the Company initially refused to return him to the same building where he had worked prior to his discharge or to pay him the same salary. (D&O 13, 17, 35, 41; Tr. 425, 1741-45, 1751-53, GCX 35, 36, 95 at exhibits 9-11, 14, RX 23, 25.) The superintendents continued their organizing activities for Local 32 by holding meetings in Millet's or Medina's apartments. The meetings continued until December 2007. (D&O 13, 18; Tr. 1453-62, 1816, 2122-23, 2149-50, GCX 69.)

After Millet returned to work he complained that he was not assigned supplemental repair work in his building. (Tr. 2274.) In an April 13 letter, President Scharfman acknowledged that superintendent Felix Rodriquez had received the work, but stated that it did not mean Millet would "never be offered" such work. The letter further stated that any attempt by Millet to "limit" or "direct" management's right to chose who will perform supplemental repair work will result in "further disciplinary action." (GCX 20.)

Also in April, Manager Rafael Sosa, who began working for the Company in 2005, and who supervised de los Santos, Medina, and Millet upon their return to work, asked de los Santos how much money he wanted to quit. Sosa directed de los Santos to meet with Medina and Millet, and stated that he would then inform Scharfman of their offer. Thereafter, the three superintendents met with Sosa and offered to quit their jobs for a total of $200,000. Sosa declined their offer and stated that President Scharfman might offer them $10,000 each. Medina then asked Sosa why the Company was not giving them supplemental repair work. Sosa said that he would ask Scharfman. (D&O 16, 18, 34, 39; Tr. 1446-49, 2140-43, 2275-76, 2869-73.)

Subsequently, Sosa told Medina that Scharfman did not want them performing supplemental repair work. (D&O 16, 18, 34, 39; Tr. 2142.) Similarly, Scharfman told Manager Bryant that the four superintendents would no longer

perform renovation work. (D&O 13, 16, 27, 35-36; Tr. 2679-80.) Manager Ramirez told Medina that other superintendents, including Marte, were doing repair work in Medina's building instead of him because Scharfman did not want him and the other union leaders doing the work. (D&O 18; Tr. 2138-40.)

In June, Leonardo Ruiz, the president of the tenant association in Millet's building, asked Manager Sosa why Millet was not receiving materials he needed to perform his work. Sosa replied that his job was to "get rid of" Millet. (D&O 40; Tr. 2276-78.) In response, Ruiz wrote a letter to President Scharfman on July 1 that defended Millet and stated that "its no secret" that the Company had an "agenda" to discharge Millet. (D&O 24, 39; GCX 40.) About this time, Millet declined Manager Sosa's offer of $25,000 to quit his job. (D&O 4; Tr. 2279-80.)

Between July 20 and September 15, de los Santos and Millet filed unfair labor practices charges with the Board asserting that the Company was failing to offer them supplemental repair work. (Tr. 2275, 2282, GCX 1(s), (u), (w).) About that time, Manager Sosa offered de los Santos a small job for $75 because the Company "knew" that he was complaining to the Board about not getting repair work. (D&O 17; Tr. 1450-51, 1589-90, 1592, 1601-02, 1609, GCX 89, 97(c).) In October, President Scharfman offered Nina up to $55,000 to quit his job. (D&O 31, 34; Tr. 1734-41, 1972.) After Nina returned to work in November, his managers, including Sosa and Valdet Prelvukaj, who replaced Sosa in December

2007 as the manager of Nina's building, praised Nina's work and apologized for not offering him supplemental repair work, but noted that Scharfman would not give him the work. Sosa also warned Nina that the Company was planning to fire him. (D&O 27; Tr. 1773-80.)

Sometime in 2005, Managers Sosa and Larry Wornum encouraged tenants in Millet's building to circulate a petition against him. Fifty people signed in favor of keeping Millet in his position and seven signed against. (D&O 24, 34, 39; Tr. 2290, GCX 77 par. 5.)

H. Between February 2006 and January 2008, the Company Discharges Millet, Nina, and Medina; de los Santos Quits

On February 17, 2006, Millet took tenant association President Ruiz to the Board's Regional Office to give an affidavit. (D&O 25; Tr. 2300.) When Millet returned home, Manager Sosa handed him a discharge letter signed by President Scharfman, and told him that de los Santos and Medina "were next." (D&O 25, 40; Tr. 2301, GCX 22.) The letter stated that Millet was discharged for poor work performance and gave him until March 3 to vacate his apartment. (D&O 25, 40; GCX 22.)

Over the years, Millet performed a decreasing amount of supplemental repair work in his building. In 2002 he did 52 jobs for $17,240, and others did 4 jobs for $625; in 2003 he did 102 jobs for $18,850 and others did 17 jobs for $6,430; in 2004, prior to his discharge, he did 74 jobs for $12,820, and others did

14 jobs for $6,650; in 2005, after his reinstatement, he did 1 job for $75, and others did 84 jobs for $23,520; and in 2006 he did 1 job for $75, and others did 22 jobs for $2,590. Millet also did some work outside his building in 2002 and 2003, but none thereafter. (D&O 22-23; GCX 96(a), 97(a).)

In May, de los Santos accepted $5,000 from the Company to quit his job. De los Santos quit because he was not making enough money due to a lack of supplemental repair work. (D&O 17, 36; Tr. 1452-53, RX 31.) Regarding the supplemental repair work in de los Santos' building, in 2002, he did 53 jobs for $15,575, and others did 95 jobs for $13,825; in 2003, he did 38 jobs for $9,340, and others did 53 jobs for $10,985; in 2004, prior to his discharge, he did 2 jobs for $125, and others did 36 jobs for $9,040; in 2005, after his reinstatement, he did 13 jobs for $3,125, and others did 38 jobs for $11,735; and in 2006, until he resigned, he did 5 jobs for $2,250, and others did 31 jobs for $11,350. De los Santos also did a little bit of work outside his building prior to his initial discharge, but none after his reinstatement and before his subsequent discharge. (D&O 17; GCX 96(c), 97(c).)

Between October 2007 and mid-December 2007, the Company used a private investigation firm to surveil Nina. The firm notified President Scharfman on several occasions that Nina was acting properly. (D&O 31-32, 34-35; Tr. 219-20, 1274-80, 1292-98, GCX 59-65.) In a January 4, 2008 letter, the Company fired

Nina for allegedly leaving early for a vacation and not timely returning to work. The letter directed Nina to vacate his apartment by January 18. (D&O 33, 42; RX 52.) Regarding the supplemental repair work in Nina's building, in 2002 he did 164 jobs for $53,595, and others did 21 jobs for $15,415; in 2003, prior to his discharge, he did 53 jobs for $16,270, and others did 37 jobs for $10,377; in 2005, after his reinstatement, he did no jobs, and others did 6 jobs for $4,675; in 2006 he did no jobs and others did 173 for $84,675; and in 2007 he did no jobs and others did 157 jobs for $93,235. Nina also did work in other apartment buildings during 2002 and 2003, but none thereafter. (D&O 17, 29; Tr. 1759-60, 1773-74, GCX 96(b), 97(b).)

In a January 7, 2008 letter, the Company discharged Medina and began proceedings to evict him for alleged "unsatisfactory work performance." (D&O 21; GCX 84.) The Company had not previously alerted or warned Medina of any performance issues. (D&O 21, 40; Tr. 2155-59, 2302.) Regarding the supplemental repair work in Medina's building, in 2002 he did 49 jobs for $14,460, and others did 72 jobs for $19,990; in 2003 he did 50 jobs for $15,740, and others did 14 jobs for $8,175; in 2004, prior to his discharge, he did 2 jobs for $1,400, and others did 29 jobs for $14,405; in 2005, after his reinstatement, he did no jobs, and others did 27 for $7,430; in 2006 he did no jobs, and others did 55 for

$8,842; and in 2007 he did no jobs, and others did 83 jobs for $36,775. (D&O 20; GCX 96(d), 97(d).)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman and Members Pearce and Hayes) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by:

- Imposing more onerous working conditions on Nina between March or April 2003 until November 7, 2003, and on de los Santos and Millet between March or April 2003 until October 29, 2004, by refusing to offer them supplemental repair work, increasing their work loads, changing their schedule, requiring them to obtain permission before leaving their work places, and more closely scrutinizing their work;
- Issuing a disciplinary warning to Nina on June 12, 2003;
- Discharging Nina on November 7, 2003, and Santos, Medina, and Millet on October 29, 2004, and failing to reinstate them until 2005;
- Offering its employees money to resign their employment, and by threatening employees with discharge and directing them to resign because they engaged in activities in behalf of Local 32;

- Refusing to offer supplemental repair work to de los Santos, Millet, Medina, and Nina after they were reinstated until they were again discharged or otherwise left the Company;
- Soliciting complaints in about December 2005 from building tenants about Millet's work performance; and
- Discharging Millet on about February 17, 2006, Nina on January 4, 2008, and Medina on January 7, 2008, and commencing eviction proceedings against them.

(D&O 1, 43.)

The Board also found, in agreement with the administrative law judge, that the Company rendered assistance to Local 187 in violation of Section 8(a)(2) and (1) of the Act (29 U.S.C. §158(a)(2) and (1)) by:

- Paying dues to Local 187 on behalf of employees in the absence of any deductions for such dues from employees' paychecks;
- Deducting money from employees' wages and remitting same to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances;
- Employing its supervisors and agents to solicit employees to sign authorization cards for Local 187.

(D&O 1, 43.)

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 their statutory rights. (D&O 44.) Affirmatively, the Order requires the Company to offer reinstatement to Nina, Medina, and Millet, and upon reinstatement offer them supplemental repair work without discrimination because of their activities on behalf of Local 32, and to make them and de los Santos whole for any loss of benefits incurred as a result of the discrimination against them. The Order also requires the Company to withdraw any eviction proceedings pending against the four discriminatees, to remove from its files any reference to the unlawful actions taken against them, and to post and electronically distribute copies of a remedial notice. (D&O 1-2, 44.)

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of the bulk of its findings that the Company committed numerous violations of Section 8(a)(3), (2), and (1) of the Act because they are uncontested. Nonetheless, because the majority of those violations demonstrate the Company's widespread and persistent unlawful conduct that primarily targeted its four building superintendents who led the union organizing effort on behalf of Local 32, that body of uncontested violations provide context to inform the Court's review of the remaining issues.

2. The Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by refusing to offer supplemental repair work to three of the superintendents in the months prior to discharging all four of them, and then again later to all four superintendents after their reinstatement, are amply supported by the credited record evidence. The Company's knowledge that the four superintendents led the organizing effort on behalf of Local 32, and the numerous uncontested unfair labor practices that it committed in response, fully demonstrates its unlawful motivation. Moreover, the credited testimony of the four superintendents and the Company's own officials support the Board's finding that the Company departed from its normal practice in assigning work to limit and then virtually eliminate the amount of supplemental repair work offered to them. The Board's findings are also corroborated by the General Counsel's exhibits that summarized the amount of repair work performed by the four superintendents over the years. Moreover, because the credited testimony establishes that the four superintendents asked for supplemental repair work, the Board reasonably rejected the Company's reed-thin defense that it did not offer repair work to them because they did want it. Nor has the Company offered any basis to reverse the Board's crediting of testimony, or to disturb its reasonable inferences drawn from that testimony.

3. The Company's challenges to two portions of the Board's remedial Order are not properly before the Court. First, the Court is jurisdictionally barred under Section 10(e) of the Act from considering the Company's contention that language of the Board's Order will improperly require the Company to offer all supplemental repair work to the discriminatees under all circumstances because that argument was never raised to the Board in the Company's exceptions. Second, before the administrative law judge, the Company never argued, as it attempts to now, that superintendent Nina should be denied reinstatement and backpay based on the "after-acquired" evidence rule, or because he had lied at hearing. Accordingly, under settled principles, the Company could not have properly raised the issue to the Board in its exceptions, or thereafter to the Court. Moreover, in a related context, the Board reasonably considered and rejected (D&O 41) the same evidence upon which that argument is now based in finding that the Company would not have discharged superintendent Nina in 2003, even in the absence of his union activities.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(3), (2), AND (1) OF THE ACT IN RESPONSE TO THE UNION ACTIVITIES OF ITS SUPERINTENDENTS

In its exceptions to the Board, the Company did not object to many of the administrative law judge's unfair labor practice findings. It is well settled that the Board is entitled to summary enforcement of such uncontested findings because the Court is jurisdictionally barred from reviewing them. *See Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115, 121-22 (2d Cir. 2001) (reviewing court is barred by Section 10(e) of the Act, 29 U.S.C. § 160(e), to consider an objection not raised to the Board); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). The Board is therefore entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(3) and (1) by:

- Increasing Nina's workload and changing his schedule;
- Increasing both de los Santos' and Millet's workload, changing their work schedules, and more closely scrutinizing their work;
- Discharging Santos, Medina, and Millet in 2004, and failing to reinstate them until 2005; and
- Discharging Medina again in 2008, and commencing eviction proceedings against him.

The Board is similarly entitled to summary enforcement of the uncontested findings that the Company violated Section 8(a)(2) and (1) of the Act by:

- Rendering assistance to Local 187 by paying dues to Local 187 on behalf of employees in the absence of any deductions for such dues from employees' paychecks, and deducting money from employees' wages and remitting same to Local 187 notwithstanding the absence of employee authorizations for the deductions and remittances.

Further, in its opening brief, the Company fails to contest that the Board properly overruled its exceptions to the administrative law judge's decision regarding several other unfair labor practices. It is well settled that when a party does not contest the Board's unfair labor practices before the Court, "the Board is entitled to summary affirmance of those findings." *Torrington Extend-A-Care v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *accord NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67-68 (2d Cir. 1992). The Board is therefore also entitled to summary enforcement of the following findings that the Company violated Section 8(a)(3) and (1) of the Act by:

- Requiring Nina to obtain permission before leaving his workplace, more closely scrutinizing his work, issuing a warning to him, and discharging him in 2003;

- Requiring de los Santos to obtain permission before leaving his workplace;
- Requiring Millet to obtain permission before leaving his workplace, and soliciting complaints about his work performance; and
- Discharging Millet and Nina subsequent to their earlier reinstatements.

For the same reason, the Board is also entitled to summary enforcement of the Board's finding that the Company violated Section 8(a)(2) and (1) of the Act by:

- Rendering assistance to Local 187 by employing the Company's supervisors and agents to sign authorization cards for Local 187.

Moreover, none of the uncontested violations disappear from the case. Rather, "[i]t is against the background of acknowledged violations" that the Court considers the Board's remaining findings. *Torrington Extend-A-Care*, 17 F.3d at 590; *accord NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (uncontested violations "remain, lending their aroma to the context in which the [contested] issues are considered").

II. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY OF THE ACT BY REFUSING TO OFFER SUPPLEMENTAL REPAIR WORK TO FOUR OF ITS BUILDING SUPERINTENDENTS BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to "discriminate[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In discrimination cases, the General Counsel has the burden of demonstrating that an employer took an adverse employment action against an employee and that the employee's union activity was a "motivating factor." *Wright Line, a Division of Wright Line, Inc*, 251 NLRB 1083 (1980) (establishing the test in unlawful motive cases), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1991), and approved by the Supreme Court in *NLRB v. Transport. Mgmt. Corp.*, 462 U.S. 393 (1983); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001). If that burden is met, "the employer may avoid liability only if it demonstrates by a preponderance of the evidence 'that it would have reached the same decision absent the protected

conduct.'" *Id*. (citation omitted); *accord Holo-Krome Co. v. NLRB*, 954 F.2d 108, 111-12 (2d Cir. 1992) (denying rehearing) (explaining the *Wright Line* test).[2]

It is settled that the Board may rely upon direct or circumstantial evidence in determining motive, and that the General Counsel's case can appropriately rest on a variety of circumstantial factors. *See G & T Terminal*, 246 F.3d at 116-17; *Holo-Krome*, 954 F.2d at 113-14. Among the factors supporting an inference of unlawful motivation are the employer's knowledge of the employee's union activity, the employer's disparate treatment of prounion employees as compared to others, the employer's other unfair labor practices, and the implausibility of its asserted reason for the adverse action. *See NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143-44 (2d Cir. 1990); *Abbey's Transp. Servs.*, 837 F.2d 573, 579-82 (2nd Cir. 1988). Review of a Board finding of unlawful motive is particularly deferential because "[d]rawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995).

Moreover, the Board's findings of fact are entitled to affirmance if supported by substantial evidence, and its credibility determinations may not be disturbed

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[2] A violation of Section 8(a)(3) of the Act is also derivatively a violation of Section 8(a)(1) of the Act because such discriminatory conduct necessarily interferes with, restrains or coerces employees in the exercise of their Section 7 rights. *See Office & Prof'l Emp. Int'l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1998).

"'unless incredible or flatly contradicted by undisputed documentary testimony.'" *G & T Terminal*, 246 F.3d at 114 (citation omitted). On review, the Court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp v. NLRB*, 340 U.S. 477, 488 (1951); *accord G & T Terminal*, 246 F.3d at 114.

B. The Board Reasonably Found that the Company Refused To Offer Supplemental Repair Work to Nina, de los Santos, Medina, and Millet Because of Their Union Activities

The Company does not dispute that it responded to the Local 32 organizing campaign by committing a litany of unfair labor practices, many of which were targeted specifically against superintendents Nina, de los Santos, Medina, and Millet, who were the open and active leaders of the organizing effort, and whom the Company itself referred to as the "heads" of the Local 32 campaign. The only issues remaining for the Court to review are the Company's challenges to the Board's findings that it violated Section 8(a)(3) and (1) by of the Act by refusing to offer supplemental repair work to the superintendents during two separate periods: in the months preceding their first discharge, and again later after their reinstatement. Those contentions must be rejected, however, because the Board's findings are amply supported by the credited evidence.

As an initial matter, the Company's knowledge that Nina, de los Santos, Medina, and Millet led the organizing effort for Local 32, and its undisputed commission of numerous unfair labor practices in response to their union activities, provide the requisite evidence of unlawful motivation. Thus, the Company (Br. 6) does not dispute the Board's finding (D&O 34) that the four superintendents "were active from the beginning of [Local 32's] organizing drive in January 2003," or that it was well aware of the four superintendents' leadership role. Indeed, President Scharfman's telling Nina and de los Santos in March 2003 that he knew of their union activity, and the Company's initiating a meeting in May 2003 for the "the heads" of the campaign (D&O 7, 18, 34; Tr. 1387, 1644, 2115), amply demonstrate the Company's knowledge of the four superintendents union activity. The Company was also obviously aware of their ongoing union activities given the public nature of the campaign which included holding union rallies outside Nina's apartment building, picketing outside President Scharfman's house, and the publishing of a newspaper article seen by Scharfman that discussed the organizing effort and contained a picture of the four superintendents.

The Company acted on its knowledge of the four superintendents' union activities, by committing a litany of uncontested unfair labor practices against them. Indeed, President Scharfman's warning during the May 7, 2003 meeting with the four "leaders" that "traitors" would suffer the consequences, and Manager

Bryant's subsequent warnings to them that Scharfman was "getting tired" of the situation, and that "an action brings a reaction," were prophetic. The Company then proceeded to, as the Board found (D&O 34), "engage[] in a persistent, sustained effort to thwart and destroy" the organizing effort. Initially, that unlawful activity culminated with its discharge of Nina in November 2003, followed by its discharge of Santos, Millet, and Medina in 2004. Subsequently, between the 2005 reinstatement of the four superintendents and early 2008, the Company, as the Board found (D&O 35), "sought to unlawfully undo the effects of their reinstatement." During that time frame, the Company unlawfully offered money to all four superintendents to resign, an offer de los Santos accepted, and later the Company unlawfully discharged Nina, Millet, and Medina for the second time. In sum, the Company's uncontested unfair labor practices provide overwhelming evidence of its unlawful motivation.

Substantial evidence also supports the Board's finding that the Company refused to offer supplemental repair work to the four superintendents. As shown at pp. 10, 11, 14-15, 15, the credited record evidence shows that, beginning in spring of 2003, it refused to offer supplemental repair work to Nina up until his November 2003 discharge, nor did it offer the work to Santos and Millet until their October 2004 discharges. Substantial evidence further supports the Board's finding that after the 2005 reinstatement of the four superintendents, the Company

refused to offer any of them supplemental repair work until Santos quit, and it again unlawfully discharged Nina, Medina, and Millet.

Thus, the Board reasonably found (D&O 35) that, prior to the union organizing campaign in 2003, the Company had a "consistent policy to offer supplemental work to the superintendents in the buildings in which they resided because [they] were familiar with the building, the tenants, and the work to be done." Indeed, the testimony of the Company's own managers, including Ramirez (D&O 14, 22; Tr. 798, 804), Burrell (D&O 14; Tr. 1003-07), Sosa (D&O 14, 18; Tr. 2921), Bryant (Tr. 2627-28, 2704-07), and Prelvukaj (Tr. 2581), confirms that policy. Moreover, President Scharfman conceded in this testimony (Tr. 309) that prior to 2003, he applied that policy to the four superintendents who performed supplemental repair work. Similarly, Manager Bryant conceded in his testimony that prior to spring of 2003, de los Santos was given a "ton" of supplemental repair work. (D&O 16; Tr. 2682.) In light of the Company's concessions, it is in no position to dispute Nina's (D&O 26, 27; Tr. 1694-700), and de los Santos' testimony (D&O 16; Tr. 530-33) that they performed a significant amount of supplemental repair work prior to the union campaign. Nor could it, given the high hurtle that would need to be overcome to reverse the Board's crediting of their testimony. *See G & T Terminal*, 246 F.3d at 114 (the Board's credibility

determinations may not be disturbed "unless incredible or flatly contradicted by undisputed documentary testimony").

Notwithstanding the Company's longstanding policy for the assignment of supplemental repair work, it responded to the union campaign by informing the superintendents that they would no longer receive such work. As shown at pp. 11, prior to de los Santos' initial discharge, President Scharfman offered him a supplemental repair job, but warned that it would be the last one he would receive. Similarly, as shown at p. 15, Scharfman told Millet prior to his initial discharge that he would not receive any more supplemental repair work. Then, after the Company reinstated all four superintendents from their unlawful discharges, it made abundantly clear that it would not offer them repair work. For instance, Managers Sosa and Bryant told Nina that Scharfman did not want him to receive such work, and one manager even apologized to Nina for not offering it to him. Likewise, Manager Sosa told Medina that President Scharfman did not want him performing the work. *See* pp. 18-20.

Significantly, testimony of the Company's own officials confirms, as the Board found (D&O 35), that it decreased and then virtually eliminated all such work. Thus, prior to the initial discharges, Manager Burrell acknowledged that President Scharfman had instructed managers to clear the assignment of all supplemental work through him. After the discharges and subsequent

reinstatements, Manager Bryant acknowledged that Scharfman had issued an order that certain superintendents would not perform supplemental repair work, and that such work was then given to superintendents other than the four union leaders. (D&O 23; Tr. 2689-91.) Bryant further conceded that he stopped offering major renovation work to Nina in 2003. (Tr. 2717, 2731-33.) Moreover, Manager Sosa admitted that he did not offer supplemental repair work to Nina, Medina, and Millet, whom he supervised from 2005 to 2007. (D&O 14, 15, 18, 22, 23, 35; Tr. 2881-84, 2894-95, 2913-16, 2920-21.) Sosa even conceded that there was a lot of repair work in Nina's building, but that he did not give the work to Nina, despite having no problem with his performance. (D&O 27; Tr. 2913-16.) Similarly, Manager Prelvukaj (D&O 19; Tr. 2577, 2580-81) admitted that when he replaced Sosa in 2007, he did not offer repair work to Medina.

In these circumstances, it is hardly surprising that all four superintendents testified that after the union campaign began the Company decreased the amount of supplemental work offered to them. For example, Millet testified that he began getting less repair work in 2003. (D&O 22; Tr. 2273, 2284-89, 2335-36, 2383-84, 2387.) Similarly, de los Santos explained that the repair work offered to him began to decline in 2003, and he further noted that after his 2005 reinstatement, the Company offered him a few small jobs, but only in response to his filing a charge with the Board that he was not receiving supplemental repair work. (D&O 16; Tr.

1441-42, 1445, 1530-33, 1543, 1573-81.) Likewise, Medina testified that, after his 2005 reinstatement, he was informed of work in his building, but that it was then given to others. (Tr. 2143-48). Nina also testified extensively about the lack of supplemental repair work that was offered to him starting in 2003. (D&O 26, 27; Tr. 1696-97, 1773-76, 1759-60, 2036-37.)

Finally, the reduction and later virtual elimination of supplemental repair work performed by the four superintendents is further supported, as the Board reasonably explained (D&O 35), by the General Counsel's documentary evidence which included a detailed compilation of information from various company records. For example, Nina suffered a substantial drop in his supplemental work between 2002 and 2003. Moreover, during that time, the number of jobs performed by others in his building increased, and he performed less work outside of his building. Then, between his 2005 reinstatement and subsequent discharge, he performed none of the almost $200,000 worth of supplemental work done in his building. *See* p. 22. With respect to de los Santos, the number of jobs performed and total amount of money he earned from supplemental repair work in his building, and other buildings, decreased between 2002 and 2003. Others earned even more money from the work in his building in 2003 than he did. Then in 2004, prior to his discharge, and from after his 2005 reinstatement until his subsequent discharge, de los Santos performed only a handful of jobs each year,

while others performed dozens. *See* p. 21. Millet performed some supplemental repair work in his building in 2003 and 2004, but others started doing more work in his building during that time. Moreover, during the period between his 2005 reinstatement, until his subsequent discharge, he performed only a handful of jobs for a few hundred dollars, while others performed over 100 jobs for over $25,000. *See* pp. 20-21. Similarly, between Medina's 2005 reinstatement and his subsequent discharge, he performed none of the over $50,000 of supplemental repair work performed in his building. *See* pp. 22-23.

In sum, the credited testimony of the four superintendents and the Company's own managers, as well as the documentary evidence, provide ample evidentiary support of the Board's findings that it unlawfully withheld supplemental repair work from the four superintendents on the basis of their union activities, particularly when viewed in the context of the Company's extensive and admitted unfair labor practices. This extensive evidence fully supports the Board's finding that the General Counsel met his burden of showing that the Company was unlawfully motivated.

The Company offers two challenges to the Board's finding that the General Counsel had established his initial burden. With respect to the time period between the advent of the union campaign and the discharges in 2003 and 2004, the Company asserts that it did not actually fail to offer supplemental work. With

respect to the period after the 2005 reinstatements until the subsequent resignation and discharges, the Company argues that the Board erred by attributing its actions to antiunion animus. Neither of these arguments has merit.

For the time period between the advent of the union campaign and the initial discharges of Nina, de los Santos, and Millet, the Company (Br. 15-16, 18-24, 37) faults the Board for its reliance on the General Counsel's exhibits to find that the Company had refused to offer supplemental work. Specifically, the Company points to General Counsel Exhibit 96, a yearly summary of all of the work performed by the four superintendents in their buildings between 2002 and 2007, and General Counsel Exhibit 97, a yearly summary of all of the work performed by the four superintendents and others in the four relevant buildings between 2002 and 2007.[3]

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[3] General Counsel Exhibit 96 was derived from various company records, including General Counsel's Exhibits 89 and 90 and the Company's Exhibits 88 and 101, which set forth all of the individual checks paid to the four superintendents from 2002 through 2007. Similarly, General Counsel's Exhibit 97 was derived from various company records, including General Counsel's Exhibits 91, 92, and 93, and Company Exhibit 98 which set forth all of the checks for work performed in the four superintendents' buildings. In its brief in support of its exceptions to the Board, the Company specifically set forth how the General Counsel's compilations of the Company's records misstated the number of checks that Medina had received in 2003. That dispute has little relevance here, because his work during that time frame is not at issue. The Company also asserted general disagreements with the General Counsel's calculations. The Company, however, failed to present any contrary calculations at the hearing when it would have been appropriate.

As an initial matter, those exhibits were not, as the Company claims (Br. 23), the "key" to the Board's findings that it had refused to offer supplemental repair work prior to the initial discharges. Rather, as shown, the Board's findings were extensively based on credited witness testimony, and the General Counsel's exhibits simply corroborated the Board's findings. Moreover, before the Court, the Company now presents a new compilation of its records (Br. 27 & n.6, 29), that for the first time, assertedly make various corrections to the General Counsel's exhibits, which it claims "properly ascribe[s]" the work performed in 2002 and 2003. However, it is unclear what specific changes the Company made from the voluminous amount of raw documents to determine the new figures. Moreover, such issues should have been raised to the Board's administrative law judge in the first instance.[4] *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116-17 (D.C. Cir. 1996); *Int'l Paper Co.*, 319 NLRB 1253, 1276 (1995), *enforcement denied on other grounds*, 115 F.3d 1045 (D.C. Cir. 1997). Of course, it is not this Court's role to engage in such factfinding, and, even if there were other plausible compilations of the Company's records, now is not the time to present them.

With respect to its failure to offer supplemental work after the reinstatements in 2005, the Company's claim (Br. 16, 17, 33) that it had no union animus against

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[4] Not surprisingly, the Company's newly coined figures (Br. 27-29) generally show Nina, de los Santos, and Millet performing more supplemental work during the relevant time frame, and others performing less than the General Counsel had determined.

Local 32 at that time is absurd. That claim ignores that it admittedly engaged in a continuous course of unlawful conduct against the superintendents that was interrupted only by the first round of unlawful discharges. The continuation of the Company's unlawful conduct after the reinstatements led the Board's Regional Director to revoke the Settlement Agreement and reinstate the numerous complaint allegations against the Company. Since the Company does not dispute that after the 2005 reinstatements it then unlawfully offered money to the superintendents to quit, and unlawfully discharged Nina, Medina, and Millet, it is hardly in a position to claim that it had no continuing animus against Local 32 and its lead organizers.

The Company's suggestion (Br. 11, 22, 34) that the superintendents did not engage in union activities after their 2005 reinstatements is equally frivolous. As the Board found, the superintendents held meetings for Local 32 until December 2007. Moreover, whether or not those efforts might have been futile because some superintendents worked in one–person buildings and could not force the Company to bargain with the Local 32, those efforts, as the Board noted, "still constitute protected concerted activities." (D&O 10.) Accordingly, the Company has presented no basis to disturb the Board's finding that the General Counsel met his burden of showing that the Company was unlawfully motivated.

C. The Company Has Failed To Show by a Preponderance of the Evidence that It Would Have Refused To Offer Supplemental Repair Work To The Four Superintendents Absent Their Union Activity

The Company has failed to show that it would have refused to offer the supplemental work to the four superintendents absent its unlawful motivation. Although the Company asserts (Br. 9, 10, 12, 17, 25) that a variety of factors might have influenced who received supplemental repair work, it does not dispute that the Board (D&O 35-36) properly rejected many of those factors as a defense to its failure to offer Nina, de los Santos, Medina, and Millet such work. Those rejected defenses included the Company's claims that it did not offer the superintendents repair work because their neighborhoods had become more desirable and the tenants more demanding, there was less renovation work because most of the apartment buildings were already renovated, only licensed contractors could perform the work, and that the four superintendents were incompetent, their apartment buildings had too many violations, and they were not willing to travel to other buildings. Tellingly, before the Court, the Company (Br. 12, 28-29, 35-36) only disputes the Board's rejection (D&O 36) of its defense that it stopped offering the supplemental repair work to the superintendents because they did not want it. That claim, however, is simply an unwarranted attack on the Board's credibility determinations and its reasonable inferences drawn from the credited evidence.

Thus, the Board credited testimony of the superintendents (D&O 36) that they "continuously" asked for more supplemental work. For example, de los Santos credibly testified (D&O 16; Tr. 1425-27, 1441-43, 1485-86, 1588-92) that he asked for more work both before his initial discharge, and then again after his reinstatement. He further credibly explained that he performed work even when he was unhappy over the price he received. Indeed, de los Santos even resigned subsequent to his 2005 reinstatement because of his dissatisfaction over not receiving supplemental repair work. Similarly, Nina (D&O 26; Tr. 1698-1702, 2033-36) flatly denied that he refused to perform supplemental repair work. Moreover, as the Company acknowledged (Br. 8), the superintendents generally wanted such work because they receive extra pay for it. In fact, as the Board found (D&O 36), it was often a large part of their income, if not more than their base pay. Accordingly, the Board can hardly be faulted for inferring from the credited testimony (D&O 36), that it was unlikely that the four superintendents would have simply refused to perform supplemental repair work.

Nor has the Company shown that the four superintendents refused to perform supplemental repair work because they were not satisfied with the money they received for the work. Although the superintendents may have had complaints over the amount they were paid for repair work that predated the union campaign (Br. 7, 10, 16, 23, 25), that was one of the precise issues that led to the

union campaign and, as the Board found (D&O 36), they had previously performed such work despite disputes over money. Indeed, at the hearing Manager Bryant conceded that de los Santos performed the work despite disagreeing with the amount of money he was going to get paid. (Tr. 2715-16.) Similarly, Manager Sosa (Tr. 2925-26) conceded that Millet and Medina wanted more work after their 2005 reinstatements, and Manager Ramirez (D&O 22; Tr. 899) conceded that at some point Millet had asked for more work.

The Board did recognize (D&O 35), as the Company notes (Br. 28-29), that the superintendents were not available during certain time periods to perform supplemental repair work due to vacations and illness, and that there were issues over particular jobs, such as with Medina for a short time in the fall of 2005. (D&O 19, 36; Tr. 2145-46.) Yet, such temporary disputes were no basis to simply stop offering supplemental work to them, particularly when, as the Board found (D&O 17, 36; Tr. 2606-07), that superintendent Marte, who was not a union supporter, turned down work because of the amount to be paid without any impact on future offers of work. Nina also had an issue over a job shortly after the union campaign started when President Scharfman (Br. 28) offered him the opportunity to name his own price for a repair job. As shown above p. 12, Nina reasonably declined, because Scharfman's offer was contrary to the Company's policy and he was concerned that the Company was trying to single him out to stop his union

activities without making any overall change to how it would pay the superintendents for repair work. Accordingly, the Company's defense must be rejected.

D. The Company's Remaining Contentions Are Not Before the Court

In a final attempt to limit its liability, the Company raises two challenges to portions of the Board's remedial Order, neither of which are properly before the Court. The principles that apply to the Board's remedial authority are well settled. Section 10(c) of the Act (29 U.S.C. § 160(c)) provides that "upon finding that an employer had committed an unfair labor practice," the Board may direct the violator "to take such affirmative action . . . as will effectuate the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *NLRB v. Coca-Cola Bottling Co.*, 191 F.3d 316, 323 (2d Cir. 1999). Under the Act, the Board may properly design the remedy to restore "the economic *status quo* that would have obtained but for the [unfair labor practice]." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *accord NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

Moreover, the Board's discretion in formulating remedies "is a broad one, subject to limited judicial review." *Fibreboard Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 960 (2d Cir. 1988). "Because of the Board's unique expertise in labor disputes," this Court

accords "deference to the remedy [the Board] imposes." *Coca-Cola Bottling Co.*, 191 F.3d at 323-34. Accordingly, the Board's remedial decisions are to be set aside only if the Board's choice of remedy "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Fugazy Cont'l Corp.*, 817 F.2d 979, 982 (2d Cir. 1987).

First, the Company complains (Br. 39-43), that the superintendents "may" later interpret the Board's Order to require the Company to offer the work to those superintendents under any conditions. The time, however, for the Company to have disputed the language of the administrative law judge's recommended order, which the Board adopted, has long passed. In its exceptions to the Board, the Company failed to challenge that portion of the recommended order (D&O 44) requiring the Company to, upon the reinstatement of Medina, Millet, and Nina, "offer them supplemental repair work without discrimination because of their [union] activities." Accordingly, the Court is jurisdictionally barred from considering the Company's contention. *See Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115, 121-22 (2d Cir. 2001) (reviewing court is barred by Section 10(e) of the Act, 29 U.S.C. § 160(e), to consider an objection not raised to the Board); *accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

Second, the Company also belatedly argues (Br. 44-55) that the Board exceeded its remedial authority in ordering Nina's reinstatement because there was

evidence adduced at the unfair labor practice hearing that he had taken a vacation in late July and early August 2003, and lied to his manager about it. (*See* D&O 41; Tr. 1941-42, GCX 92). Before the administrative law judge, however, the Company never raised any substantive argument regarding the appropriateness of ordering Nina's reinstatement with backpay (*see* D&O 41-42), but simply stated in the facts section of its brief before the judge that if it did unlawfully discharge Nina then he should be denied reinstatement and backpay because of the discrepancy over his whereabouts. The Company made no claim that Nina should be denied reinstatement based on the "after-acquired" evidence rule or because he had lied before the administrative law judge. Accordingly, the Company could not have properly raised the issue to the Board in its exceptions and brief in support of exceptions, or thereafter to the Court. It is well settled that an argument raised for the first time to the Board is untimely. *See Trident Seafoods,* 101 F.3d at 111, 116-17 (holding an issue waived when a party fails to raise it to the administrative law judge, and that such failure precludes Board and court review) (collecting cases); *Int'l Paper Co.*, 319 NLRB at 1276 (1995) (collecting cases).

The Company's challenge to the Board's Order requiring that it reinstate Nina is transparently meritless under well settled principles. From the earliest days of the Act, "[r]einstatement [has been] the conventional correction for discriminatory discharges" (*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194

(1944) (quoted in *NLRB v. Int'l Van Lines*, 409 U.S. 48, 54 (1972))), and contrary to the Company's claim (Br. 48), lying under oath at a Board hearing does not present an absolute bar to reinstatement. *See ABF Freight Sys.*, 510 U.S. 317, 325 (1994) (holding that the Board did not abuse its discretion in refusing to adopt a rule precluding reinstatement or backpay to an employee whose discharge was motivated by antiunion animus, even though the employee gave false testimony); *accord Blue Circle Cement Co., v. NLRB*, 41 F.3d 203, 211 (5th Cir. 1994) (finding no basis to deny reinstatement and backpay to discriminatee who lied under oath).

Moreover, the Board reasonably found (D&O 41) that the Company had not shown that it would have discharged Nina due to the discrepancy over his whereabouts absent his union activities. Thus, the Company does not to dispute that the Board properly rejected the Company's claim that one of the reasons for Nina's November 2003 discharge was "repeated absences and unavailability during your assigned workday," and an "apparent act of dishonesty in lying to the building management regarding visits to the doctor." (D&O 30; GCX 16.) Although the letter was apparently referring to a different incident than the apparent unscheduled July vacation, the Board took the additional incident into account in determining whether the Company would have discharged Nina in 2003 even in the absence of his union activities. Thus, as the Board explained (D&O 41;

Tr. 2663, 2731-32), Manager Bryant asserted that he had problems with Nina's availability since Bryant had started working for the Company in August 2001, but admitted that he gave him the "benefit of the doubt," and did not take any adverse action against him until the advent of the union activity. Accordingly, the Board reasonably found it likely that Bryant would not have taken adverse action against Nina for his vacation, absent his role as a union leader. That finding stands unrefuted.

Finally, the Company does not advance its position that Nina should be denied reinstatement by relying (Br 30-34) on *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). There, the Supreme Court held that federal immigration policy precluded backpay (*id*. at 140) to an undocumented alien who had been unlawfully discharged but who initially had obtained his job with fraudulent documents, because the alien's actions made the underlying employment relationship illegal (*id*. at 144). In its ruling, the Supreme Court compared that case to those cases where employees were denied reinstatement because they had engaged in serious criminal acts, such as strike misconduct (*id.* at 143-45), circumstances wholly distinct from those here.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's Order in full, and denying the Company's cross-petition for review.

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May 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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	*	
Petitioner/Cross-Respondent	*	Nos. 11-3724
	*	11-4066
v.	*	
	*	Board Case No.
BEACH LANE MANAGEMENT, INC., FSM	*	2-CA-35720
MANAGEMENT, INC., CARPE DIEM	*	
MANAGEMENT, LLC, A SINGLE EMPLOYER	*	
	*	
Respondent/Cross-Petitioner	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,069 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses

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Dated at Washington, DC
this 4th day of May, 2012

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