Nos. 11-1314 & 11-1353

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNECO, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Intervenor for Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNECO, INC.	)	
	)	
Petitioner	)	
	)	Nos. 11-1314 & 11-1353
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos.
	)	7-CA-49251 et al.
	)	
Respondent	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW	)	
	)	
Intervenor	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. ***Parties and Amici:*** Tenneco is the petitioner before the Court; it was the respondent before the Board. The Board is the respondent before the Court; its General Counsel was a party before the Board. Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") is the intervenor before the Court; the Union was the charging party before the Board.

B. ***Ruling Under Review:*** The case involves Tenneco's petition to review, and the Board's cross-application to enforce, a Decision and Order the Board issued on August 26, 2011 (357 NLRB No. 84).

C. ***Related Cases****:* This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, DC
this 24th day of May, 2012

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GLOSSARY

A.	The parties' Joint Appendix
Abr.	The brief of *amicus curiae* Lonnie Tremain
Act	The National Labor Relations Act (29 U.S.C §§ 151 *et seq.*)
Board	The National Labor Relations Board
Br.	The Opening Brief of Tenneco, Inc. to this Court
Union	Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW

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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 petition of Tenneco, Inc. to review, and the cross-application of the National Labor Relations Board to enforce, a final Board Decision and Order issued against Tenneco on August 26, 2011, and

reported at 357 NLRB No. 84. (A.1-57.)[1] The Board found that Tenneco committed numerous unfair labor practices during and immediately after an employee strike.

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)). The Board's Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Tenneco's petition for review and the Board's cross-application for enforcement were timely filed, as the Act imposes no time limit on such filings. Local 660, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, charging party before the Board, intervened on the Board's behalf.

STATEMENT OF THE ISSUES PRESENTED

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

2. Whether substantial evidence supports the Board's finding that Tenneco

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[1] "A." references are to the parties' Joint Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

violated Section 8(a)(1) of the Act by directing employees to refrain from saying anything that might be deemed offensive or "evoke a response" from another employee.

3. Whether substantial evidence supports the Board's finding that Tenneco violated Section 8(a)(3) and (1) of the Act by disciplining employee Joseph Helton because of his protected conduct.

4. Whether substantial evidence supports the Board's finding that Tenneco violated Section 8(a)(5) and (1) of the Act by:

a. Refusing to provide the Union with the replacement employees' requested home addresses;

b. Refusing to provide the Union with requested information about the planned installation of video cameras;

c. Unilaterally promulgating a rule requiring supervisory approval prior to the posting of signs, letters, or printed material at its facility;

d. Withdrawing recognition from the Union.

5. Whether Section 10(e) of the Act precludes the Court from considering Tenneco's challenge to the Board's affirmative bargaining order because Tenneco failed to raise that objection before the Board.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

Upon charges filed by the Union, the Board's General Counsel issued a complaint alleging that Tenneco committed numerous violations of Section 8(a)(1), (3) and (5) of the Act. (A.15,26-27;377-83,397-405.) After a hearing, the administrative law judge found that Tenneco had committed some alleged violations, and dismissed the remainder. The General Counsel and the Union filed exceptions to the dismissals, and limited exceptions to the findings of violations, and Tenneco filed answering briefs, but no cross-exceptions. Finding merit to the exceptions, the Board affirmed, with modifications, the judge's findings of violations, and reversed the dismissals, finding Tenneco had violated the Act as alleged. (A.1&nn.3-4,8-10.)

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Parties Fail to Reach a New Agreement in Late 2004; the Union Strikes from April 2005 through January 2006; and the Employer Hires Permanent Striker-Replacements

Tenneco is a manufacturer and distributer of automotive parts with a facility in Grass Lakes, Michigan. From 1945 until December 4, 2006, Tenneco recognized the Union, in a series of collective-bargaining agreements, as the representative of a unit of approximately 40 production and maintenance

employees. (A.1,15-16;266-291.) The most recent contract expired on May 12, 2004, and, thereafter, the employees worked without an agreement during negotiations. In late 2004, the Union rejected Tenneco's "last, best and final" contract offer. In response, Tenneco implemented four provisions in that offer—union-security, dues checkoff, no-strike-no-lockout, and arbitration—while keeping the remainder of the expired agreement in effect. (A.2&n.6,16.)

On April 26, 2005, the Union struck. Tenneco continued operations by hiring 16 permanent replacements, using employees who either did not strike or crossed the picket line ("crossovers"), and contracting with another employer. (A.2,16.)

B. In Mid-to-Late 2005, Tenneco Refuses to Provide, or Fails to Timely Provide, Relevant Information Requested by the Union

1. Information on Video Cameras

On August 29, 2005, during the strike, Valerie Balog, Tenneco's human resources manager, wrote to James Walker, the Union's international representative, stating that Tenneco planned to install video cameras in its test lab, due to alleged incidents of tampering. The letter invited the Union's response. (A.2,16;310.) By letter dated September 2, Walker requested documentation on the alleged tampering. The Union explained that installation of video devices in the workplace is a mandatory subject of bargaining, and it needed the requested

information to bargain effectively. (A.16;311.) Tenneco never responded, and, ultimately, did not install video cameras. (A.16-17,44;97,144-49.)

2. Information Regarding an Employee's Discipline

Tenneco hired Joseph Helton in February 2005, about two months before the strike began, and discharged him the following month. He filed an unfair labor practice charge, which was settled in September 2005 with a reinstatement offer. Helton, who supported the Union, returned to work with the Union's permission. (A.4,35-36;125-26.) As the only union supporter in the facility during the strike, he believed that other employees viewed him as a union "mole," and that signs posted at the facility stating "mole" and "reject" were directed at him. (A.4,36;117-20.)

On October 13, 2005, Tenneco disciplined Helton for allegedly spraying body spray at two employees. (A.17&n.7;313,406-07.) The Union grieved the discipline, (A.17&n.8;312), and requested relevant information, including who complained, which rule(s) were allegedly violated, and whether Tenneco disciplined others for similar infractions, (A.17-18;314-15). The Union repeated its request several weeks later. Over the next months, Tenneco verbally provided some information, but not the complainants' identities and whether other employees faced similar discipline. (A.18-19,30-31,44-45;316-19.)

C. During the Ten-Month Strike, There Are No Documented Instances of Violence, But Employees on Both Sides Engage in Profanity and Verbal Abuse

In June 2005, a few members of a sister local union picketed across the street from the home of Sue and Mickey Neal, two former strikers who crossed the picket line after three days. The sister local's members had joined the Union's picket line at Tenneco, and recognized Sue Neal as a former coworker who, years earlier, had crossed the sister local's picket line against another employer. In June, as Sue Neal crossed the picket line, she made angry and profane gestures at the sister local's members and called one of them a profanity. (A.3;151,155-58,161.)

In response to Sue Neal's provocation and repeated strike-crossing, the sister local decided to picket the Neals' home. The only person affiliated with the Union who attended was International Representative Walker, who stayed for the duration of the protest "to make sure nothing happened." (A.3;158,167-68.) Walker made sure the protesters remained across the street from the Neals' residence. They carried signs with messages protesting the Neals' decision to cross picket lines—such as "mom and dad, what is a scab worker?"—but did not engage in any acts of violence. (A.3;151,158-61.) During this peaceful protest, Mickey Neal received a call from his 12-year-old son, who, unbeknownst to the picketers, was home at the time. Neal immediately went home and discovered that his son—who was prone to such episodes when excited—had suffered a seizure. The police were called,

and the picketers dispersed without incident. No other employees' homes were picketed during or after the strike. (A.3;159-60,167-68,186-90.)

During the 10-month strike, there were other, occasional instances of abusive language, name calling, and rude gestures by both picketers and employees crossing the picket line. None involved any documented acts of violence. For example, Tenneco filed charges with the Board alleging that, in Fall 2005, picketers twice "struck" vehicles. In one incident, a retiree hit a van with a cardboard poster board as it exited the facility. In the other, Walker struck the tire of a van with his cane after the driver stopped the vehicle near the picketers, "revved the motor," and "squealed the tires." (A.3-4;76-78,80,91,96,322,347-50.) Tenneco also alleged that employees were photographed crossing the picket line, but the Union did so at the police's advice to document cross-over employees who were driving their vehicles towards the picket line and swerving at the last minute. Tenneco's charges were settled, and there were no further incidents. (A.4&n.14;76-78,80,91,96.)

D. Tenneco Disciplines Employee Helton for Wearing a T-shirt Reading "Thou Shall Not Scab"

On January 19, during the strike, employee Helton wore a t-shirt to work displaying the slogan, "Thou Shall Not Scab." Company Supervisor Dan Eggleston told Helton to change his shirt because, he believed, some employees would not like the message. Instead, Helton covered the word "scab" with a piece

of tape on which he had written the word "steal," so that the slogan read, "Thou Shall Not Steal." Eggleston objected to this message and told Helton to tape over the word "steal." Helton taped over "steal" and wrote the words "be a low life" on the new piece of tape. Eggleston again objected, and ordered Helton to tape over the slogan and leave it blank. After further discussion, Helton and Eggleston agreed that Helton should go home for the day. (A.4,36; 121-24.) The next day, Helton received a written reprimand for wearing the "scab" slogan on his shirt and then altering the message to "goad fellow employees inappropriately and unnecessarily." (A.4&n.19;320-21.)

E. On January 27, 2006, the Union Ends the Strike with an Unconditional Offer to Return to Work; Tenneco Refuses the Union's Request for the Home Addresses of the Replacement Workers, Who Became Unit Employees When the Strike Ended

On January 27, Walker provided Tenneco with a written, unconditional offer for the strikers to return to work pursuant to Tenneco's final contract offer. (A.2,19;70-71,323-24.) That day, the Union requested, *inter alia*, the names and home addresses of the permanent striker replacements. The Union explained that it needed the replacements' contact information because they became unit employees when the strike ended, and the Union needed to communicate with them about working conditions, collective-bargaining proposals, grievances, and other representational matters. (A.2,19;72,325-26.)

On February 6, Tenneco reinstated four strikers, but did not recall the vast majority because their positions were filled by replacements or eliminated. By letter that day, Tenneco refused to provide the names, addresses and other requested information regarding the replacements, claiming that the information was irrelevant, and that it was concerned about alleged picketer misconduct towards replacements. However, Tenneco acknowledged that it had hired 16 replacement workers since the strike began. (A.2,19;329-31.)

By letter dated February 13, Walker reiterated that the Union needed the replacements' names and addresses to represent them. He observed that, "mailing addresses are the only practical way for the Union to communicate with these bargaining unit members in a private fashion that cannot be monitored by Tenneco." He disputed Tenneco's proffered safety concerns, noting that there had been no allegations of picket-line misconduct since November 2005. (A.2,20-21;335-36.)

In late February through March, Tenneco provided the replacements' names but not their addresses. It proposed that the Union could communicate with replacements by having returning strikers talk to replacements at work, using the company-supplied union bulletin board, and identifying a neutral party to send correspondence. (A.2,20-25;354-67,372-76.) The Union reiterated that it needed the home addresses because the replacements became unit employees when the

strike ended, and there was no reason to be concerned over potential harassment. (A.20-21;344-46,351-53,368-71.)

F. Tenneco Bars Employees From Doing Anything that Might "Evoke a Response," and Requires They Get Permission Before Posting Anything on Company Property

On February 6, the day four strikers returned to work, Company Manager Mark Kortz held a mandatory meeting for all employees, during which he announced two new company rules. He described Tenneco's work force as consisting of three groups: those who crossed the picket line, permanent replacements, and returning strikers. (A.5,25-26;132,328.) He directed employees to refrain from inciting tensions, and to "not . . . engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker." (A.5,25-26;103,131,139-40.) He memorialized this directive in a letter to all employees. (A.5,25-26;113,332.)

During the same meeting, Kortz announced that the posting of signs, letters, or printed materials on company property would be subject to supervisory approval. (A.6,26;103,131,142,328.) Kortz's notes for this part of the meeting state, "Things that will be changing . . . Posting of signs, letters or printed materials are subject to supervision approval." (A.328.) Prior to this announcement, Tenneco had allowed employees to freely post materials at its facility, including on bulletin boards, without prior approval, despite an unenforced rule to the contrary

in its manual. (A.6&n.23;82,104,107,110-12,133,142,249.) Tenneco did not notify the Union or provide it with an opportunity to bargain before making these changes. (A.6;83,113,134,143,328.)

G. The Union Requests Information Regarding Tenneco's Use of Outside Contractors

On February 13, 2006, the Union requested information about Tenneco's use of an outside contractor during the strike to provide services unit employees usually performed. Tenneco, however, failed to provide all the requested information. (A.20,47;68,74,81,335-36,344-46,372-76.)

H. The Employees File Decertification Petitions; Tenneco Withdraws Recognition from the Union, and Refuses to Process a Grievance

On February 10, 2006, employee Lonnie Tremain filed with the Board a petition signed by 25 unit employees seeking to decertify the Union as their representative. (A.2,7,26;84,334.) The Board's Regional Director held the petition in abeyance pending resolution of the instant unfair labor practice charges, which the Union had filed on February 1 and 16. (A.2,7,26;86-87,342-43,384-85.)

On November 27, 2006, Tenneco discharged unit employee Steven Prysianzy for alleged violations of company rules. (A.26;386.) That day, the Union submitted a grievance protesting the discharge. (A.26;387-88).

On November 30 and December 1, 24 of the then 31 unit employees signed a second decertification petition, which they presented to Tenneco on December 4.

(A.2,7,26;389-95.) Tenneco sent a letter to the Union that day stating that, given the petition, it would no longer recognize the Union as the unit employees' bargaining representative. (A.2,7,26;84,396.) Thereafter, Tenneco refused to process Prysianzy's grievance.

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman, and Members Pearce and Hayes) affirmed, with modifications, the administrative law judge's findings that Tenneco violated Section 8(a)(5) and (1) of the Act by refusing to give the Union requested information about its discipline of employee Joseph Helton and its use, during the strike, of an outside contractor to provide services usually performed by unit employees. The Board also affirmed the judge's uncontested finding that Tenneco violated Section 8(a)(5) and (1) by refusing to continue processing the grievance regarding Prysianzy's discharge after its withdrawal of recognition. (A.1&nn.3-4,8-10.)

Reversing the judge, the Board (Chairman Liebman and Member Pearce, Member Hayes dissenting) found that Tenneco violated Section 8(a)(1) by directing employees to refrain from engaging in conduct that could "evoke a response"; Section 8(a)(3) and (1) by disciplining employee Joseph Helton for displaying the slogan "Thou Shall Not Scab" on his shirt, and then altering the slogan; and Section 8(a)(5) and (1) by refusing to furnish the Union with the

replacements' home addresses and information about its plan to install surveillance cameras, unilaterally promulgating a rule requiring employees to obtain supervisory approval prior to posting materials at Tenneco's facility, and withdrawing recognition from the Union. (A.2-8.)

The Board's Order requires Tenneco to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires Tenneco to: rescind its directive prohibiting employees from saying anything that might be deemed offensive or "evoke a response" from coworkers; rescind, revoke, and remove any reference in its files to the written warning issued to Helton; furnish the Union with most of the requested information; rescind its unilaterally implemented rule requiring supervisory approval prior to posting material in its facility; meet with the Union at the third step of the grievance procedure regarding Psysianzy's discharge; recognize and bargain in good faith with the Union; and post a remedial notice. (A.10-11.)

STANDARD OF REVIEW

The Court "applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of

whether the [C]ourt might have reached a different conclusion *de novo*." *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board's findings are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Further, the Board's assessment of witness credibility is given great deference and must be adopted unless it is "hopelessly incredible" or "self-contradictory." *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988). The Court will "abide [the Board's] interpretation of the Act if it is reasonable and consistent with controlling precedent." *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996). Therefore, the Court's review of the Board's findings "is quite narrow." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

SUMMARY OF ARGUMENT

Tenneco committed several unfair labor practices during and after its employees' strike. The Board is entitled to summary enforcement of the uncontested portions of its Order. Moreover, the Court must affirm the Board's contested findings—that Tenneco unlawfully issued and maintained overbroad work rules, disciplined an employee for protected union activities, refused to provide the Union with replacements' home addresses and other relevant information, unilaterally restricted the posting of materials in the workplace, and withdrew recognition from the Union—because they are supported by substantial evidence. At each turn, Tenneco offers its own view of the strike, but fails to prove, as it must, that the Board's contrary view was unsupported.

This Court must affirm the Board's "clear and present danger" test for supplying replacements' home addresses because it is reasonable and consistent with the Act's policies. Indeed, other circuit courts have utilized the test. A different result is not required by the circuits that have failed to apply the test because those courts erroneously substituted their own judgment for the Board's, without providing the Board with the required deference.

Finally, this Court is jurisdictionally barred from considering Tenneco's challenge to the Board's affirmative bargaining order because it failed to raise that

objection before the Board. In any event, the Board weighed the factors set forth by this Court, and determined that an affirmative bargaining order was appropriate.

ARGUMENT

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

Tenneco did not file exceptions with the Board, and in its opening brief, it does not contest the Board's findings that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to provide the Union with requested information concerning Joseph Helton's discipline and work a contractor performed for Tenneco during the strike, and refusing to process Prysianzy's grievance to the third step. Tenneco is therefore barred from challenging those violations. *See Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665-66 (1982); *see also Laurel Bay Health & Rehabilitation Center v. NLRB,* 666 F.3d 1365, 1367 n.2 (D.C. Cir. 2012). Accordingly, the Board is entitled to summary enforcement of its Order with respect to these violations. *See, e.g., Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(1) OF THE ACT BY DIRECTING EMPLOYEES TO REFRAIN FROM DOING ANYTHING THAT MIGHT BE DEEMED OFFENSIVE OR "EVOKE A RESPONSE"

A. Applicable Principles

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 the rights guaranteed in [S]ection 7." Section 7 of the Act (29 U.S.C. § 157), in turn, guarantees employees the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing . . . ." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employees' rights; proof of antiunion motive or actual coercion is unnecessary. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931-32 (D.C. Cir. 1991).

The Board, with this Court's approval, will find that an employer's "mere maintenance" of a work rule violates Section 8(a)(1) if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citation omitted); *accord Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007). Specifically, even if the challenged rule does not explicitly restrict Section 7 activity, the Board will find the rule unlawful upon a showing of any one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, 343 NLRB at 647; *accord Guardsmark LLC v. NLRB*, 475 F.3d 369, 374-76 (D.C. Cir. 2007).

In assessing whether employees would reasonably construe a rule to prohibit Section 7 activity, the Board will "give the rule a reasonable reading," "refrain from reading particular phrases in isolation," and "not presume improper interference with employee rights." *Lutheran Heritage*, 343 NLRB at 646; *accord Community Hosps. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003). Any ambiguity in the challenged rule must be construed against the employer as its promulgator. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). The Board's determinations whether employer rules unlawfully interfere with protected activity are entitled to considerable deference and must be affirmed if "reasonably defensible." *Cintas Corp.*, 482 F.3d at 467 (citation omitted).

B. Tenneco Unlawfully Promulgated an Overbroad Work Rule Barring Employees from Doing Anything that Would "Evoke a Response"

On February 6, the first day strikers returned to work, Company Manager Mark Kortz held a mandatory meeting for all employees. He described the workforce as those who crossed the picket line, permanent striker replacements, and returning strikers. He directed employees not to "engage in taunting, verbal or physical threats, or in other conduct that is confrontational or meant to evoke a response from a co-worker." He repeated that directive in a memorandum, which asked employees to report any "issues" or "inappropriate conduct" to management.

He did not explain what he meant by conduct that would "evoke a response," provide examples, or limit the rule in terms of time or place. (A.5.)

Because Tenneco's directive did not explicitly address Section 7 activity, the Board analyzed whether it was issued in response to, or would be reasonably construed as restricting, such activity. (A.5-6.) The Board answered both questions in the affirmative; either finding establishes a violation.

Substantial evidence supports the Board. First, it is beyond cavil that Kortz issued the directive in response to union activity. As the Board noted (A.6), the timing of his speech and letter—the day former strikers returned to work—and its introductory description of employees' strike status, "clearly created the context of Kortz's directive." Second, employees would reasonably construe Kortz's broad directive as encompassing protected conduct because spirited debate about the strike or a union is often "meant to evoke a response."[2] Yet, Kortz did not define that phrase, or provide examples of conduct outside the rule, or assure employees that his rule did not apply to protected activity. As the Board reasonably noted (A.6), absent any explanatory reference to plainly unprotected conduct, it is unreasonable to presume that employees would narrowly interpret the rule to exclude Section 7 activity, and the Board properly resolved Kortz's failure to

[2] Indeed, Kortz acknowledged that employees might violate the rule by arguing about the Union on the shop floor (A.247-48) or even telling a coworker, "I don't like the Union," (A.259-61).

clarify the rule's ambiguity against Tenneco. *See* cases at p. 19. Exacerbating the coercion, Kortz instructed employees to report coworkers' "inappropriate" conduct, encouraging employees to avoid protected conduct rather than risk discipline.[3] Finally, the manner and context in which the rule was announced, reminding employees about their roles in the strike, would lead employees to conclude that the rule restricted protected activity. As such, the rule chilled employee rights.

Tenneco offers nothing compelling a different result. Kortz's motive (Br.36) is irrelevant. As the Board explained (A.6), the test for Section 8(a)(1) violations asks whether the employer's conduct would reasonably tend to coerce employees in the exercise of their rights, not whether the employer deliberately sought to do so. *See also* cases at p. 18. Irrespective of motive, Kortz prefaced the rule by reference to the employees' strike status, and employees would reasonably view his remarks in that context.

Tenneco urges (Br.37-39) that the broad ban on doing anything meant to "evoke a response" is narrowed by the rule's preceding reference to "taunting,

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[3] *Cf. Bloomington-Normal Seating Co. v. NLRB*, 357 F.3d 692, 696-97 (7th Cir. 2004) (employer unlawfully directed employees to report whenever they subjectively felt harassed, pressured, or offended by union supporters).

verbal or physical threats," and other "confrontational"[4] conduct. This claim fails. "Evoke a response" covers a broader array of conduct—including protected, vigorous debate about union matters—than does "taunting" and "physical threats." As such, any claim that those terms are coextensive would fail to give the phrase "evoke a response" independent meaning. *See Guardsmark*, 475 F.3d at 378 ("[A]ll words in a text must be given independent meaning.").

The Board did not ignore (Br.39-40) Tenneco's interest in avoiding conflict at work. Rather, it found (A.6) no evidence that such a broad rule was necessary to meet that concern. As shown, Tenneco's directive is reasonably read to restrict protected conduct, including conduct unlikely to disturb workplace order, and was not limited to work time or even to Tenneco's facility. As such, the breadth of the rule far exceeds the reasons offered to justify it. *See Guardsmark*, 475 F.3d at 380 (employer must show it cannot achieve legitimate goals "with a more narrowly tailored rule that would not interfere with protected activity"); *accord Cintas Corp.*, 482 F.3d at 470.

Thus, Tenneco finds no shelter (Br.40) in cases where the employer lawfully maintained a narrowly-tailored rule against insubordination and which, in context,

[4] Tenneco fails to acknowledge that some protected Section 7 activity is "confrontational." *See* cases cited at p. 25 (messages about "scab" labor, though potentially upsetting, are protected).

"clearly does not apply to union organizing activity;"[5] or a narrower prohibition on "abusive and threatening language," which was not issued in response to union activity.[6] Finally, contrary to Tenneco (Br.41-42), evidence that it applied its rule to restrict employees' Section 7 rights or actually coerced them in the exercise of those rights is unnecessary to sustain a Section 8(a)(1) violation. *See* cases at p. 18.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCIPLINING EMPLOYEE JOSEPH HELTON BECAUSE OF HIS UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates the Act by taking adverse employment actions against employees for engaging in union activity. *NLRB v. Trans. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).[7]

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[5] *Cmty. Hosps.*, 335 F.3d at 1088-89.

[6] *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 23 (D.C. Cir. 2001).

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

The legality of an employer's adverse action depends on its motivation. Where, as here, the employer does not dispute that union activities were a motivating factor, its action violates the Act unless it proves that it would have taken the same action even absent those activities. *Trans. Mgmt. Corp.*, 462 U.S. at 395; *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). This Court is deferential to the Board's conclusions regarding unlawful discrimination, which must be affirmed if supported by substantial evidence. *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000).

B. Tenneco Unlawfully Issued a Written Warning to Helton

It is undisputed that Helton's protected concerted activity was a motivating factor in his discipline. Tenneco did not challenge this finding before the Board (*see* A.5) or this Court (*see* Br.30-33), and thus is barred from doing so. 29 U.S.C. § 160(e). The Board's finding (A.4-5) that Tenneco failed to prove that it would have taken the same action even absent Helton's protected union activities is supported by substantial evidence.

Tenneco's claim (Br.31) that it disciplined Helton not for the term "scab," but for his efforts to "goad fellow employees" is baseless. Tenneco's written warning (A.5;321) explicitly admonished Helton for his protected conduct in "[w]earing a shirt about 'scabs'" to work during an "ongoing labor dispute." It

rebuked him for refusing "to cover up the reference to the scab," and warned that repeating such conduct could result in further discipline. (*Id.*) As the Board noted (A.5), Helton's "message, admonishing employees not to cross the picket line, was a clear expression of support for the strikers and, as such, was protected." Moreover, his use of the word "scab" did not deprive him of the Act's protection and, therefore, Tenneco could not lawfully discipline him for it. *See Nor-Cal Beverage Co.*, 330 NLRB 610, 611 (2000) (employer unlawfully disciplined employee for calling another employee "scab"); *accord Letter Carriers Branch 469 v. Austin*, 418 U.S. 264, 283 (1974) (the term "scab" is "common parlance in labor disputes and has specifically been held to be entitled to the protection of § 7 of the [Act]") (citation omitted). Thus, Tenneco's own written warning belies its claim that it punished Helton for anything other than his t-shirt's "scab" reference. (A.5;321.)

The Board also properly rejected (A.5) Tenneco's claim (Br.33) that it disciplined Helton for insubordination in refusing to cover up his protected message, and not for the message itself. An employee's refusal to comply with an employer's directive to cease protected communication—here, that Helton "cover up the reference to the scab," (A.321)—does not constitute insubordination. *See, e.g., AMC Air Conditioning Co.*, 232 NLRB 283, 284 (1977) (employee's refusal to stop making a prounion speech in the employee lunchroom not insubordination).

Tenneco's reliance (Br.33) on *Detroit Newspaper Agency v. NLRB*, 435 F.3d 302, 309 (D.C. Cir. 2006), is woefully misplaced. There, the employee repeatedly refused to perform "the clearly delineated duties associated with his job." *Id.* There is no such claim here.

Contrary to Tenneco (Br.31-32), the circumstances surrounding Helton's protected communication are neither "unique" nor justify discipline. For example, strikes often involve "divisive[ness]," verbal "taunting," or the use of striker replacements. *See Advertisers Composition Co. Typographers, Inc.*, 253 NLRB 1019, 1023 (1981) (noting that strike involved "the normal picket line name calling and verbal taunting"). If these common circumstances justified curtailing protected speech, then employees' statutory rights would not mean much. Tenneco's desire (Br.30, 32) to prevent acrimony among its employees "is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights." (A.5, citing *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1315 (1994) (quoting *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976).)

Likewise, Tenneco gains nothing by observing (Br.31-32) that Helton's protected message was "aimed at scabs,"[8] was "inflammatory," or other employees

[8] This begs the question: to whom should that message be directed? The Supreme Court has recognized that "naming" nonunion workers as scabs is "literally and factually true" because "[o]ne of the generally accepted definitions of 'scab' is 'one who refuses to join a union.'" *Austin*, 418 U.S. at 283.

had "approached" Tenneco "about his actions." As the Board noted (A.5n.21), such "a bare assertion of generalized danger cannot justify the infringement of an employee's statutory rights." Nor can the fact that Helton's protected communication may have been unwelcome. Indeed, Helton's status as the only union supporter inside the facility at the time (Br.31-32) made him an obvious target for an employer seeking to silence protected activity at its facility.

Finally, while there may be other circumstances where an employer can lawfully limit its employees' use of the term "scab," this case is not one of them. Thus, Tenneco relies (Br.32) on cases where the Board, expressly limiting its holding to specific facts, found that employers lawfully banned "no scab" buttons, where there was evidence of strikers' firing gun shots into a non-striker's home and making other threats of personal injury (*Reynolds Elect. & Eng'g Co., Inc,*, 292 NLRB 947, 947 n.1 (1989)) or "mass picketing and violence" and a union official's threatening to "hunt down" every strikebreaker "like the economic animal he is" (*United Aircraft Corp.*, 134 NLRB 1632, 1633-34 (1961)). There was no similar pattern of striker violence or threats of violence here.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE THE UNION WITH THE REPLACEMENT EMPLOYEES' HOME ADDRESSES

A. Because Information Allowing the Union to Contact Employees It Represents is Presumptively Relevant, the Board Reasonably Imposes a High Burden on Employers To Justify Denying a Union's Request for Information about a Bargaining Unit's Replacement Employees

It is settled that an employer's duty to bargain in good faith under Section 8(a)(5) includes the duty to "provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967); *accord United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Accordingly, an employer's failure to provide relevant information upon request constitutes a violation of Section 8(a)(5) and (1) of the Act. *Acme Indus. Co.*, 385 U.S. at 435-37; *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). [9]

This Court has held that information pertaining solely to bargaining-unit members and central to the union's duties as a bargaining representative is presumptively relevant and must be produced. *See United States Testing Co.*, 160 F.3d at 19. Employees' home addresses are presumptively relevant and constitute fundamental information for a union. *Prudential Ins. Co. v. NLRB*, 412 F.2d 77,

[9] A violation of Section 8(a)(5) results in a "derivative" violation of Section 8(a)(1). *See* n.7.

83-84 (2d Cir. 1969); *NLRB v. CJC Holdings, Inc*., 97 F.3d 114, 117 (5th Cir. 1996); *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). As Second Circuit has explained, such information is, "by its very nature fundamental to the entire expanse of a union's relationship with its employees," because, without it, "a union cannot even communicate with employees it represents." *Prudential Ins. Co*, 412 F.2d at 83-84. *See generally Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 929 (D.C. Cir. 2005) (discussing importance of access to employees).

The Supreme Court has recognized that employees hired as permanent striker replacements assume the same employee status as other unit employees and become unit members to whom the exclusive-bargaining representative owes a duty of fair representation when the strike ends. *See NLRB v. Curtin Matheson Scientific, Inc*., 494 U.S. 775, 782, 787 (1990); *accord Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1075 n.8 (1st Cir. 1981); *Service Electric Co*., 281 NLRB 633, 639-40 (1986). Thus, because replacements are unit employees whom the union must represent, whose input it must receive, and whose goodwill it must earn, unions are entitled to the same contact information for replacements as they are for the entire unit, under the same standard of presumptive relevance. Recognizing the somewhat atypical situation concerning requests for replacements' personal information, however, the Board has allowed that, despite the information's relevance, an employer may withhold it if it can demonstrate a

"clear and present danger" of misuse of the information by the union. *See Pearl Bookbinding Co.*, 213 NLRB 532, 535-36 (1974), *enforced*, 517 F.2d 1108, 1113 (1st Cir. 1975); *Page Litho*, 311 NLRB 881, 882 (1993), *enforcement denied in relevant part*, 65 F.3d 169, 1995 WL 510029 (6th Cir. 1995) (unpublished); *accord United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1207 (2d Cir. 1970); *Lear Siegler Inc. v. NLRB*, 890 F.2d 1573, 1581 (10th Cir. 1989).

To meet this burden, the employer must provide an objective basis for finding a clear and present danger. Hearsay, general testimony, and isolated instances of minor or outdated misconduct are insufficient. *See, e.g.*, *Pearl Bookbinding Co.*, 213 NLRB at 535-36 ("hearsay" reports of alleged violence and "relatively minor and sporadic" misconduct during four-month strike, insufficient); *accord Beverly Health and Rehabilitation Services, Inc.*, 346 NLRB 1319, 1327 (2006) ("general testimony about isolated incidents" insufficient); *Advertisers Composition Co. Typographers*, 253 NLRB 1019, 1023 (1981) (no clear and present danger where alleged harassment was "no more than the normal picket line name calling and verbal taunting"). When the objective evidence suggests misuse, however, the Board finds no fault in an employer's refusal to disclose. *See, e.g.*, *Webster Outdoor Advertising Co.*, 170 NLRB 1395, 1396 (1968) (employer justified in refusing to provide information where strikers had "harassed, threatened and assaulted," nonstriking employees and union gave no assurances

information would not be used to further harassment), *affirmed sub. nom. Sign and Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 738 (D.C. Cir. 1969).

The Board has, in its discretion, determined that the clear and present danger test strikes the proper balance between the interests of the union, the replacements, and the employer. The Board's test recognizes that information relating to unit employees—particularly those who may be unknown to the union—is essential to the union's ability to communicate with these employees to assess the needs of the unit and pursue those needs in bargaining and through grievances. At the same time, the test acknowledges the exceptional circumstances where this critical information should be withheld from the union. *See Brown & Sharpe Co.*, 299 NLRB 586, 590-91 (1990).

For these reasons, Tenneco and the Amicus (Br.17-19, ABr.11-15) face a heavy burden in seeking to overturn the Board's test. The Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). The Board's decisions—including its decision here to place a heavy burden on the party attempting to deny a union the ability to privately communicate with employees it represents—are subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996); *Int'l Longshoremen's & Warehousemen's Union, Local 14*,

AFL-CIO v. NLRB, 85 F.3d 646, 652 (D.C. Cir. 1996). Accordingly, where—as here—the plain terms of the Act do not specifically address the precise issue, *Chevron* requires the courts to defer to the Board's reasonable interpretation of the Act. *See Holly Farms Corp.*, 517 U.S. at 398.

Deference is required because the Board's test furthers important statutory purposes by affording unions access to information relevant and necessary to carrying out their representational duties, absent proof of serious, overriding defenses to justify withholding the information. Given the vital importance of such information to a union's ability to perform its representational functions, the Board's test is reasonable and properly balances the interests of unions, employees, and employers under the Act.

To the extent Tenneco raises the specter of unleashed union harassment under the Board's test, Congress gave the Board the power to protect employees against such persecution. As the Board stated many years ago in requiring the dissemination of home addresses to union representatives (even before the union's selection as bargaining representative), "[w]e cannot assume that a union, seeking to obtain employees' votes in a secret ballot election, will engage in conduct of this nature; if it does, we shall provide an appropriate remedy." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1244 (1966) (citing cases punishing union harassment at employees' homes). Similarly, a union like the one here, seeking to garner the

replacements' support now that they comprise a majority of the unit, is equally unlikely to act belligerently. If it does, the Board will provide the remedy. *Cf. Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 738 n.8 (D.C. Cir. 1969).

Tenneco and the Amicus (Br.18-19, ABr.13-15) invite this Court to join the Seventh Circuit in rejecting the Board's test in favor of a totality of the circumstances approach. *See Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 247 (7th Cir. 1992); *Chicago Tribune Co. v. NLRB*, 79 F.3d 604, 608 (7th Cir. 1996). The Board respectfully submits that the *Chicago Tribune* cases failed to give the Board the appropriate *Chevron* deference, in light of the Act's ambiguity and the Board's congressionally-delegated role in balancing interests in collective-bargaining relationships. Moreover, not only did those decisions fail to defer to the Board's interpretation of ambiguous statutory language, they relied on inapposite caselaw. Both *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956), the cases from which the Seventh Circuit drew the "totality of the circumstances" language, evaluated a union's request for non-presumptively relevant information concerning matters other than unit employees. *See Chicago Tribune Co.*, 79 F.3d at 607. In the current context, however, where the information requested pertains directly to the union's representational relationship with unit employees, the Board properly erects a

higher standard for employers to meet. Indeed, Tenneco ignores the fact that four other courts have applied the Board's test with little problem. *See Lear Siegler Inc. v. NLRB,* 890 F.2d 1573, 1580-81 (10th Cir. 1989); *NLRB v. Pearl Bookbinding Co., Inc.*, 517 F.2d 1108, 1113 (1st Cir. 1975); *Shell Oil Co. v. NLRB,* 457 F.2d 615, 619 (9th Cir. 1972); *United Aircraft Corp. v. NLRB,* 434 F.2d 1198, 1205-06 (2d Cir. 1970).

Other cases on which Tenneco relies do not address the Board's clear and present danger test head-on. In *Grinnell Fire Protection Sys. Co. v. NLRB,* 272 F.3d 1028, 1029-30 (8th Cir. 2001), the Eighth Circuit applied the totality of the circumstances test, but neither acknowledged that the Board employed a different standard, nor evaluated the Board's test using proper *Chevron* deference. Similarly, the Sixth Circuit did not explicitly reject the clear and present danger test in its unpublished *per curiam* decision in *Page Litho,* 65 F.3d 169, 1995 WL 510029, *3 n.2 (6th Cir. 1995). Rather, noting only that in-circuit cases (which involved the release of different types of information) had not adopted that test, it held that the employer had lawfully withheld the replacements' addresses given ongoing striker harassment of replacements, and its having offered proposals that would meet the union's need for that information. *Id.* Thus, this Court should not heed those courts' implicit disagreement with the Board's clear and present danger

test, in the absence of their reasoned application of settled administrative law principles.

B. Substantial Evidence Supports the Board's Finding that Tenneco Failed To Prove a Clear and Present Danger that the Union Would Misuse the Replacements' Home Addresses, and, Therefore, Unlawfully Withheld Them

Applying the foregoing principles, the Board found (A.2-4) that Tenneco failed to overcome the presumptive relevance of the replacements' home addresses by showing a "clear and present danger" that the Union would misuse that information. Based on the record evidence—and looking beyond generalized ill will between strikers and replacements and a single, unfortunate incident—the Board reasonably concluded that Tenneco did not meet its burden.

1. Following the Strike, There Was Insufficient Evidence of Union Hostility Towards Replacements

The Board reasonably found there was insufficient evidence of post-strike hostilities between the strikers, crossovers, and replacements to justify Tenneco's refusal to provide information at that time. Indeed, contrary to Tenneco, the evidence showed that, following the strike, the relationships between the groups of employees were not hostile. *See generally NLRB v. Curtin Matheson Scientific Inc.*, 494 U.S. 775, 792 (1990) ("the interests of strikers and replacements . . . may converge *after* the strike") (emphasis in original).

As the Board explained, replacements testified that they were on friendly terms with the union officials who were reinstated after the strike. (A.3;195,197,207-08,210,216,218,223.) Replacements stated that they had positive, even "jocular," interactions at work with the returning strikers, and that the returning strikers had neither threatened them nor indicated that they would not represent their interests. (*Id.*)

Tenneco's suggestion (Br.22-23) that it demonstrated clear and present danger of misuse, because, during the strike, Union Representative Walker had once called the replacements "scabs" and attempted to have them removed is frivolous. At that time, Walker was acting on behalf of the then-striking unit employees and the replacements were not part of the unit, but had taken unit positions. When the strike ended, and the replacements were part of the unit, he sought to reach out to them in an effort to "move on together" to negotiate a contract for all unit employees, and to assure all employees that the Union would represent them regardless of their individual roles in the strike. (A.31;72,88-89.) Walker needed the replacements' contact information to communicate with them privately to ascertain their bargaining priorities and any grievances they might have. (A.72-73.)

2. Even During the Strike, the Purported Incidents of Picket-Line Misconduct Were Few and Relatively Mild

The Board found (A.3) that during the 10-month strike, there were only few

and mild instances of picket line misconduct, all of which occurred months before the request for the replacements' information. Although Tenneco cites (Br.23-24) a litany of incidents that it claims the Board ignored, the Board examined each of those and rejected Tenneco's repeated characterization of severe misconduct. As shown at p. 7 above, both sides engaged in abusive language. The alleged vehicle damage occurred when a retiree hit a van with a poster board and when Walker struck the tire of a van with his cane after the driver stopped near the picketers, "revved the motor," and "squealed the tire." (A.3-4;76-78,80,91,96.) *See, e.g.*, *Medite of New Mexico v. NLRB*, 72 F.3d 780, 791 (10th Cir. 1995) (hitting car with cardboard picket signs not serious strike misconduct). On the advice of the police, the Union photographed instances of crossover employees driving their cars towards picketers and swerving away at the last moment. (A.4&n.14;76-78,80,91,96.) The limited evidence of egg throwing is vague, second-hand, and fails to establish who was responsible. (A.4n.14;233,253.) None of these incidents involved union violence or misconduct.[10]

Likewise, the so-called "mock shooting incidents" (Br.24) involved one picketer briefly pointing his finger at someone in the shape of a gun. The

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[10] Accordingly, Tenneco also errs in suggesting (Br.23n.9) that this case is analogous to others in which employees were lawfully discharged for "threatening assault," or "climbing onto," "spitting on," and "throwing cigarette butts at" vehicles.

replacement who testified to the incident acknowledged it was "isolated." (A.200,202-03.) Thus, considering this evidence, the Board reasonably found (A.4) these few and relatively mild allegations of misconduct during a 10-month long strike do not demonstrate a likelihood that the Union would use the addresses for purposes other than legitimate representation.

3. The Single Instance of a Sister Union's Picketing at an Employee's Home During the Strike Does Not Prove a Clear and Present Danger of Union Misuse of Home Address Information

Next, the Board explained (A.3) that the single protest at the Neals' house, while regrettable, did not establish a "clear and present danger" that the Union would likely misuse the requested addresses in the future to harass the replacements. The Board reasonably concluded that the incident "simply does not establish any danger of misuse by the Union, much less a clear and present danger." (A.3.)

The protest occurred across the street from the Neals' home, on a single day, 7 months before the Union ended the strike and requested the replacements' home addresses. (A.3; *see* pp. 7-8.) It was organized by members of a different union who, while picketing in support of the Tenneco strikers, recognized Sue Neal from a prior dispute where she had crossed another picket line by their own local against another employer. (A.3;151,155-68.) Sue Neal triggered the pickets' decision to picket her house when she made obscene gestures and profane comments to them,

as she crossed the picket line to enter Tenneco. (A.3&n.13;151,156-58,161.) Uncontested evidence establishes that Walker was the only representative of the Union to attend the picket, and he did so in a constructive capacity "to make sure nothing happened." (A.3;158,167-68.) While the protesters carried signs suggesting that the Neals were "scabs," (a protected expression of their views regarding the ongoing labor dispute, *see* pp. 7-8, 25), they remained across the street from the Neals' residence and did not engage in, or threaten violence. (A.3;158-61.)

The Board acknowledged that Mr. Neal found the protest disturbing, undoubtedly exacerbated by his son's suffering a seizure during that time, as he was prone to do when excited. (A.3;167,186-90.) As the Board explained, however, the issue is not "whether the protest was wrong in some way, but whether it establishes a clear and present danger of misuse of home addresses by the Union." (A.3.) The Board reasonably found in the above circumstances—where the protest occurred 7 months before strike's end, was conducted by a different union, and was an isolated incident—that it did not.

Contrary to Tenneco (Br.24-25), the vague testimony by three replacements that they had "heard" about the incident at the Neals', and their understandable desire not to be the subject of coercive picketing, does not portend that the Union would misuse home addresses for such purposes. For example, replacement Eric

Crots acknowledged that he did not know who picketed at the Neals' house or why, or what triggered the protest. (A.211.) He stated that he did not want "them showing up at my house or doing whatever it was they did to [the Neals]." (A.207.) Likewise, Andrew Porter testified, without elaboration, that he was worried that "someone" might come to his house (A.195), while Chris Oakley stated that he was "not interested" in the Union and did not want "anyone showing up at his doorstep" or doing anything to "alarm" his family (A.220). Such generalized concerns about how the Union *might* act does not establish a clear and present danger that the Union *would* misuse their home addresses.

Contrary to Tenneco's claim (Br.19-21), the Board did not unfairly minimize the picketing at the Neals' and its impact on employees, but carefully considered the evidence. First, Tenneco's broad claim (Br.20) that "picketing a private home is unlawful" is inaccurate. As its own cases show (*id.*), it is not *per se* unlawful to picket a private residence; rather, the picketing's propriety turns on its coerciveness in each case. *Compare New York Telephone*, 305 NLRB 770, 770 (1991) (picketing was unlawfully coercive) *with Womack, Inc.*, 280 NLRB 875, 875 n.1 (1986) (picketing lawful). Notably, here, no charges were filed regarding the picketing at the Neals', and there has been no finding of misconduct by this Union.

Next, Tenneco wrongly attacks (Br.21) the Board's reliance (A.3) on Walker's unrebutted testimony that he participated to "make sure nothing happened" at the Neals'. There is no evidence that the Board's decision to credit Walker's testimony was "hopelessly incredible or self-contradictory," and, accordingly, that finding must be affirmed. *See* cases cited at p. 15. Tenneco claims, without citation, that the administrative law judge "obviously" discredited Walker's constructive intentions, although the judge did not address, much less discredit, it.

Tenneco mischaracterizes the record by asserting (Br.20) that it is "undisputed" that the picketers, including Walker, targeted the Neals' children. Again, Tenneco cites no support for this claim, which highlights how neither Tenneco nor the replacements really knew what happened at the Neals.[11]

[11] Tenneco's position here is contradictory. When it claims the facts cast the picketing at the Neals' in a bad light, it assumes the replacements had full knowledge of those facts, even when their testimony shows otherwise. But when the Board finds mitigating circumstances, Tenneco assumes the replacements were unaware of them. *See* Br.20-21.

4. The Personal Preference of Five Replacements Not To Release Their Addresses Does Not Constitute Objective Proof that the Union Would Misuse the Information

Finally, the Board found (A.3) that, although five replacements (out of 17) testified that they told Tenneco not to provide the Union with their home addresses, "the expression of such personal preferences does not suggest a likelihood of misuse by the union." Two replacements testified about generally not wanting to receive Union mail or "propaganda." (*See* A.3;195,216.) One specified that he lived with his parents and so it was "not his call" who may send mail or visit there. (A.216.) However, the desire to avoid phone calls, mail, and union "propaganda"—activities consistent with legitimate organizational contacts—does not prove a clear and present danger of Union misuse of the information.

Indeed, bolstering the Board's case, the replacements who testified that they opposed releasing their addresses were unaware they were represented by the Union, much less understood its negotiating strategies. (*See* A.196,201,211,226-27.) They also acknowledged that *if* they had an exclusive collective-bargaining representative, that representative should be able to contact them directly and "tell its side of the story." (A.201,209,218,222.)

C. The Board Reasonably Found that Tenneco Would Have To Provide the Addresses Even Under a "Totality of Circumstances" Test

The Board found that Tenneco's refusal to provide the addresses would be unlawful even under the "totality of the circumstances" approach applied by the Seventh Circuit in *Chicago Tribune v. NLRB*, 79 F.3d 604 (7th Cir. 1996), and urged by Tenneco (Br.26-30). The Board explained (A.4&n.17) that the cases were factually distinguishable and the different circumstances presented here favor disclosing the replacements' addresses.

In *Chicago Tribune*, following a lengthy strike where replacements "endured both verbal and physical assaults" and required an injunction to prevent violent picketing, the union sought the replacements' home addresses. 79 F.3d at 606. The employer refused to provide the information, fearing for the replacements' physical safety in light of the pervasive violence, but offered the union several alternative methods of communication, including direct communication during nonwork times, posting notices on its bulletin boards, enlisting the assistance of a third party, or any other mutually agreeable alternative. *Id.* at 608. The Court, considering the "totality of circumstances," found that the employer lawfully withheld the addresses for two fact-specific reasons: first, the pattern of violence raised legitimate concerns about employees' safety and privacy, and, second, the employer offered to provide the information to the union by viable, alternative

means. Significantly, in finding no violation of the Act, the court found "readily distinguishable" its decision in *NLRB v. Burkart Foam, Inc.*, 848 F.2d 825 (7th Cir. 1988), where there were "no documented instances of violence," and the employer did not propose viable, alternative methods of communication. *Id.* at 608.

Like *Burhart Foam*, this case is "readily distinguishable." First, unlike the situation addressed in *Chicago Tribune*, the record here does not include the "pattern of violence" there, including physical injury to replacements. 79 F.3d at 608. In *Chicago Tribune*, such violence provided an objective basis for the employer's belief that providing replacements' addresses would lead to further violence. Contrary to Tenneco's claim (Br.26-27), the Board did not hold that only a "pattern of violence" can justify withholding replacements' home addresses, but simply noted that the absence of it here distinguished *Chicago Tribune*.

Second, in *Chicago Tribune*, the replacements' interests in privacy in light of the violence outweighed the union's need for the information because the replacements there worked "side by side with union members for several years" and could communicate with them. Here, the Union did not even know the replacements' names.

Third, contrary to Tenneco's claims (Br.27-28), the alternative means of communication offered differ markedly from those in *Chicago Tribune*, which ensured the union's personal communication with replacement workers during

nonwork times, distribution of materials in nonwork areas, and providing information in "any mutually agreeable manner." *Id.* at 608. Instead, Tenneco's misconduct here undermined its proposed alternative. After the strike ended, Tenneco unlawfully *restricted* in-plant communication by announcing new prohibitions on posting materials, and directing employees not to do anything that might "evoke a response." (A.5-7.) These new rules put anyone discussing the Union at risk of discipline. Indeed, Tenneco's misconduct was well-timed to nip union-replacement communication in the bud, as it occurred right when the replacements became unit employees, and the Union did not know their identities.[12] The Board reasonably observed that, in these circumstances, "reliance on a union bulletin board and in-plant conversations between former strikers and replacement workers is simply no substitute for the Union's ability to communicate directly with all its employees for the purposes of representation, filing grievances,

[12] Accordingly, this case is also factually unlike *Grinnell Fire Protection Sys. Co. v. NLRB*, 272 F.3d 1028, 1029-30 (8th Cir. 2001), where the union had "ample opportunities" to, and had, in fact, been able to, communicate at work with replacements who had been employed by the employer for several years; or *JHP & Assoc., LLC v. NLRB*, 360 F.3d 904, 912 (8th Cir. 2004), where the union lacked a "compelling need" for replacements' addresses because, in the court's view, the union already had enough information to contact them. It is also unlike *Page Litho v. NLRB* 65 F.3d 169, 1995 WL 510029, at *3 (6th Cir. 1995) (unpublished), where the court found the employer lawfully withheld the addresses of replacements who were suffering contemporaneous harassment, and the employer offered access to payroll records that met the union's claimed need to monitor vacancies in the positions held by replacements.

and negotiating a collective-bargaining agreement." (A.4&n.16.) *See United Aircraft Corp. v. NLRB*, 434 F.2d 1198, 1205-06 (2d Cir. 1970) (restricted use of bulletin boards, and in-person communications with stewards limited by no-solicitation rule, were not viable alternatives to union's directly communicating with its employees). Thus, the Board reasonably found that under the totality of the circumstances, Tenneco could not justify denying the replacements' addresses.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE INFORMATION REGARDING ITS PLANNED INSTALLATION OF SURVEILLANCE CAMERAS

As shown, an employer violates Section 8(a)(5) of the Act by failing to provide requested relevant information to the union. Tenneco admits that it withheld the requested information about its proposed surveillance cameras and does not dispute that it was relevant at the time it was requested. Therefore, it violated the Act by failing to provide the information. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967).

Tenneco asserts (Br.16-17), however, that the surveillance camera information violation was *de minimis* because the request became moot when Tenneco decided against installing the cameras. There is no support for this position. Both the Board and the judge (A.2,44) found a violation, recognizing that the relevancy of information is determined at the time of the request. *See Wayne*

Memorial Hosp., 322 NLRB 100, 110 (1996); *Finn Indus.*, 314 NLRB 556, 558 n.13 (1994). Thus, Tenneco's subsequent decision not to install the cameras did not absolve it of its duty to timely provide the requested information.[13]

Contrary to Tenneco's argument (Br.16), *Bloomsburg Craftsmen*, 276 NLRB 400 (1985), does not support the proposition that the obligation to provide information expires when events render the issue moot. Rather, as here, the Board found the employer in *Bloomsburg* had a continuing statutory obligation to provide the requested information, despite the conclusion of the grievance procedure for which the union originally requested it. *Id.* at 400 n.2. Tenneco's reliance (Br.16) on *Glazers Wholesale Drug Co.*, 211 NLRB 1063, 1066 (1974), is simply inapposite because there the union failed to demonstrate the relevance of the requested information.

VI. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY PROMULGATING A RULE REQUIRING SUPERVISORY APPROVAL PRIOR TO THE POSTING OF SIGNS, LETTERS, OR PRINTED MATERIAL AT ITS FACILITY

It is well-established that Section 8(a)(5) prohibits an employer from making changes related to terms and conditions of employment—including unilaterally

[13] Recognizing that Tenneco reversed its decision to install the cameras, the Board (A.2) limited the remedy for this violation to ordering it to cease and desist from engaging in this unlawful conduct, but did not require it to provide the requested information regarding the now-defunct plan to install cameras.

changing work rules—without bargaining with the Union. *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001); *accord NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 125, 128, 131 (D.C. Cir. 2001). Tenneco did just that when, during a mandatory employee meeting, Kortz announced that the posting of signs, letters, or printed materials on company property would be subject to supervisory approval. (A.6,26;103,131,141,328.) Notwithstanding a written rule with a similar constraint, Tenneco had a longstanding practice allowing employees to freely post materials at its facility without prior approval. (A.6&n.23;82,104,107,110-12,133,142,249.) Kortz's meeting notes confirm this change, stating "Things that will be changing . . . Posting of signs, letters or printed materials are subject to supervisory approval." (A.6;328.) It is undisputed that Tenneco did not notify the Union or provide it with an opportunity to bargain before making this change, thus violating Section 8(a)(5) of the Act.

Contrary to Tenneco's argument (Br.44-45), Kortz's credibility regarding his motivation or his failure to discipline violators is not at issue. *Flambeau Airmold Corp.*, 334 NLRB at 165-66 (employer's lack of discipline against violators of new policy "immaterial"). Rather, the Board looks to whether a change to terms and conditions of employment has been implemented without bargaining. If so, a statutory violation exists, regardless of whether the rule has

been enforced. *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996). Tenneco's claim that this is not a change or excludes the union bulletin board is quite simply refuted by the evidence, including Kortz's own meeting notes.

VII. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT TENNECO VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM THE UNION

A. Applicable Principles

As discussed, Section 8(a)(5) of the Act requires an employer to recognize and bargain with the labor organization chosen by a majority of its employees. A union is entitled to a conclusive presumption of majority status during the term of a collective-bargaining agreement, up to three years. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786-87 (1996). Such a presumption "enabl[es] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying about the immediate risk of decertification and by removing any temptation on the part of the employer to avoid good-faith bargaining in an effort to undermine union support." *Id.* at 786 (quoting *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)) (internal quotations omitted). After the contract expires, the presumption becomes rebuttable, and an employer may withdraw recognition if it establishes that the union actually lost its majority status. *Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341,

347 (D.C. Cir. 2011) (citing *Shaw's Supermarkets*, 350 NLRB 585, 587 (2007)). A petition signed by a majority of employees indicating that they do not desire union representation ordinarily constitutes sufficient objective evidence supporting an employer's withdrawal. *See Levitz Furniture Co.*, 333 NLRB 717, 725 (2001); *see also BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 217 (D.C. Cir. 2003) (citing *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727, 737 (D.C. Cir. 2000)). Although an employer may withdraw recognition based on a decertification petition, it does so at its own peril, for if the employer ultimately fails to establish an actual loss of support it will not have rebutted the presumption of majority status, and the withdrawal of recognition will violate Section 8(a)(5) of the Act. *See Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 182 (D.C. Cir. 2006).

As the Court has observed, one way in which an employer imperils itself in withdrawing recognition is when it relies on employee expressions of disaffection where "the union's decline in support was attributable to the employer's misconduct." *Mathews Readymix, Inc. v. NLRB*, 165 F.3d 74, 77 (D.C. Cir. 1999). The employer's proof of the union's loss of majority must be "raised in a context free of unfair labor practices 'of such a character as to either affect the [u]nion's status, cause employee disaffection, or improperly affect the bargaining relationship itself.'" *Sullivan Indus. v. NLRB*, 957 F.2d 890, 897 (D.C. Cir. 1992).

If there is an objective causal link between the employer's unfair labor practices and the union's loss of majority support, the employer "may commit an unfair labor practice by withdrawing its recognition of the union." *Vincent Indus. Plastics*, 209 F.3d at 737 (citing *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1458-60 (D.C. Cir.1997) (per curiam)). In *Master Slack Corp.*, 271 NLRB 78, 84 (1984), the Board identified four factors relevant to evaluating this causal link: (1) the length of time between the unfair labor practices and the disaffection; (2) the nature of the illegal acts, including the possibility of a lasting detrimental effect on employees; (3) their tendency, if any, to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and union membership. *See Williams Enters., Inc. v. NLRB*, 956 F.2d 1226, 1236 (D.C. Cir. 1992) (approving *Master Slack* factors). The Board's findings with respect to this causal link are to be enforced if supported by substantial evidence. *See Vincent Indus. Plastics*, 209 F.3d at 734.

B. Substantial Evidence Supports the Board's Findings that a Causal Connection Existed Between Tenneco's Unlawful Actions and the Union's Loss of Majority Support and Therefore Tenneco Violated the Act By Withdrawing Recognition

Tenneco committed a number of unfair labor practices that hindered both the Union's ability to communicate with the employees it represented—including the replacements—and the employees' ability to communicate with one another. As

discussed above, this included refusing to furnish the Union with replacements' addresses, directing employees to refrain from discussing matters that could "evoke a response" from others, implementing a rule requiring employees to obtain permission before posting materials at the facility, and disciplining an employee for wearing a t-shirt with a protected message. Based on its careful analysis of these violations under the *Master Slack* analytical framework, the Board found (A.8) "a sufficient and substantial causal connection" between these unfair labor practices and the employees' decertification effort.

The Board began its analysis (A.7) by acknowledging that the nearly 10-month period of time that elapsed between Tenneco's unlawful acts and its withdrawal of recognition was "a relatively long period." This span of time did not, however, preclude a finding that a sufficient causal connection existed. *See Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 465 (6th Cir. 1992) (unremedied unfair labor practices within one year of signing decertification petition sufficient to taint petition); *AT Systems West, Inc.*, 341 NLRB 57, 60 (2004) (passage of nine months insufficient to dissipate effects of unfair labor practices); *Beverly Health & Rehab. Servs.*, 346 NLRB 1319, 1328-29 (2006) (passage of 6-8 months did not preclude a finding of a causal connection).[14]

[14] Tenneco asserts (Br.51) that a "close temporal proximity" between a ULP and the loss of support "is a matter of days or weeks." The Board has never suggested such a short passage of time is necessary to establish a sufficient causal

Next, given the ongoing, continuous nature of Tenneco's violations, the Board reasonably found (A.7) that they had a lasting, detrimental effect on the employees' views of the Union. Most notably, Tenneco's refusal to give the Union the replacements' addresses "severely impacted" the Union's ability to communicate privately with those employees, a majority of the unit, for the 10-month period leading up to Tenneco's withdrawal of recognition. By refusing to fulfill this obligation, Tenneco "depriv[ed] the Union of opportunities to meaningfully address any lingering feelings of disconnect that would naturally exist" in the strike's aftermath, the Board explained (A.7).

Furthermore, by unlawfully prohibiting discussions that could "evoke a response" from other employees and by unlawfully requiring that employees obtain supervisory approval before posting materials, Tenneco further interfered with the ability of the Union and the employees to communicate about protected matters. And Tenneco manifested its willingness to punish employees for openly supporting the union by disciplining Helton for displaying a protected message on a t-shirt. All of this, according to the Board (A.8), favored finding a causal link

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connection. Tenneco also erroneously states (*id.*) that the Board "[c]onceded" that Tenneco's unfair labor practices "[w]ere [s]ignificantly [r]emoved" from the withdrawal of recognition. It was the judge, whose finding concerning the withdrawal was reversed, who characterized (A.53) the passage of time as "significant."

between Tenneco's unlawful acts and the employees' disaffection because the nature of the misdeeds demonstrated the employer's "hostility towards the free expression of employee views about union matters" and its "determination to prevent the occurrence of protected union speech in the workplace" throughout the entire 10-month period between strike's end and withdrawal.

In light of their effect on employees' ability to discuss unionization, the Board properly found (A.8) that Tenneco's actions also had a tendency to cause employee disaffection from the Union. Tenneco's restrictions on communication between the Union and the employees it represented—most of whom were replacements or crossovers—"significantly restrained the Union[']s ability . . . to discern and address any concerns and disaffection that may have existed and lingered following the strike." (A.8.) Similarly, not only did Tenneco's unfair labor practices allow disaffection to linger, they directly interfered with the Union's ability to fully perform its representational obligations, which would surely lower employees' opinions of the Union's effectiveness and necessity.

Having duly considered the timing, nature, and impact of Tenneco's unlawful actions, the Board reasonably found (A.8) that Tenneco's actions, "[a]t a minimum, . . . deprived employees of an atmosphere where they could meaningfully and freely consider whether they desired to continue being represented by the Union." Substantial evidence supports the Board's finding that

a sufficient causal connection existed between Tenneco's unfair labor practices and the Union's loss of majority support, and thus Tenneco violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the Union.

C. Tenneco's Remaining Arguments Lack Merit

1. Tenneco's Reliance on the Administrative Law Judge's *Master Slack* Analysis Is Misplaced

Throughout its argument, Tenneco relies heavily on the administrative law judge's analysis of the *Master Slack* factors, arguing (Br.52) that "[t]he judge correctly found the ULPs were not of a nature to taint the withdrawal petition." But, of course, the judge engaged in his analysis only after recommending (A.52) that the Board dismiss allegations that went directly to the Union's ability to communicate with the unit, and the employees' ability to communicate with each other, about protected activity. Although the judge then engaged (A.53-54) in a cursory *Master Slack* analysis based, in part, on these allegations, that analysis was incurably tainted by his finding that these actions were lawful. That flawed analysis retains no residual value in assessing whether the Board's analysis—the analysis before the Court—was supported by substantial evidence.

2. Evidence Pertaining to the Union's Strike Activity and the Testimony of Employees Who Signed the Decertification Petition Did Not Preclude Finding a Causal Connection

Tenneco points (Br.55-61) to evidence about various individuals' conduct during the strike and petition signers' testimony to try to establish (Br.57) that "the

signers' disaffection was attributable to factors unrelated to the alleged ULPs." That evidence does not, however, establish that Tenneco's actions did not have a "meaningful impact" in bringing about employee disaffection. *Master Slack Corp.*, 271 NLRB at 84. Indeed, the Board acknowledged (A.8) that some employees may not have supported the Union because they were hired to permanently replace striking employees or had crossed the picket line. Nevertheless, the Board reasonably found (A.8) that this did not outweigh the fact that Tenneco's unlawful conduct hindered the Union's ability to engage in organizational and representational activities and to make its case directly to the employees, including the replacements.

Tenneco's effort (Br.58) to separate the replacements' testimony from its unfair labor practices is unavailing. Tenneco cites to *Master Slack*, 271 NLRB 78, 78 n.1 (1984), for the proposition that the petition signers' testimony was "highly relevant." However, in *Master Slack*, the Board noted "particularly" that the commission of unfair labor practices occurred many years before the decertification petition and the employer remedied them before the decertification petition was filed. In the absence of a correlation between the unlawful conduct and the decertification petition, the Board had "no basis to disturb the judge's reliance on the unambiguous testimony of the petition's signers" that the eight-year old violation had no impact on their conduct. *Id.* Similarly, in *Renal Care of*

Buffalo, Inc., 347 NLRB 1284, 1297 (2006), the Board dismissed the surface bargaining allegation that was the lynchpin of the General Counsel's case for employee disaffection and found that the remaining unfair labor practices were mostly unknown to the unit. In that context—very different from the situation here—the Board reasonably found no evidence establishing a causal connection between the employer's unlawful acts and the employees' decertification efforts.

Here, the Board did not ignore countervailing evidence that could have influenced replacements and crossovers to lose support for the Union. Rather, it recognized (A.8) that it was "particularly significant" that the majority of the unit consisted of crossovers and replacements. However, it found these circumstances did not outweigh the fact that Tenneco's unlawful actions hindered the Union's ability to freely communicate with the employees and thereby discern and address the employees' concerns, naturally resulting in disaffection. (A.8.) Thus, contrary to Tenneco's claim and its supporting cases (Br.57), the Board addressed the causal connection to the replacements' disaffection. *See Matthews Readymix, Inc. v. NLRB*, 165 F.3d 74, 78-79 (D.C. Cir. 1999) (single unlawful employment application was insufficient causal connection where many other explanations for replacements' disaffection existed); *Quazite Division of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497 (D.C. Cir. 1996) (Board did not link unfair labor practices with employees' lack of support for union). Tenneco's

unfair labor practices therefore deprived employees of an atmosphere where they could meaningfully and freely consider whether they wanted to be represented by the Union, and rendered the employees' expression of dissatisfaction unreliable.

VIII. SECTION 10(e) OF THE ACT PRECLUDES THE COURT FROM CONSIDERING TENNECO'S CHALLENGE TO THE BOARD'S AFFIRMATIVE BARGAINING ORDER, BECAUSE TENNECO FAILED TO RAISE THAT OBJECTION BEFORE THE BOARD

To remedy Tenneco's withdrawal of recognition, the Board ordered (A.9-10) Tenneco not only to cease and desist from its refusal to recognize and bargain with the Union, but also affirmatively ordered it to bargain with the Union for a reasonable period of time.[15] Tenneco failed to challenge this bargaining order before the Board, and therefore the Court lacks jurisdiction to consider Tenneco's challenge to the remedy now.

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

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[15] An affirmative bargaining order requires the employer to bargain for a reasonable time, defined in this context as not less than six months but not more than one year. *See Lee Lumber Bldg. & Material Corp.*, 334 NLRB 399, 399, 401 (2001), *enforced*, 310 F.3d 209, 215-16 (D.C. Cir. 2002). It precludes the filing of a decertification petition during that period, thus differing from a cease-and-desist order standing alone, which would also require bargaining, but would permit employees to file a decertification petition at any time. *See Caterair Int'l v. NLRB*, 22 F.3d 114, 121-23 (D.C. Cir. 1994).

extraordinary circumstances." Thus, if a particular objection has not been raised before the Board, a reviewing court, absent extraordinary circumstances, has no jurisdiction to consider the issue in a subsequent enforcement proceeding. *See Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 665 (1982).

After the Board issued its decision reversing the administrative law judge and finding that Tenneco unlawfully withdrew recognition, it determined that a bargaining order was necessary to remedy Tenneco's actions, as the General Counsel had requested in the complaint. Tenneco had the opportunity to file, within 28 days, a motion for reconsideration, rehearing, or reopening of the record, to present to the Board its arguments against a bargaining order. 29 C.F.R. § 102.48(d)(1). It did not do so, but instead raised this challenge for the first time in its opening brief to this Court. (Br.61-63.) Accordingly, under this circuit's well-established law, the Court lacks jurisdiction to consider this argument.[16] Further, the Board's *sua sponte* inclusion of a comprehensive and reasoned explanation for issuing an affirmative bargaining order under the facts of a particular case,

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[16] *See Spectrum Health-Kent Comm. Campus v. NLRB*, 647 F.3d 341, 344 (D.C. Cir. 2011) (failure to except to affirmative bargaining order at proper time precludes judicial review); *accord Parkwood Dev. Ctr. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008); *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1241 (D.C. Cir. 2001); *Exxel-Atmos v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493, 497-98 (D.C. Cir. 1996); *Bentonite Performance Minerals, LLC v. NLRB*, 10-1265, 2012 WL 116808, at *2 (D.C. Cir. Jan. 10, 2012) (per curiam).

consistent with this Court's jurisprudence, does not excuse Tenneco's failure to file a motion for reconsideration to the Order with particularity or permit this Court to review the merits of the Order. *See Highlands Hosp. Corp., Inc. v. NLRB*, 508 F.3d 28, 33 (D.C. Cir. 2007); *see generally Int'l Union of Elec., Radio, and Machine Workers Local 900 v. NLRB*, 727 F.2d 1184, 1192 (D.C. Cir. 1984) ("[T]he fact that the Board has or has not discussed an issue raises no necessary inferences with respect to [S]ection 10(e).").

In any event, the Board weighed the factors set forth in *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), and determined that the imposition of an affirmative bargaining order was an appropriate remedy on the facts of this case. (A.8-10.) The Board's analysis more than adequately meets this Court's test. *See Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

CONCLUSION

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

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May 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNECO, INC.	)	
	)	
Petitioner	)	Nos. 11-1314 & 11-1353
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	7-CA-49251
	)	
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,357 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
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Dated at Washington, DC
this 24th day of May, 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

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

Sec. 8(a). [Sec. 158(a).] [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [Section 157 of this title];
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
>
> * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [Section 159(a) of this title].

Sec. 10(a). [§ 160(a).] [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the

determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Sec. 10(e). [Sec. 160(e)] [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TENNECO, INC.	)	
	)	
Petitioner	)	Nos. 11-1314 & 11-1353
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	7-CA-49251
	)	
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 24th day of May, 2012