

No. 11-60877

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ARKEMA, INCORPORATED

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would be of assistance to the Court.

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**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 to enforce an Order issued against Arkema, Incorporated. The Board had 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’s Decision and Order was issued on October 31, 2011, and

is reported at 357 NLRB No. 103. (D&O 1-41.)¹ The Court has jurisdiction over the case under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the Order is final with respect to all parties, and the unfair labor practices occurred in Houston, Texas. On December 27, 2011, the Board filed an application for enforcement that was timely because the Act places no time limits on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that Arkema violated Section 8(a)(1) of the Act by issuing a written warning to employee Saltibus for soliciting coworker Russell's support for the Union in the upcoming decertification election.

2. Whether substantial evidence supports the Board's finding that Arkema's July 23 anti-harassment letter violated Section 8(a)(1) of the Act because it had the tendency to chill the employees' exercise of their Section 7 rights and was issued in response to union activity.

3. Whether the Board reasonably found that Arkema violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, and

¹ "D&O" references are to the Board's Decision and Order. "Tr." references are to the hearing transcript, and "GCX" and "RX" references are to the exhibits introduced by the Board's General Counsel and Arkema, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

therefore whether its subsequent unilateral changes and direct dealing with employees were also unlawful.

4. Whether substantial evidence supports the Board's finding that Arkema violated Section 8(a)(3) and (1) of the Act by disciplining employee Shepherd on the basis of his union activities.

5. Whether the Court lacks jurisdiction to hear Arkema's challenge to the Board's Order that it post a remedial notice consistent with *J. Picini Flooring*, or, in the alternative, whether the Board's Order is a proper exercise of its remedial authority.

STATEMENT OF THE CASE

This case involves unfair labor practices committed by Arkema in the critical weeks before and immediately after the Board conducted an election among Arkema's employees to decide whether to decertify their exclusive-bargaining representative, the United Steelworkers of America ("the Union"). In the wake of its one-vote loss, the Union filed election objections and unfair labor practices charges with the Board. After an investigation, the Board's General Counsel consolidated the representation and unfair labor practices cases for hearing and issued a consolidated complaint. Among other allegations, the complaint alleged that Arkema violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by issuing a written warning to employee Mark Saltibus for soliciting a

coworker's support for the Union and by issuing an anti-harassment letter that had the tendency to chill the employees' exercise of their rights under Section 7 of the Act and was issued in response to union activity. The complaint also alleged that Arkema violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining employee Fred Shepherd for his union activities, and violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by withdrawing recognition from the Union and thereafter making unilateral changes and dealing directly with its employees.

After the hearing, the administrative law judge issued his recommended decision and order finding that the alleged conduct violated the Act and determining that Arkema's unfair labor practices committed during the critical weeks before the decertification election warranted setting aside the election. On review, the Board affirmed the judge's rulings, findings, and conclusions and adopted the recommended order, as modified. (D&O 1-4, 21-22.) The subsections below are summaries of the Board's findings of fact and its conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Decertification Efforts

Arkema manufactures chemical products at its facility in Houston, Texas, where its production and maintenance employees have had union representation since 1961. The Union is currently the collective-bargaining representative of 35

employees at the plant, and the parties' most recent collective-bargaining agreement was set to expire in October 2008. (D&O 10; Tr. 25-26, 202, GCX1v, 1x.)

In April 2008, employees Vance Thomas and Chuck Rayburn approached Madonna Trevino, a warehouse clerk, on several occasions asking her to sign a petition to decertify the Union. Trevino repeatedly told them she was uninterested, and informed employee Fred Shepherd, the Union's general president, that she felt harassed by them and asked him to intervene. Shepherd conveyed Trevino's concerns to Terry Freeman, the plant's site manager, who agreed to investigate. (D&O 12-13; Tr. 31-32, 115-20.) On July 17, employee Gregory Schull filed a decertification petition with the Board, and a vigorous campaign ensued. (D&O 9; Tr. 146, 281-85, 380, GCX1a.)

B. Employee Saltibus Solicits Union Support from Coworker Russell; Arkema Interviews Saltibus about that Conversation and Immediately Disciplines Him

Employee Mark Saltibus, a utility operator, was a member of the Union's bargaining committee and actively campaigned for the Union. Saltibus was also "step-up" chief operator who filled in for the chief operator when needed. On July 21, Saltibus approached employee Susan Russell, a relatively new employee who sometimes required help on the job, and asked if she knew about the election and briefly described the plant's history of labor relations. Saltibus asked Russell if the

Union had her support, but Russell did not respond. (D&O 11; Tr. 77, 277, 279, 282, 365.) Saltibus then said that if the Union goes away, “there’s no support . . . the relationship’s going to change.” (D&O 11; Tr. 282.) Russell remained stoic and said very little during their one-minute conversation. (D&O 11; Tr. 283, 372.) Later that day, Russell reported the conversation to Chief Operator Randy Joy, an antiunion supporter, and Joy then called Freeman. Freeman interviewed Russell and prepared a statement for her to sign. (D&O 11& n.7; Tr. 39-40, RX11.)

On July 22, Freeman called Saltibus into a meeting to interview him about his conversation with Russell. The meeting was also attended by Human Resources Manager Wendy Dupuy and Dennis Van Wye, Saltibus’ supervisor. Saltibus asked Shepherd to attend as his union representative. When asked what Saltibus had meant about the relationship changing, he explained that he would no longer do Russell’s job for her, unless there was a fire or other dangerous situation or he was acting as chief operator. (D&O 1, 11; Tr. 96-98, 210-12, 285, GCX 6.)

At the close of the meeting, Freeman handed Saltibus a prepared “written reminder” for “Violation of Company Harassment Policy.” (D&O 1, 11; Tr. 82; GCX6.) Arkema’s harassment policy prohibits “any unwanted attention or unwanted behavior [that is] engaged in because of a person’s sex, race, color, religion, national origin, age, disability, sexual orientation, or gender identity” and that meets certain additional criteria. (D&O 1, 11; RX1.) The written reminder

stated that Arkema had “completed its investigation into [Saltibus’] alleged inappropriate behavior towards [his] coworkers,” and described Saltibus’ violations as “making intimidating and threatening remarks toward a coworker and creating an offensive working environment.” It accused him of “threatening [Russell’s] job if she continued to pursue her non-union status.” (D&O 1, 11; GCX 6.)

The reminder also cited “a separate occasion” on which Saltibus allegedly “made threatening and inappropriate remarks to a laboratory employee concerning her wishes to not join the Union,” but did not provide the name of the laboratory employee, state when the alleged incident occurred, or give any other specifics. (D&O 1, 11; GCX6.) Freeman refused to tell Saltibus anything more about that allegation. (D&O 1, 12; Tr. 210-12, 289-91.) The reminder concluded that these incidents were “wholly unacceptable and [would] not be tolerated” and that Saltibus’ failure to comply with Arkema’s expectations regarding employee misconduct might “result in the termination of [his] employment.” (D&O 1, 11; GCX6.)

C. Arkema Sends an Anti-harassment Letter to All Employees; Freeman Belatedly Looks into Trevino’s Complaint; the Election Is Held and the Union Loses by One Vote; Arkema Withdraws Recognition

On July 23, Plant Manager Wendal Turley sent to all employees an email with two attachments—the Board’s pamphlet entitled “Your Government

Conducts an Election” and a letter informing employees of the upcoming election and stating that harassment and other similar conduct were prohibited. (D&O 3, 14; Tr. 64, GCX2.) Specifically, the letter prohibited employees from being “harassed, intimidated or threatened in any way . . . by anyone, including the [U]nion, for refusing to support a strike or certification.” (D&O 3, 14; GCX2.) The letter also directed employees to contact management if “you feel you have been subjected” to such prohibited conduct. (D&O 3, 14; GCX2.) The letter concluded by telling employees that Turley did not believe a union was necessary. (D&O 3, 14; GCX2.)

In late July, Freeman directed Supervisor Wheeland to talk to employee Trevino about the concerns she expressed in April that she felt pressured by employees Thomas and Rayburn to sign the decertification petition. Wheeland spoke to Trevino a day or two later and reported back to Freeman, who then spoke to Thomas and Rayburn. Freeman did not take further action, take a statement from Trevino, or make a record of the meeting with Thomas and Rayburn. (D&O 13; Tr. 33-38, 68-69.) On July 26, Wheeland complained to Freeman that he had overheard employee Shepherd instructing Duncan not to talk to an employee who did not support the Union. A few days later, Freeman interviewed Duncan about the conversation, but decided not to take action. (D&O 17; Tr. 45, 93.)

On August 11 and 12, the Board held a decertification election, which the Union lost by one vote. (D&O 15; GCX 1b, 1c.) About 90 minutes after the polls closed, Turley sent an email notifying all employees that “the collective bargaining agreement no longer exists at this facility.” (D&O 15; GCX3.) In the week after the election, employee and union general president Shepherd investigated potential objections to the election, spoke with employees about pre-election events, and asked some employees to talk to the Union’s lawyer. (D&O 17; Tr. 44-46.)

D. Freeman Investigates Complaints about Shepherd; the Union Files Charges and Objections to the Election; Freeman Orally Reprimands Shepherd

On August 18, Duncan reported to Freeman and Dupuy that Shepherd was throwing things around the shop. They took statements from two employees in Shepherd’s department, James Wright and David Pope, neither of whom had seen such behavior. (D&O 17; Tr. 47-48, 50-55, GCX8, RX3.) On August 19, the Union filed objections to the election and unfair labor practice charges, alleging violations of Section 8(a)(1), (3) and (5). (D&O 17; GCX1.)

Also on August 19, Freeman called Shepherd into a meeting, which Turley also attended. Freeman told Shepherd that employees had reported that he had thrown things around the shop, told employees they were either with him or against him, and told an employee not to explain something to a nonunion employee. (D&O 17; Tr. 51-53, 90.) Shepherd denied the first two complaints,

but with respect to the third, he described an incident with Duncan about two weeks before the election. Shepherd explained that when a gas line problem had forced a plant shut down, he gave Duncan two work orders that were critical. Later, when Shepherd found Duncan conversing with another employee before the work was complete, he repeated that the work orders were critical and there was no time for other matters. (D&O 17; Tr. 216-20.) Freeman and Turley warned Shepherd not to be confrontational and orally counseled him not to create a hostile work environment. After this meeting, Freeman conducted no further investigation, nor did he receive any additional complaints about Shepherd. (D&O 17; Tr. 53-54, 220.)

E. Shepherd Continues His Attempts To Represent the Union; Arkema Issues a Written Confirmation to Shepherd; Arkema Makes Unilateral Changes and Speaks Directly to Employees about Their Terms of Employment

In late August, Shepherd asked Freeman if Arkema would arbitrate a pending grievance, and Freeman said Arkema would not. On September 4, Shepherd met again with Freeman to discuss Arkema's intentions regarding the Union's status at the plant. Freeman told Shepherd that Arkema did not recognize the Union, had forbidden the use of the union bulletin boards, and would not process existing grievances. (D&O 17; Tr. 55-63.) On the afternoon of September 5, Shepherd sent Freeman an email confirming the prior day's discussion and Arkema's post-election position on certain matters. (D&O 17; GCX9.)

Later that day, Freeman told Shepherd that Arkema would not arbitrate any grievances. He then handed Shepherd a document entitled: “Written Confirmation—Alleged Violation of Company Anti-Harassment Policy.” (D&O 17; Tr. 44, GCX7.) The confirmation described the three incidents that Freeman and Turley had discussed with Shepherd on August 19. It stated that Arkema had “completed its investigation into [Shepherd’s] alleged inappropriate behavior towards [his] coworkers.” (D&O 17; GCX 7.) The confirmation instructed Shepherd to “reflect on your responsibilities and work in a way that does not lead to complaints,” and that “such actions could lead to further disciplinary action up to and including termination.” (D&O 17; GCX 7.) Arkema put the letter in Shepherd’s personnel file. (D&O 4, 17; Tr. 110.)

In the months after Arkema’s withdrawal of recognition, it communicated directly with employees regarding changes in the terms and conditions of employment, ceased deducting union dues, removed the bulletin boards previously used by the Union, and granted wage increases to employees. Arkema also refused to respond to the Union’s grievances, information requests, and requests to bargain. (D&O 3, 15-16; GCX 5.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Member Becker; Member Hayes dissenting) found, in agreement with the administrative law judge, that Arkema violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by issuing a written reminder to employee Saltibus for engaging in the protected activity of urging a coworker to support the Union in the upcoming decertification election. The Board found that Arkema also violated Section 8(a)(1) by issuing the July 23 letter to all employees that prohibited harassment, invited employees to report the protected activities of their coworkers, and impliedly threatened employees with unspecified reprisals for engaging in protected activities. The Board also found that, by informing employees that they had no rights under the collective-bargaining agreement that was, at the time, still effective, Arkema violated Section 8(a)(1).² (D&O 1, 3, 21.)

The Board found further, in agreement with the judge, that Arkema issued oral and written warnings to employee Shepherd on the basis of his union activity in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (D&O 3-4, 21). Lastly, the Board agreed with the judge's finding that Arkema withdrew recognition, refused to recognize and bargain with the Union,

² In agreement with the judge, the Board sustained the Union's objections to the election that were consistent with the Section 8(a)(1) violations found by the Board. (D&O 1 n.1, 20-21.)

unilaterally implemented changes, bypassed the Union and dealt directly with employees in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (D&O 1, 21.)

The Board's Order requires Arkema to cease and desist from the unfair labor practices found and, in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (D&O 1, 21-22.) The Board also ordered Arkema to rescind the unlawful disciplines of Saltibus and Shepherd and to recognize and, on request, bargain with the Union concerning the terms and conditions of employment of employees and, if an understanding is reached, to embody it in a signed agreement. (D&O 1, 22.) The Order also directs Arkema to restore the status quo as to the use of bulletin boards, grievance processing, the scheduling of arbitrations, and dues checkoff and to rescind, upon the Union's request, the unilaterally implemented terms and conditions of employment. (D&O 1, 22.) The Board also agreed with the judge's finding that the alleged violations warranted setting aside the election and ordered a second election.³ (D&O 3, 22.) Finally, the Board ordered Arkema to post a

³ Arkema's challenge (Br. 37-40) to the Board's Order to set aside the election and order a second one is not currently reviewable. A Board order in a certification proceeding is not a final order and thus not directly reviewable by the courts under Section 10(e) of the Act (29 U.S.C. § 160(e)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *Bishop v. NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974). If the Union wins the rerun election and remains the certified bargaining representative

remedial notice in a manner consistent with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board’s finding that Arkema violated Section 8(a)(1) of the Act by disciplining Saltibus. Arkema does not dispute that Saltibus was initially engaged in protected activity when he approached Russell to discuss the upcoming decertification election. Arkema further admits that it disciplined him because of a comment to Russell during the course of that conversation. Under the principles set forth in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), Arkema’s actions violate the Act inasmuch as Arkema cannot demonstrate on this record that it had an honest belief that Saltibus had threatened or harassed Russell. Nor has Arkema shown that the Board’s additional finding—that Saltibus did not, in fact, threaten Russell—is unsupported by substantial evidence.

2. Applying the settled principles of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board reasonably determined that Arkema violated Section 8(a)(1) of the Act in issuing the July 23 anti-harassment letter to its employees. The one-sided letter, transmitted two days after Saltibus’ protected

of Arkema’s employees, Arkema may challenge the election order by refusing to bargain with the Union. *See Boire*, 376 U.S. at 476.

solicitation of Russell, expressly proscribed only *prounion* activities and invited employees to report any instances of what they perceived as harassment by union supporters. Under established Board law, the Board found that the letter would reasonably tend to chill the employees' Section 7 activities and that Arkema issued it in response to union activity.

3. The Board reasonably concluded that Arkema violated Section 8(a)(5) and (1) of the Act by withdrawing recognition and refusing to bargain with the Union and thereafter making unilateral changes and dealing directly with employees. An employer's withdrawal of recognition must occur absent the coercive effect of unfair labor practices, and under settled Board precedent, cannot be accomplished before the Board has certified the results of this election. Arkema's reliance on *Dow Chemical Co. v. NLRB*, 660 F.2d 637 (5th Cir. 1981), and *Selkirk Metalbestos v. NLRB*, 116 F.3d 782 (5th Cir. 1997), is misplaced under the circumstances of this case.

4. The Board's determination that Arkema committed an additional violation of Section 8(a)(3) and (1) by disciplining Shepherd on the basis of his representation efforts in the wake of the election is supported by substantial evidence. Similarly supported is the Board's finding that the General Counsel satisfied his initial burden of showing that the discipline was unlawfully motivated

and that Arkema failed to show it would have disciplined Shepherd absent his union activities.

5. Arkema's challenge to that portion of the Board's Order requiring it to distribute a remedial notice consistent with *J. Picini Flooring*, 356 NLRB No. 9 (2010), is not properly before this Court. At this stage of the case, Arkema is not aggrieved by that portion of the Order, and this issue is not ripe for review. Alternatively, assuming that this Court reaches the merits of Arkema's challenge, the Board's distribution requirement established in *Picini* was a proper exercise of its broad remedial authority granted it under the Act and reflects the realities of today's modern workplace.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT ARKEMA VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCIPLINING SALTIBUS

The Board reasonably found (D&O 1-2, 13) that Saltibus was engaged in extensive union activities protected by Section 7 when he campaigned vigorously against decertification and that Arkema's attempt to "shoehorn" his statement to Russell into its anti-harassment policy was unavailing. Arkema cannot show that the Board's finding that Arkema interfered with Saltibus' Section 7 rights is unsupported by substantial evidence.

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees 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” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.”

Under *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23-24 (1964), an employer risks violating the Act when it disciplines an employee for alleged misconduct during an employee’s exercise of a Section 7 right. The Board will find the discipline to violate Section 8(a)(1) of the Act under the following burden-shifting test: First, the employer must demonstrate that it disciplined the employee because it held an honest belief that the employee had engaged in misconduct. *Id.* at 23 n.3. If the employer meets that burden, the General Counsel must then establish that no misconduct, in fact, occurred. *Id.* The Board will find a violation if either the employer fails to show that it based its discipline on an honest belief of misconduct or the General Counsel establishes that, in fact, no misconduct occurred. *See NLRB v. Plastic Applicators, Inc.*, 369 F.2d 495, 498 (5th Cir. 1966); *Pepsi-Cola Co.*, 330 NLRB 474, 474 (2000).

The Board's findings of fact are "conclusive" if supported by substantial evidence on the record considered as a whole. 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). As this Court has observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978). Further, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488.

"In determining whether the Board's factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007). The Board's adoption of the administrative law judge's credibility determinations must be upheld absent a showing that they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007). "Indeed, where a case turns on witness credibility, this [C]ourt will accord special deference to the [Board's] credibility findings and will overturn them only in the most unusual of circumstances." *NLRB*

v. Cal-Maine Farms, Inc., 998 F.2d 1336, 1339-40 (5th Cir. 1993) (internal citations omitted).

B. The Board Reasonably Held that Arkema Disciplined Saltibus for Conduct that Occurred During the Exercise of His Section 7 Rights

1. Saltibus was engaged in protected concerted activity and did not lose the Act's protection

The Act protects activities related to “self-organization,” 29 U.S.C. § 157, including communication among coworkers about a union organizing campaign. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Under well-settled Board law, “the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited.” *Ryder Truck Rental*, 341 NLRB 761, 765 (2004), *enforced*, 401 F.3d 815 (7th Cir. 2005). The Board has held further that “[u]nion solicitations do not lose their protected status simply because a solicited employee rejects them, or feels bothered or harassed by them.” *Frazier Indus. Co.*, 328 NLRB 717, 718-19 (1999), *enforced*, 213 F.3d 750 (D.C. Cir. 2000). Absent offensive or threatening behavior, an employee soliciting union support engages in protected Section 7 activity. *See id.* at 719; *see also Consol. Diesel*, 332 NLRB 1019, 1020 (2000), *enforced*, 263 F.3d 345 (4th Cir. 2001).

When discipline flows from conduct that is part of the surrounding circumstances of protected activity, the Board will only find privilege to discipline

if the employee's conduct is so flagrant or egregious as to warrant removal of the Act's protection. *Tri-County Mfg. & Assembly, Inc.*, 335 NLRB 210, 218-19 (2001), *enforced*, 76 F. App'x 1 (6th Cir. 2003); *accord Allied Aviation*, 490 F.3d at 379. The right to engage in protected activity "may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *Tri-County Mfg.*, 335 NLRB at 218 (internal quotation omitted). This Court recognizes that "responsibility to draw the line between these conflicting rights rests with the Board, and its determination, unless illogical or arbitrary, ought not be disturbed." *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 730 (5th Cir.1970) (internal quotation omitted).

The Board's conclusion that Saltibus never lost protection of the Act because he was engaged in protected activity is supported by substantial evidence. As shown above (pp. 6-7), in the weeks leading up to the election, Saltibus actively campaigned for the Union and solicited employee support. In one such brief encounter with Russell, Saltibus—after observing Russell's apparent ambivalence toward the Union—observed that if the Union lost the election, there would be "no support" and their relationship would "change." It is undisputed that the conversation never became heated or otherwise confrontational and, at no point, did Saltibus invoke profanity or an intimidating tone. (D&O 1, 11; Tr. 283-84,

380.) The Board expressly found (D&O 2, 13) on the basis of these facts that Saltibus never threatened Russell's job if she chose not to support the Union.

Arkema appears to concede (Br. 21) that Saltibus was engaged in protected activity by acknowledging that Saltibus' initial purpose was protected. Arkema, instead, argues that Saltibus "lost [the Act's] protection once he threatened Russell with not helping her do her job if she did not support the Union." (Br. 21.) The Board's conclusion to the contrary is eminently reasonable.

The credited evidence reveals only that Saltibus approached Russell to secure her support for the Union. His statement about the relationship changing was plainly innocuous, certainly not so "flagrant or outrageous" as to cost him the Act's protection. Arkema does not claim or show that Saltibus threatened or intimidated Russell, used profanity, or acted in an abusive manner when he spoke to her about the Union. As the Board found, Russell "interpreted [Saltibus' statement] as a threat that [he] and the union men would no longer help ('support') her when she needed it" (D&O 13.) Arkema relies, therefore, on nothing more than Russell's purely subjective notion of harassment, which is insufficient to strip Saltibus of his protection under the Act. *See Frazier Indus.*, 328 NLRB at 718-719; *accord Consol. Diesel*, 332 NLRB at 1020.

Further, the Board and courts have recognized that the Act protects far more egregious behavior than exhibited by Saltibus in this case. *See, e.g., Tri-County*

Mfg., 335 NLRB at 218-19 (employee retained Act’s protection when threatening a coworker’s termination if the union won and the coworker did not sign a card); *Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1203 (1979) (employee retained Act’s protection when threatening to have a coworker fired if she did not vote for the union); *Traverse City Osteopathic Hosp.*, 260 NLRB 1061, 1061 (employee’s profane outburst was protected), *enforced*, 711 F.2d 1059 (6th Cir. 1983). In short, Saltibus’ solicitation of Russell retained the Act’s protection, and Arkema violated Section 8(a)(1) by disciplining him.

2. Substantial evidence supports the Board’s finding that Arkema failed to show that it disciplined Saltibus on the basis of an honest belief that he had engaged in misconduct

Substantial evidence supports the Board’s finding (D&O 1-3, 12-14) that Arkema has not shown that it acted with an honest belief that Saltibus threatened Russell on the basis of her gender.⁴ As the Board observed (D&O 1), the administrative law judge fully credited Saltibus’ account of the interaction with Russell and specifically found that Saltibus never referenced Russell’s gender during the conversation.⁵ On the basis of the credited evidence, the Board

⁴ Arkema’s argument (Br. 19-21) that its honest belief is irrelevant misunderstands the Board’s analytical framework in applying *Burnup & Sims*. See p. 17.

⁵ The judge considered several factors. Most notably, the disciplinary letter lacks any “mention of any harassment based on Russell’s gender.” (D&O 13; GCX 6.) The letter also mentions a second and much older allegation of harassment by Saltibus on the basis of an employee’s union affiliation. (D&O 13; GCX 6.) The

concluded that Saltibus “did nothing that could conceivably be considered to have created an offensive working environment.” (D&O 1.)

Next, the Board reasoned (D&O 1-2) that Arkema’s “rush[] to judgment” and “suspect” deviation from its past practice militated against a finding that Arkema acted on an honest belief of misconduct. Specifically, Arkema prepared its written reminder “before [its] managers met with Saltibus to get his side of the story (even though [the reminder] stated that [Arkema] had ‘completed its investigation.’).” (D&O 2.) Such swift disciplinary action was, according to Shepherd’s credited testimony, “different from the usual practice” of discipline issuing “two or three days after [] an investigatory meeting.” (D&O 12; Tr. 212.) The Board also viewed the inclusion of a “stale” allegation (and one that Arkema refused to discuss) that Saltibus had previously harassed a coworker on the basis of union status as evidencing Arkema’s “predetermined intent to discipline Saltibus.” (D&O 2, 14.) Finally, the Board relied on (D&O 1, 14) Arkema’s cavalier dismissal of Trevino’s complaint of harassment to sign the decertification petition, which stood in sharp contrast to its treatment of Russell’s complaint. Arkema belatedly interviewed Trevino, did not obtain written statements from employees,

judge also considered that Shepherd corroborated Saltibus’ account and relied on inconsistencies between the testimony of Arkema witnesses. (D&O 12.) Arkema’s challenge to the judge’s credibility determinations as “unsupported” and “conclusory” (Br. 22, 23) is simply untenable in light of these express findings.

did not issue a written reminder to the alleged harassers, and “close[d] the ‘investigation’ without taking any action.” (D&O 14.)

Arkema faults (Br. 20) the Board’s finding that Arkema lacked an honest belief of misconduct by citing Board cases standing for the general proposition that employee reports may be sufficient to support a finding of an honest belief. In lodging this vague complaint, Arkema does not challenge the specific underpinnings of the Board’s finding that Arkema failed to carry its burden to show an honest belief of misconduct, and the cases do nothing more than demonstrate a general principle not at issue here.

Through credibility and evidentiary challenges, Arkema weakly contests (Br. 24-25) the Board’s determination that Arkema rushed to judgment. The Court will not lightly disturb credibility determinations, *see Dynasteel Corp.*, 476 F.3d at 257; and inasmuch as it was Arkema’s burden to show that it had an honest belief that misconduct occurred, the Board properly considered the lack of evidence showing actions that would be consistent with an honest belief of misconduct. (D&O 2, 14.)

Under these circumstances, the Board reasonably rejected Arkema’s contention that it had an honest belief that Saltibus threatened Russell on the basis of her sex. Instead, Arkema put on a superficial show of concern, where the issue

of Russell's gender was "a mere gloss" (D&O 13) in its attempts to justify the discipline of an adamant union advocate.

3. Even assuming Arkema demonstrated an honest belief of misconduct, substantial evidence supports the Board's finding that Saltibus did not, in fact, engage in misconduct

Substantial evidence supports the Board's finding that Saltibus did not, in fact, engage in misconduct. Therefore, even if Arkema sufficiently demonstrated an honest belief of misconduct, its actions still constitute a violation of the Act.

In determining that the alleged misconduct did not occur, the Board emphasized (D&O 2) Arkema's failure to assert in the reminder that Saltibus' alleged actions were related to any classifications covered by the harassment policy. The Board then highlighted Saltibus' credited (and corroborated) testimony that "he never told Russell that he would refuse to help her because she was a woman." (D&O 2.) At most, the Board determined that "Saltibus informed Russell that decertification would affect their relationship as coworkers and . . . he would not continue to assist her with what were properly her job duties." (D&O 3.) The Board's finding that Saltibus did not engage in misconduct for which he was disciplined is fully supported by substantial evidence.

Arkema's reliance on (Br. 27-29) *Contempora Fabrics*, 344 NLRB 851 (2005), does not advance its position. The alleged harasser in *Contempora Fabrics*, who had a previous history of misconduct and violence, ominously

warned a female coworker that she “had better not vote ‘no’ for the union.” *Id.* at 852. The employer in that case also maintained a broad policy prohibiting “abusive or threatening language.” *Id.* Here, Saltibus did not make his comment against a background of threats, violence, or a proclivity for angry outbursts. Saltibus was “a model employee” (D&O 2) who had worked for Arkema without incident for 17 years. Further, Arkema did not rely on or maintain a “consistently applied general policy prohibiting abusive or threatening language.” (D&O 2.) Accordingly, *Contempora Fabrics* is inapposite.

Arkema appears to argue (Br. 22-24) that Saltibus’ conduct, even if not based on Russell’s gender, loses the Act’s protection either because it violates Arkema’s anti-harassment policy or it constitutes an unprotected threat. Arkema’s policy plainly prohibits harassment only on the basis of Title VII’s protected classes, such as race, color, sex, and religion. (D&O 2, 14; RX 1.) It does not proscribe the type of conduct at issue here, namely, Saltibus’ statement that if the Union loses the election, he would no longer help a coworker perform her own job duties. By its very terms and contrary to Arkema’s contention, the policy has no bearing on harassment based on union affiliation. Arkema’s argument also ignores the Board’s express finding that “there was no threat or promise of retribution if Russell did not support the Union.” (D&O 2, 13.)

Finally, Arkema asserts (Br. 26-27) that the written reminder, despite omitting any reference to sex or gender, sufficiently described harassment on the basis of gender because the interaction occurred between Saltibus, a male employee, and Russell, a female employee. Arkema's argument illogically suggests that mere interaction between employees of the opposite sex is sufficient both to allege sexual harassment and to discipline an employee for the allegation. This assertion finds no support in Title VII law.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE JULY 23 LETTER PROHIBITING HARASSMENT VIOLATED SECTION 8(a)(1) OF THE ACT

On July 23, the day after unlawfully disciplining Saltibus, Arkema issued a letter to all employees reminding them that certain pro-union conduct was prohibited. The Board reasonably found (D&O 3, 14-15) that in issuing the letter, Arkema violated Section 8(a)(1) of the Act because employees would reasonably interpret it to restrict protected activities and because Arkema issued it in direct response to union activity. Arkema offers no basis for the Court to disturb the Board's reasonable findings.

A. An Employer's Work Rule Is Unlawful if It Restricts Employee Activities Protected by Section 7 of the Act

As the Supreme Court has recognized, Section 7 rights "are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Cent.*

Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972). Courts have interpreted Section 7 to include employees' right to discuss their terms and conditions of employment with other employees and union officials. See *Beth Israel Hosp.*, 437 U.S. at 491; *Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir. 2007).

Accordingly, an employer violates Section 8(a)(1) of the Act by maintaining work rules that infringe on employees' rights under Section 7 to discuss wages and other terms and conditions of employment. See *Beth Israel Hosp.*, 437 U.S. at 491.

In making such determinations, the Board "must strike the appropriate balance between organizational [rights of employees] and employer rights in the particular industry to which each [rule] is applicable." *Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1121 (7th Cir. 1982) (internal quotations omitted). "The Board thus adjusts and accommodates both the employees' rights to organize and the employer's right to maintain work discipline according to the particular circumstances." *Hughes Props., Inc. v. NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985). Courts will "defer to the Board's balancing if it is supported by substantial evidence." *Montgomery Ward*, 692 F.2d at 1121.

The Board will find a Section 8(a)(1) violation where an employer maintains a rule or policy that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-*

Livonia, 343 NLRB 646 (2004), the Board articulated a framework for determining whether a given employer rule “would reasonably tend to chill” Section 7 activity. *Id.* at 647.

Under *Lutheran Heritage*, the Board first considers whether an employer’s rule “explicitly restricts activities protected by Section 7.” *Id.* If so, the Board will find the mere maintenance of the rule violates Section 8(a)(1). *Id.* If the rule does not explicitly restrict such activities, the Board proceeds to ask whether: “(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* If the Board affirmatively answers any of these questions, it will find a Section 8(a)(1) violation. *Id.* Moreover, any ambiguity in a rule must be construed against the rule’s promulgator. *Lafayette Park*, 326 NLRB at 828.

B. The Board Reasonably Found that Arkema Violated Section 8(a)(1) of the Act Because Employees Would Reasonably Interpret the Anti-Harassment Letter To Prohibit Section 7 Activity and Because Arkema Issued the Letter in Response to Union Activity

The Board reasonably concluded (D&O 3, 14-15) that Arkema issued a letter prohibiting harassment and other similar conduct that unlawfully restricted its employees’ Section 7 right to engage in union solicitation during the decertification campaign and that Arkema unlawfully promulgated the letter in

response to union activity. Arkema attempts to justify issuance of the letter as protected employer speech, criticizes the Board's "myopic" reading of the communication, and baldly asserts that its issuance was unrelated to protected union activity. These claims are unfounded and amount to specious attacks on the Board's credibility determinations and factual findings, and Arkema relies on inapplicable cases.

1. Employees would reasonably construe the letter to prohibit Section 7 activity

The Board, properly applying *Lutheran Heritage*, concluded (D&O 3) that employees would reasonably understand the letter to prohibit lawful union solicitation based on the letter's express terms, the environment in which it was posted, and the timing of its issuance. As the Board noted (D&O 3), Arkema posted the letter "during the critical period," just weeks before the election. Under well-established Board precedent, the timing of a work rule's dissemination is significant. *See W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980); *Colony Printing & Labeling, Inc.*, 249 NLRB 223 (1980), *enforced*, 651 F.2d 502 (7th Cir. 1981). The Board recognizes that an employer's circulation of a harassment policy during a union campaign "has the potential dual effect of encouraging employees to report to [the company] the identity of union [] solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees,

and of correspondingly discouraging [union] solicitors in their protected organization activities.” *W. F. Hall Printing*, 250 NLRB at 804.

Moreover, the Board has long held that the Act protects an employee’s right “to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. To that end, an employer’s invitation to employees to report instances of ‘harassment’ by employees engaged in union activity is violative of Section 8(a)(1).” *Ryder Truck*, 341 NLRB at 761 (citations omitted). Accordingly, just as the employers’ actions in *W. F. Hall, Colony Printing*, and *Ryder Truck* would discourage union organizers in their campaign, here, the Board reasonably found that Arkema’s employees would reasonably interpret the broad prohibition on harassment to include union solicitation during the election period.

The Board also examined additional factors supporting its conclusion that the letter was unlawful, such as the “one-sided” communication broadly prohibited harassment “in any way” and conveyed that Arkema would not tolerate “any activity of this type.”⁶ (D&O 3, 15; GCX 2.) The letter did not limit the breadth of the prohibition. *See Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding overbroad a confidentiality provision prohibiting “the release of *any* information”),

⁶ Notably, the letter expressed a broad prohibition on harassment, but uniquely offered examples of harassment on the basis of a refusal to engage in prounion conduct. (D&O 3 n.8)

enforced, 482 F.3d 463 (D.C. Cir.2007)); *see also Tawas Indus. Inc.*, 336 NLRB 318, 323 (2001).

Further, the Board noted that the letter “invoked the subjective reactions of employees by inviting them to report conduct simply if they ‘feel’ they have been harassed.” (D&O 3.) The Board has repeatedly struck down employer invitations to report instances of subjective harassment by employees who are engaging in union activity. *See Ryder Truck*, 341 NLRB at 761; *Boulder City Hosp.*, 355 NLRB No. 203, 2010 WL 3835580, at *2 (2010); *Eastern Maine Med. Ctr.*, 277 NLRB 1374, 1375 (1985).

Lastly, the Board considered that Arkema did not post the letter “in a context free of unfair labor practices.” (D&O 3.) Arkema posted the letter just one day after unlawfully disciplining Saltibus. The Board has recognized that the environment in which an employer disseminates a rule is relevant to whether the rule would reasonably chill the exercise of Section 7 rights. *See Boulder City Hosp.*, 2010 WL 3835580, at *3; *Journal Register East*, 346 NLRB 1131, 1134 (2006). In short, substantial evidence amply supports the Board’s finding that the letter was unlawful under the first prong of *Lutheran Heritage*.

2. Arkema promulgated the letter in response to Saltibus’ union activity

The Board also reasonably found that Arkema issued the July 23 letter in direct response to its employees’ union activities, and it was thus unlawful under

the second prong of *Lutheran Heritage*. In reaching this conclusion, the Board first observed that Arkema issued the letter during the critical period, or more specifically, during a time when Arkema “was well aware of . . . efforts by union adherents to oppose [the decertification campaign].” (D&O 3.) This fact supports the conclusion that Arkema intended the letter to have the effect of tamping down those efforts.⁷

The Board then emphasized that “[b]y its terms, the letter references and prohibits only harassment of employees opposed to the Union (i.e., ‘employees refusing to support a strike or certification.’).” (D&O 3.) This type of blatant one-sided employer communication similarly supports a finding that Arkema issued the letter in response to union activity. *See, e.g., Journal Register East*, 346 NLRB at 1140 (finding unlawful a communication singling out only prounion threats or coercion that the employer drafted strictly in response to the union’s campaign).

⁷ The Board explicitly discredited (D&O 1 n.1, 15) Turley’s claim that the incident with Russell motivated, in part, Arkema’s decision to issue the letter. Freeman, another Arkema manager, testified that the issuance of the letter and the incident were coincidental and that the letter had been “in the works” before the incident. (D&O 14; Tr. 42.) Arkema now attempts to reconcile (Br. 36) Turley’s and Freeman’s contradictory and discredited testimony by arguing that the incident affected the timing of the letter’s issuance. Arkema thus tacitly concedes that—assuming Saltibus’ conduct was indeed protected as shown above (pp. 19-22)—its actions establish a violation under the second prong of *Lutheran Heritage*. That is to say, Arkema now argues that Saltibus’ conduct precipitated the letter’s issuance. If Saltibus’ conduct is protected, Arkema thereby acknowledges that issuance of the letter violates Section 8(a)(1).

Arkema's reliance on (Br. 33-34) *River's Bend Health & Rehabilitation Service*, 350 NLRB 184 (2007), is misplaced. As the Board explained (D&O 3 n.8, 15), *River's Bend* is distinguishable because the employer in that case issued a general harassment policy, 350 NLRB at 186, unlike the one-sided policy here that applied only to protection from harassment for refusing to engage in prounion activity. (D&O 3 n.8.) Here, as shown above, Arkema issued the letter in response to protected union solicitation. Accordingly, *River's Bend* does not require a different result.

Arkema incorrectly asserts (Br. 34) that by relying on the letter's invitation to report subjective feelings of harassment, the Board has contradicted its holding in *Contempora Fabrics*, 344 NLRB 851 (2005). In *Contempora Fabrics*, the Board, on different facts, merely upheld a disciplinary action on the basis of an employee's unsolicited and independent complaint that a coworker with a violent history threatened her. *Id.* at 852.

Arkema also urges (Br. 35-36) this Court to set aside the Board's finding that the letter was unlawful by asserting that the Board failed to consider the second attachment (the Board's publication) to the e-mail.⁸ As demonstrated, the

⁸ Arkema highlights (Br. 36) the lack of evidence that employees were "actually deterred from engaging in section 7 activity." Such a showing is unnecessary. *See Cintas Corp.*, 482 F.3d at 467 ("The Board is merely required to determine whether employees would reasonably construe the [challenged] language to

Board reviewed the entire record and made detailed findings to support its conclusion that Arkema's posting of the letter violated Section 8(a)(1). Further, Arkema cites no authority for the proposition that an employer cures an unlawful promulgation of a work rule by disseminating it along with a lawful policy. *See Boulder City Hosp.*, 2010 WL 3835580, at *3 ("And, of course, the existence of a lawful anti-harassment policy is not a license for an employer to commit unfair labor practices in the name of implementing that policy.").

III. THE BOARD REASONABLY FOUND THAT ARKEMA VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION AND MAKING UNILATERAL CHANGES TO TERMS AND CONDITION OF EMPLOYMENT AND DEALING DIRECTLY WITH ITS EMPLOYEES

The Board reasonably found (D&O 3), that Arkema violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) "when, after the decertification election, [and] while the Union's objections were still pending and a certification had yet to issue, [it] withdrew recognition from the Union, refused to recognize and bargain with the Union, made a host of unilateral changes, and directly dealt with unit employees." Arkema's challenges to that finding are without merit.

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of [its] employees" The principles governing an employer's refusal to bargain

prohibit Section 7 activity . . . and not whether employees have thus construed the rule.").

with an incumbent union are well settled. A union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement of three years or less. Thereafter, the presumption becomes rebuttable. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 775-78 (1990). Under certain circumstances, an employer may rebut that presumption and lawfully withdraw recognition by showing an actual loss of majority support. *Levitz Furniture Co.*, 333 NLRB 717, 725 (2001);⁹ accord *NLRB v. Grenada Stamping & Assembly, Inc.*, 322 F. App'x 404, 406 (5th Cir. 2009).

It is also well settled, however, that an employer's withdrawal of recognition on such grounds must occur "only in a context free of the coercive effect of employer unfair labor practices." *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 553 n.6 (5th Cir. 1989) (citations omitted); accord *Gardner Eng'g*, 313 NLRB 755, 756 (1994), *enforced in relevant part*, 115 F.3d 636 (9th Cir. 1997). Therefore, "an employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that could have reasonably tended to contribute to employee disaffection from the [u]nion." *United Supermarkets*, 862 F.2d at 553 n.6; *see also Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962) ("[c]onduct violative of Section 8(a)(1) is, a fortiori, conduct which

⁹ Prior to *Levitz*, an employer could rebut the presumption by showing that it had "good-faith doubt" of the union's continued majority support. *Levitz*, 333 NLRB at 725.

interferes with the exercise of a free and untrammelled choice in an election.”); accord *Neuhoff Bros., Packers, Inc. v. NLRB*, 362 F.2d 611, 614 (5th Cir. 1966).

Moreover, under settled Board law, “election results are not final until the certification is issued.” *W. A. Krueger*, 299 NLRB 914, 915 (1990). This “rule promotes stability and certainty during the transition period when, due to the existence of objections or determinative challenges, the employees’ choice of representative is in doubt.” *Id.* (citing cases). Consistent with those principles, the Board long ago held in *Presbyterian Hospital*, 241 NLRB 996, 998 (1979), “that a union ostensibly losing a decertification election remains the established bargaining representative of the unit employees until the certification results issue and any unilateral changes made before the certification issues violate Section 8(a)(5).” *W. A. Krueger*, 299 NLRB at 915 (describing *Presbyterian Hospital*). This is because when “an election objection is unresolved or one could be timely filed, the tally of ballots cannot be considered reliable evidence of employee sentiment.” *Id.*

Here, the Board reasonably determined (D&O 3) that Arkema’s withdrawal of recognition and subsequent unilateral changes and direct dealing, before the Board had resolved the Union’s election objections and issued a certification of the election results, were unlawful. It is particularly significant that Arkema so acted in the context of serious unfair labor practices that preceded the election.

Arkema argues that under this Court’s decisions in *Dow Chemical Co. v. NLRB*, 660 F.2d 637 (5th Cir. 1981), and *Selkirk Metalbestos v. NLRB*, 116 F.3d 782 (5th Cir. 1997), it was entitled to rely on the Union’s one-vote loss in the decertification election as objective evidence of actual loss of the Union’s majority support, and withdraw recognition without waiting for the Board to certify the election results.¹⁰ (Br. 40-42.)

To the contrary, in *Dow Chemical*, although this Court disagreed with the Board’s *Presbyterian Hospital* rule, its holding was limited to the circumstances of that case—that is, where a union has lost a decertification election and the Board later found “the election fair and decertified the union.” *Dow Chem.*, 660 F.2d at 656. Similarly, although the Court later relied on *Dow Chemical* in *Selkirk*, a case in which the Board had set aside the election on the basis of objectionable conduct by the employer prior to the election (*see Selkirk*, 116 F.3d at 790), that case is distinguishable as well. There, the Court reversed the Board’s unfair labor practice findings and thus concluded that the employer had engaged in no coercive activity prior to the election. *Id.* In those circumstances, the Court held that “the election results provided . . . a sufficient basis for [the employer’s] good faith doubt” that

¹⁰ In its brief (Br. 40-42), Arkema articulates its argument under the Board’s earlier “good-faith doubt” standard, but acknowledges that the “actual loss of majority support” standard adopted in *Levitz* applies here.

the union had majority support.¹¹ *Id.* Here, as shown above pp. 16-34, substantial evidence fully supports the Board’s finding that Arkema committed unfair labor practices just before the election.

In any event, the Board has fully explained the important policy considerations of maintaining stability and ensuring employee free choice that serve as the underpinning to the *Presbyterian Hospital* rule. Indeed, in reaffirming that rule, the Board explained that, in the context of an incumbent union, allowing the employer “to proceed with impunity until the issuance of a certification could undermine the union’s status” if the election is ultimately set aside because of objectionable or unlawful conduct by the employer. *Krueger*, 299 NLRB at 915. In addition, as long as objections are pending, or could be filed, it is unknown whether the tally of ballots “reflects *uncoerced* employee sentiment.” *Id.* at 916. Therefore, requiring the employer to maintain the status quo “encourages stability in the parties’ relationship *while* the Board determines whether the apparent

¹¹ In both *Dow Chemical* and *Selkirk*, the Court considered the issue under the Board’s pre-*Levitz* “good faith doubt” standard for withdrawal of recognition. *See Dow Chem.* 660 F.2d at 657 (application of the *Presbyterian Hospital* rule “to enforce a duty to bargain under the present circumstances is [] inconsistent with the long-standing rule that an employer is under no obligation to bargain with a union if it has reasonable and good faith grounds for doubting the union’s continued majority status.”); *Selkirk*, 116 F.3d at 790. This Court has not addressed the continuing viability of *Dow Chemical* and its progeny given that good-faith reasonable doubt is no longer the standard for an employer’s withdrawal of recognition. *See Levitz*, 333 NLRB at 725; *Grenada Stamping*, 322 F. App’x at 406.

employee choice was freely made and discourages the employer from acting prematurely based on that unreliable tally.” *Id.* at 916-17 (emphasis in original).

In other contexts, and for the same policy reasons, the Board, with court approval, similarly requires an employer to continue to recognize an incumbent union, despite having some evidence that might arguably call into question a union’s majority status. For example, an employer may not withdraw from bargaining or refuse to execute a contract with the incumbent union merely because an outside challenging union filed a representation petition. *NLRB v. Katz Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 768 (2d Cir. 1996) (emphasizing rule “rooted in Board’s concern for stability in labor relations and preserving the integrity of the election process”); *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982). Similarly, just as an employer cannot withdraw recognition during the initial certification year, it cannot rely on an employee decertification petition secured during the certification year to withdraw recognition after the certification year has ended. *United Supermarkets, Inc.*, 287 NLRB 119, 120 (1987), *enforced*, 862 F.2d 549 (5th Cir. 1989); *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075-77 (D.C. Cir. 2002). Rather, an employer is required to continue to bargain even after the end of the certification year, unless employees present a new decertification petition. In recognizing that the rule could force employees to accept a union they wish to decertify, the D.C. Circuit explained “that is the

inevitable by-product of the Board’s striking the balance between stability and employee free choice, as it frequently must do.” *Chelsea*, 285 F.3d at 1077. The *Presbyterian Hospital* rule, which strikes the same balance, is a reasonable interpretation of the Act. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 775, 786 (1990).

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT ARKEMA VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCIPLINING THE UNION’S GENERAL PRESIDENT ON THE BASIS OF HIS UNION ACTIVITIES

The Board found (D&O 4, 18) that Arkema unlawfully disciplined employee and Union general president Shepherd by issuing him an oral reprimand on August 19, and a follow-up written confirmation of that discipline on September 5. Substantial evidence supports the Board’s finding that Arkema disciplined Shepherd on the basis of his union activity.

A. Section 8(a)(3) of the Act Bars Employers from Taking Adverse Actions Against Employees Because of Their Protected Union Activities

Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) and (1) by taking adverse employment actions against employees for engaging in protected union activity. *See NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186 (5th Cir. 1988).

Whether such action violates the Act depends on the employer's motive. *See Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *see also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983) (approving *Wright Line* test). Under *Wright Line*, the Board's General Counsel bears the burden of showing that an employee's protected activity was "a motivating factor" in the employer's decision to take adverse action against that employee. "The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once the General Counsel satisfies this burden, the employer can only avoid liability by proving that it would have taken the same action even in the absence of the protected activity. *See Wright Line*, 251 NLRB at 1089; *accord Thermon Heat*, 143 F.3d at 187.

The Board may rely on direct evidence to establish unlawful motive, and, because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Merchants Truck Line*, 577 F.2d at 1014. Evidence showing an unlawful motive includes the employer's knowledge of, and threats and expressions of hostility toward, its employees' union activities, its commission of other unfair labor practices, the questionable timing of the adverse

action, its deviation from customary practices, and its reliance on shifting or pretextual explanations for the adverse action. *Healthcare Emps. Union v. NLRB*, 463 F.3d 909, 920-22 (9th Cir. 2006); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

On review, the Board's finding of unlawful motive must be upheld if it is supported by substantial evidence. Courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); accord *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980) (the determination of motive is "particularly within the purview of the Board").

B. Substantial Evidence Supports the Board's Finding that the Oral Reprimand and Written Warning Issued to Shepherd Constitute Disciplinary Action

The Board explained (D&O 4, 18) that a warning is considered "an adverse disciplinary action" if it "could lay the foundation for future disciplinary action." (D&O 4) (citing *Trover Clinic*, 280 NLRB 6, 16 (1986)). Here, the foundation for future disciplinary action is clear.

Arkema orally reprimanded Shepherd while presenting reports of serious alleged misconduct and warned him not to create a hostile work environment. (D&O 4, 18.) Several weeks later, Arkema memorialized the oral reprimand in

writing, which warned Shepherd that “verified reports” of similar conduct in the future could result in “further disciplinary action,” and placed the letter in Shepherd’s personnel file. (D&O 4, 18; GCX7.) Site Manager Freeman “was unable to explain why he used the word ‘further’ if the September 5 letter was not a form of discipline.”¹² (D&O 18). Freeman also acknowledged that “a pattern of behavior [] enters into the evaluation” when he is considering disciplinary action. (Tr. 112.) Under these circumstances, substantial evidence clearly supports the Board’s finding that the oral reprimand and warning were adverse in that they could lay the foundation for future disciplinary action.

C. The Board Reasonably Found that the General Counsel Carried His Burden of Demonstrating that an Unlawful Motive Prompted Shepherd’s Discipline

The Board determined that the General Counsel satisfied his burden of showing that protected activity was a motivating factor in Arkema’s decision to discipline Shepherd. (D&O 4, 19.) The Board relied on Shepherd’s well-known union activity as the Union’s general president. (D&O 4, 19.) It also noted the timing of the discipline, just after his adamant attempts to represent the Union after the decertification election. (D&O 4, 19.) The Board also observed Arkema’s antiunion animus, including the extensive unfair labor practices and the

¹² Arkema asserts (Br. 46) that Freeman did in fact explain the use of “further.” In doing so, Arkema simply restates Freeman’s testimony, which the Board considered, but found insufficient. (D&O 4, 18.)

“precipitous withdrawal of recognition and abrogation of the collective-bargaining relationship immediately after the close of the election.” (D&O 4, 19.) Thus, substantial evidence supports the Board’s finding that the General Counsel established that Shepherd’s discipline was unlawfully motivated. The burden then shifted to Arkema to demonstrate that it would have taken the same action even the absence of Shepherd’s union activity.

D. Arkema Failed To Carry Its Burden of Proving that It Would Have Made the Same Decision in the Absence of Shepherd’s Protected Activity

In determining that Arkema failed to carry its burden, the Board relied (D&O 1, 19), in the main, on Arkema’s curious issuance of the written reminder. Specifically, the Board considered (D&O 19) that Plant Manager Turley admitted that at the end of the August 19 meeting, Arkema had decided not to discipline Shepherd because the allegations were unsubstantiated. (Tr. 416-20.) Arkema conducted no additional investigation into the matter, nor did it receive further complaints. Despite no apparent change in status, Arkema inexplicably decided several weeks later, and after Shepherd made clear his intentions to continue efforts to represent the Union, to issue the September 5 written discipline. According to the Board, “[t]he obvious conclusion is that the letter was a response to Shepherd’s attempts to continue to represent the Union in the face of [Arkema’s] eagerness to be done with the Union at the Houston plant.” (D&O 19.) The

Board's finding is entitled to special deference. *See Merchants Truck*, 577 F.2d at 1016.

Arkema relies (Br. 50) unpersuasively on Shepherd's long-standing role as a union activist and claims that it generally meted out discipline in a non-discriminatory manner. These reed-thin contentions provide no basis for this Court to disturb the Board's finding. Substantial evidence supports the Board's finding that Arkema has failed to demonstrate that it would have made the same employment decision in the absence of Shepherd's protected activities. *See Vincent Indus. Plastics*, 209 F.3d at 736 (refusing to "second guess" the Board's finding that an employer's proffered explanations were not credible).

V. ARKEMA'S CHALLENGES TO THE BOARD'S REMEDIAL ORDER ARE MERITLESS

A. This Court Lacks Jurisdiction To Hear Arkema's Challenge to the Board's Order that It Post a Remedial Notice Consistent with *J. Picini Flooring* Because Arkema Has Suffered No Present Injury

1. The Board's holding in *J. Picini Flooring*

In *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372 (Oct. 22, 2010) ("*Picini*"), the Board updated its standard remedy directing violators of the Act to post remedial notices. Specifically, the Board held that orders to post remedial notices could include new communication formats, such as electronic dissemination, posting on a respondent's intranet, or posting on the internet.

Picini, 2010 WL 4318372, at *4. Prior to its decision in *Picini*, the Board’s standard notice-posting remedy required respondents to post a remedial notice “in conspicuous places including all places where notices to employees are customarily posted.” (D&O 22.) In *Picini*, the Board modified this standard notice-posting remedy to add the following requirement:

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees [or members] by such means.

Id. at *4.

The Board expressly determined that factual resolution of how a respondent customarily communicates with its employees will be addressed in the first instance at the compliance stage, which only occurs after the Board has determined liability. *See id;* accord *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (explaining bifurcated Board proceedings in which general remedy is ordered in liability stage and remedy is “tailor[ed] . . . to suit the individual circumstances in subsequent compliance proceeding). Accordingly, the Board reasoned, respondents will have the opportunity to “present evidence about any peculiarities in their email, intranet, internet, or other electronic communication systems that would affect their ability to post remedial notices by those means.” *Picini*, 2010 WL 4318372, at *4. As explained below, because this case is not yet at the

compliance stage, Arkema’s challenges to the Board’s imposition of the requirements of *Picini* are not yet appropriate for review.

2. Jurisdictional principles

Section 10(f) of the Act (29 U.S.C. § 160(f)) provides that “[a]ny 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 [a] United States court of appeals” A person “aggrieved” under Section 10(f) must suffer “an adverse effect in fact.” *Oil, Chem. & Atomic Workers v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982); accord *Energy Transfer Partners v. FERC*, 567 F.3d 134, 139 (5th Cir. 2009) (“A party has not been aggrieved . . . unless its injury is present and immediate.”).¹³

Section 10(f)’s limitation of judicial review to persons “aggrieved” by a Board order is equivalent to the “injury in fact” requirement necessary to establish justiciability under Article III of the Constitution. See *Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1206 n.8 (D.C. Cir. 1981) (a person may not seek court review of a Board order unless he has suffered “an ‘adverse effect in fact’” from that order). A party demonstrates Article III standing by showing: “(1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or

¹³ The relevant statute in *Energy Transfer Partners* and the Act here both limit judicial review to “aggrieved” parties. See 15 U.S.C. § 717r(b) (“Any party to a proceeding . . . aggrieved by an order issued by the Commission [may] obtain a review of such order in the court of appeals of the United States”).

imminent . . . ; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Env’tl Serv.*, 528 U.S. 167, 180-81 (2000). A party must establish standing for each individual claim raised. *See id.* at 185 (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”); *accord Nat’l Fed’n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 209 (5th Cir. 2011).

Further, this Court observed that whether a party is “aggrieved” involves the related requirement that “the dispute must be ripe for review.” *Energy Transfer Partners*, 567 F.3d at 139; *accord Sheet Metal Workers Int’l Ass’n v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009); *Int’l Bhd. of Boilermakers v. NLRB*, 377 F. App’x 125, 127-28 (2d Cir. 2010). Ripeness of an agency action for purposes of judicial review depends on “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Energy Transfer Partners*, 567 F.3d at 139 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In considering these aspects, the Court evaluates three factors: “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” *Coliseum Square Ass’n v. Jackson*, 465 F.3d 215, 245 (5th Cir. 2006).

3. Arkema has suffered no present injury from the Board's posting remedy

On review, Arkema has not identified any present or immediate injury from the Board's posting remedy, nor could it. Presently, it is pure conjecture whether Arkema's obligation to post a remedial notice will encompass a requirement to disseminate such notice electronically. To date, the Board has merely ordered Arkema to post a remedial notice "in accord with [*Picini.*]" (D&O 1 n.2.) As discussed above, under *Picini*, Arkema will be permitted during a later compliance proceeding to present evidence about all factual circumstances and "peculiarities" of its electronic communication systems that bear on whether electronic notice is appropriate in this case. The extent of Arkema's remedial obligations to post electronically therefore will depend on evidence adduced at a future compliance hearing. Accordingly, any claim of adverse effect is purely hypothetical, and the Court lacks jurisdiction to entertain Arkema's challenge at this time.

Relatedly, Arkema's challenge is not yet ripe for review. There has not yet been a compliance proceeding, so the Court cannot assess the potential effect any evidence that Arkema might submit at a future hearing will have on the ultimate posting requirement. It may be that Arkema will demonstrate in the compliance proceeding that it does not, in fact, customarily communicate by electronic means with its employees. In that case, its obligation to post a remedial notice may be limited to posting a traditional paper notice. On the other hand, if and when the

compliance proceeding results in an actual aggrievement to Arkema on this issue, its challenge will then come up for review “in a concrete factual context, shedding light on how the [new remedial notice posting standard] operates in practice.” *Sheet Metal Workers*, 561 F.3d at 497. Currently, Arkema’s claim is unfit for judicial decision. *See Coliseum Square Ass’n*, 465 F.3d at 245; *Sheet Metal Workers*, 561 F.3d at 497; *Int’l Bhd. of Boilermakers*, 377 F. App’x at 128.

Further, a determination by the Court to withhold review at this time does not impose any hardship on Arkema. Under *Picini*, a Board order to distribute notice electronically is reviewable after an evidentiary hearing. The Board’s order regarding the exact requirements of notice distribution would then be ripe for review by the Court. *See Sheet Metal Workers*, 561 F.3d at 497; *Int’l Bhd. of Boilermakers*, 377 F. App’x at 128.

B. Assuming that the Court Has Jurisdiction To Hear Arkema’s Challenge, the Board Properly Exercised Its Broad Remedial Authority In Directing Electronic Posting of Notices

1. Applicable principles

The Board enjoys broad discretion in crafting appropriate remedies for violations of the Act. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. Laredo Packing Co.*, 730 F.2d 405, 407 (5th Cir. 1984) (“The Board’s remedial power in this regard is wide and discretionary[,] subject to scanty judicial review.”). Section 10(c) of the Act (29 U.S.C. § 160(c)) expressly

authorizes the Board to order a violator of the Act, not only to cease and desist from the unlawful conduct, but also “to take such affirmative action . . . as will effectuate the policies of th[e] Act.”

The Board’s choice of remedy “should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord NLRB v. DMR Corp.*, 795 F.2d 472, 477 (5th Cir. 1986). This deferential standard flows from the recognition that “[i]n fashioning its remedies under the broad provisions of Section 10(c) of the Act . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969); *accord NLRB v. Kaiser Agric. Chems.*, 473 F.2d 374, 381-82 (5th Cir. 1973) ([T]he [B]oard’s judgment [must] be given “special respect by reviewing courts.”).

2. The Board properly exercised its discretion in requiring Arkema to post a remedial notice in conspicuous places, including electronic distribution, if Arkema customarily communicates with its employees by such means

The Board weighed several policy considerations in reaching the decision to update the manner in which remedial notices may be posted under the Act. First, the Board underscored the essential goals served by its cornerstone remedy to order a respondent to post a remedial notice. *See Picini*, 2010 WL 4318372, at *2

(citing *Pennsylvania Greyhound Lines Inc.*, 1 NLRB 1, 52 (1935), *enforced*, 303 U.S. 261 (1938)). As the Board explained, notices inform employees of their rights, violations found by the Board, the respondent's commitment to cease and desist from the unlawful conduct, and the affirmative action to be taken by the respondent to redress the violations. *See Picini*, 201 WL 4318372, at *2 (citing cases). The Board thus orders respondents to post notices both to "dispel[] and dissipat[e] the unwholesome effects" of unfair labor practices, *Chet Monez Ford*, 241 NLRB 349, 351 (1979), and to reassure employees that the Board will protect their statutory rights and that employees should exercise those rights freely. *See NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940). By requiring violators to post remedial notices, the Board also seeks to deter future violations. *Hoffman Plastic Compounds, Inc. v. NLRB*, 353 U.S. 137, 152 (2002). The Supreme Court has characterized such notices as a "significant" part of the Board's remedial scheme, *id.*, and this Court has recognized that a "traditional posting of the notice has a therapy beyond mere communication." *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539 (5th Cir. 1969).

Given the importance of remedial notices, the Board strives to maximize the target audience by requiring "conspicuous" postings, including customary posting locations. *Picini*, 2010 WL 4318372, at *2. Appropriate locations have traditionally included bulletin boards, time clocks, department entrances, meeting

hall entrances, and dues payment windows. *Id.*; NLRB Casehandling Manual, Part III (Compliance), § 10518.2. But as the Board reasonably noted, the posting of a remedial notice serves little purpose if the notice fails to reach its targeted audience. *Picini*, 2010 WL 4318372, at *2-3. Accordingly, it undertook a considered examination of current trends in workplace communication and function to determine whether postings at traditionally appropriate locations are losing their effectiveness. *Id.* at *3.

To that end, the Board acknowledged the increasing reliance on electronic communication in contemporary workplaces and the strong likelihood that such reliance will continue to increase. *Id.* A recent study on which the Board relied found that 900 employers, across a wide range of industries, identified email (83 percent of respondents) and intranet (75 percent of respondents) as the most frequently used communication methods for engaging employees. *Id.* at *3 n.7. Only 28 percent of the respondents frequently used poster or flyers. *Id.* Another survey cited by the Board indicated that 75 percent of the professional employer organizations surveyed used either electronic distribution entirely to transmit human resources and benefits information or such distribution at least 50 percent of the time. *Id.* Further, the Board explained that it and “most other government agencies routinely and sometimes exclusively rely on electronic posting or email to

communicate information to their employees.” *Id.* at *3 (internal citations omitted).

Additionally, the Board recognized that “the growth of telecommuting and the decentralization of workspaces permitted by new technology” have similarly jeopardized the efficacy of the Board’s remedial notices. *Id.* In support of this observation, the Board relied on studies showing that the internet and the economy were driving up the number of telecommuters.¹⁴ *Id.* at *3 n.10. The Board properly reasoned that traditional paper notices were not necessarily adequate to reach the maximum number of affected employees.

The Board thus soundly concluded that “in addition to physical posting, notices should be posted electronically, on a respondent’s intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members.” *Id.* The Board reasoned that “[t]his approach constitutes an appropriate balancing of the parties’ legitimate interests in light of technological change, and enables the Board to continue to protect and effectively enforce

¹⁴ Additional studies clearly document this rise. *See, e.g., Companies Embrace Telecommuting as a Retention Tool*, <http://www.cnbc.com/id/44612830> (Sep. 30, 2011) (study predicting dramatic increase in telecommuters by 2016); *The State of Telework in the U.S.*, <http://www.workshifting.com/downloads/downloads/Telework-Trends-US.pdf> (June 2011) (telecommuting grew by 61% between 2005 and 2009).

employees' rights under the Act." *Id.* at *4. The Board's conclusion falls squarely within its broad discretion to fashion appropriate remedies and furthers its "responsibility to adapt the Act to the changing patterns of industrial life" *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

Contrary to Arkema's argument, the Board's decision to allow the possibility that an employer must transmit a remedial notice through electronic means is wholly distinguishable from "remedies that the Board has long considered to be extraordinary remedies." (Br. 55.) The Board carefully considered that concern and rejected the analogy, finding, instead, that electronic distribution, where such means of communication is customary, closely resembles a traditional paper posting. *See id.* at *5. As the Board explained, "[b]y definition, in a company or union for which some form of electronic communication is customary, communication of a notice by that electronic means would be customary, not extraordinary." *Id.* Moreover, the Board concluded that electronic dissemination under these circumstances imposed no burden on respondents. *Id.* As the Board explained, a respondent could upload a single file containing the notice and send it once to a clearly defined group of recipients—the virtual equivalent of posting a single paper notice on a bulletin board in a specific location. *Id.* In sum, Arkema does not, and cannot, demonstrate that the conditional electronic distribution requirement is an extraordinary remedy.

The Board also fully addressed Arkema’s claim that distribution of a remedial notice via e-mail “may mean that the notice will leave the employer’s and the Board’s effective control . . . [and] the employer and the Board could be faced with a situation where altered or defaced notices are in the public domain.” (Br. 55.) In doing so, the Board observed that respondents have, “[i]n reality, [] never had dominion over Board-ordered remedial notices.” *Id.* at *6. The Board explained that remedial notices are currently matters of public record—unsigned hard copies are available in the Board’s bound volumes and unsigned electronic copies are available on the Board’s website. *Id.* Further, the Board reasoned that charging parties routinely request and obtain signed copies pursuant to Board procedure. *See* NLRB Casehandling Manual, Part III (Compliance), § 10518.4. Despite this ready availability of remedial notices in the public domain and the possibility of improper use or dissemination, the Board indicated that none of the briefing parties or amici cited any specific examples of such misuse. *Picini*, 2010 WL 4318372, at *6. Accordingly, the Board concluded that there was no basis to believe that an obligation to send a remedial notice to employees via e-mail would cause an increase in improper use. *Id.* Arkema has offered this Court no basis to disturb the Board’s reasoned conclusion.

3. The Board’s decision to leave certain remedial notice posting issues to the compliance proceeding is consistent with established Board procedure

The Board has a long-standing practice of leaving the factual details and mechanics of how an order will be implemented to subsequent compliance proceedings. *See, e.g.*, NLRB Casehandling Manual, Part III (Compliance), § 10518.2 (leaving to compliance a determination as to the location and number of paper postings); *Utility Workers*, 356 NLRB No. 158, 2011 WL 1911093, at *1 (2011) (leaving to compliance the geographic scope of a posting); *AEi2 LLC*, 343 NLRB 433, 434 n.5 (2004) (leaving to compliance all reinstatement and backpay issues).¹⁵ The Board adhered to this practice in *Picini*, properly determining that a subsequent compliance proceeding, after liability had been decided, was the appropriate forum for deciding the issue of how a respondent will communicate a remedial order to its employees.

Arkema asserts that the Board’s decision to leave the precise contours of the posting requirement to the future compliance proceeding is “not permissible.” (Br. 53-54.) Given the vast (and non-exhaustive) body of Board case law

¹⁵ *See also R.J. Corman R.R. Constr.*, 349 NLRB 987, 1002 (2007) (leaving to compliance the determination of which discriminatees would have been hired into relevant openings); *Shisler Elec. Contractors*, 349 NLRB 840, 840 (2007) (leaving to compliance the General Counsel’s request for an order requiring the employer to reimburse discriminatees for extra tax liabilities); *Wimpey Minerals USA, Inc.*, 316 NLRB 803, 803 n.1 (1995) (leaving to compliance the calculation of backpay on either a straight time or an overtime basis).

demonstrating the established practice to resolve many details of a Board order in compliance, Arkema's assertion that the Board's order is somehow impermissible or incomplete is entirely without basis. In this same vein, Arkema's characterization (Br. 53 n.29) of the Board's approach as "one size fits all" is patently at odds with the Board's express adoption of a case-by-case approach. Further, Arkema's complaint that the Board "failed to adequately consider [] that e-mail is different from an employer's intranet website, which in turn is different from an employer's Internet website" (Br. 54), similarly ignores the Board's express recognition that these peculiarities must be addressed in a compliance proceeding.

Arkema also posits (Br. 53-54) that the Board's decision to leave factual issues concerning customary communication methods to a compliance proceeding is not the best approach. Arkema asserts that a better approach would "entail a recommendation by an [administrative law judge], in the first instance, reviewed by the Board, and ultimately subject to appeal to a proper circuit court of appeals." (Br. 54.) Arkema's argument is unavailing.

The Board's approach affords Arkema the precise review it seeks, albeit in a different sequence. As shown above, the Board will require an electronic notice posting only after an evidentiary compliance hearing, and that order, in turn, is reviewable by a circuit court of appeals. In any event, Arkema advanced its

preferred approach when the Board was considering *Picini*, but the Board ultimately adopted a valid, alternative approach that, in its expert judgment, effectively served the Act's policies. The Board, as an administrative body, has the authority to fashion its own procedures. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978); *accord Soadjede v. Ashcroft*, 324 F.3d 830, 832 (5th Cir. 2003). Thus, even if the issue were ripe for review, Arkema's continued disagreement with the Board's procedure provides no basis for this Court to disturb the Board's remedy.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full.

Respectfully submitted,

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May 2012

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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	:
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	: Case No. 11-60877
v.	:
	: Board Case No.
ARKEMA, INCOPORATED	: 16-CA-26371
	:
Respondent	:

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,973 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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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 using Symantec Antivirus Corporate Edition, program version 10.1.9.9000 (01/09/2011 rev. 3). According to that program, the CD-ROM is free of viruses.

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Dated at Washington, DC
this 8th day of May, 2012

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