Nos. 11-1481 & 12-1064

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

1. Ozburn-Hessey Logistics, LLC was the respondent before the Board and is the Petitioner/Cross-Respondent before the Court.
2. The Board is the Respondent/Cross-Petitioner.
3. The Board's General Counsel was a party before the Board
4. There are no amici in the case.

B. Ruling Under Review: The ruling under review is a Board Decision and Order issued on December 9, 2011 and reported at 357 NLRB No. 136.

C. Related Cases: The Board is not ware of any potentially related cases in this Court or any other court of the District of Columbia.

Respectfully submitted,

/s/Linda Dreeben
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Dated at Washington, DC
this 6th day of June, 2012

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GLOSSARY

Act	National Labor Relations Act
Board	National Labor Relations Board
OHL	Petitioner/Cross-Respondent, Ozburn-Hessey Logistics, LLC
Union	United Steelworkers Union

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Ozburn-Hessey Logistics, LLC ("OHL") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board Order against OHL. The Board's Decision and Order ("Board's Order") issued on December 9, 2011, and is

reported at 357 NLRB No. 136. (A 424-448).[1] The Board had subject matter jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board found that OHL violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)). The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The Court has jurisdiction over the proceeding pursuant to Section 10(e) and (f) of the Act. OHL filed its petition for review on December 16, 2011. The Board filed its cross-application for enforcement on January 30, 2012. Both were timely; the Act places no time limit on filings to review or enforce Board orders.

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

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that OHL violated Section 8(a)(1) of the Act by its numerous acts of interference, restraint, and coercion against employees in response to their union organizing campaign.

2. Whether substantial evidence supports the Board's finding that OHL violated Section 8(a)(3) and (1) of the Act by warning, suspending, and discharging employees because of their union activities.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

Upon an unfair labor practice charge filed by the United Steelworkers Union ("the Union"), the Board's General Counsel issued a complaint against OHL, alleging violations of Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)). (A 427.) After conducting a hearing, an administrative law judge issued a decision on May 20, 2010. Specifically, the judge found that OHL violated Section 8(a)(1) of the Act by coercively interrogating employees regarding union activity; threatening in various ways employees who supported or might support the Union; confiscating prounion literature; contacting the police to have union agents removed from public property; and ordering offsite employees engaged in distribution of union literature for organizational purposes to leave OHL's

premises. The judge additionally found that OHL violated Section 8(a)(3) and (1) by issuing disciplinary warnings to employees and suspending and discharging employees because of their union activities. (A 446-48.) After OHL filed exceptions to the judge's decision, the Board issued a Decision and Order, affirming, with slight modifications, the judge's findings and conclusions regarding the unfair labor practices. (A 424-27.)

In a separate but related action commenced before the issuance of the Board's Order, the Board's Regional Director, on August 18, 2010, filed for a preliminary injunction against OHL, under Section 10(j) of the Act (29 U.S.C. 160(j)), in the Western District of Tennessee. The district court granted the injunction, and ordered OHL to cease and desist from its coercive interrogations, threats, and other unlawful activity and to rescind discipline that was issued and reinstate the terminated union activists. *See Hooks ex rel. NLRB v. Ozburn-Hessey Logistics, LLC*, 775 F. Supp.2d 1029 (W.D. Tenn. 2011). The court found reasonable cause to believe OHL engaged in the unfair labor practices found by the administrative law judge and that the requested injunctive relief was just and proper. *Id*. The Board's Order in this case pretermitted further proceedings before the district court, because the court's Section 10(j) jurisdiction ends once the Board issues a final order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Company Background and the Start of the Employees' Union Campaign

OHL engages in the business of packaging and shipping various products for other businesses. It operates three warehouses in Memphis, Tennessee, and provides logistical support to multiple national retailers. (A 427; 3, 56, 212, 216.) One of the warehouses is referred to as Remington, which is on Global Drive, and it is located about 2 miles from the main company complex, on Holmes Road, where the other two warehouses are located.

In early May of 2009, employees at one of OHL's main warehouses became interested in forming a union.[2] Through a coworker, employee Carolyn Jones was introduced to the Steelworkers Union's local-area president. Shortly thereafter, she recruited her boyfriend Jerry Smith, also an OHL employee, to help organize a union. They then brought in another employee, Renal Dotson, to assist in the effort. The three became part of a core organizing committee that began speaking in favor of the Union and distributing prounion literature to their fellow employees. (A 428; 4-5, 11-12, 34-35, 57-59, 96-97, 112-13.) They did this in nonworking areas, including parking lots and breakrooms, and during nonworking time, before and after work and during lunches and breaks. On June 18, the core organizing

[2] Unless otherwise stated, all dates refer to 2009.

committee met with other employees for their first offsite union meeting to more broadly discuss the idea of forming a union at OHL. (A 428, 435-36; 8-15, 61-63, 96-98.)

The employees' interest in forming a union, however, would face strong Company opposition. OHL's Associate Handbook described its general antiunion position as a matter of Company policy: "OHL does not believe that union representation would be in the best interest of OHL associates or the Company itself." The handbook further stated that a "union can only disrupt" and that the disruption could interfere with the progress and job security of the employees. (A 427; 321-322, 334.) As employees became more involved in trying to form a union, OHL managers directly responded to the employees' union activities.

B. Human Resources Manager Van Young Interrogates Employee Undenise Martin Regarding the Employees' Union Activities

Shortly after employees began talking about organizing a union, OHL's Human Resources Manager, Evangelia Van Young, began talking to the employees about the union activity at the facilities. Van Young was the highest regional ranking human resources manager at OHL and oversaw all serious disciplinary actions. Early in June, she contacted employee Undenise Martin, who had taken the day off, at her home. On the phone, Van Young asked Martin whether she had "heard anything about the union activities." Martin responded that she had heard "some talk." (A 431; 251-53, 261, 270.) Young questioned

Martin, further asking her why the employees would want to organize the Union. *Id*. Martin replied that some of the employees did not feel like they could go to the managers and talk to them. (A 431; 251.)

C. Area Manager Phil Smith Threatens Employees with the Loss of the Gain-Share Program and Other Benefits

OHL had a history of providing employees with a benefit, referred to as "gain shares," which were awarded as bonuses in different amounts depending upon performance and seniority. One day in July, Area Manager Phil Smith walked past employee Jerry Smith, who was working on a machine. As Phil Smith passed by he told Jerry Smith, a known union supporter at that time, that he "didn't know what . . . [he] was risking," that he "could lose his gain shares . . . if a union" came in. There was no further discussion, and Jerry Smith continued to do his work. (A 428; 115.)

Later that summer, in August, Area Manager Smith conducted a meeting with all the employees of a particular department, where he spoke about the gain-share program. One of the employees in the crowd asked whether employees would still be eligible for the gain-share program if they got "a union in here." (A 428; 16-17.) Phil Smith responded, "[a]bsolutely not, you will not be eligible for . . . [gain share]." *Id*. Area Manager Smith additionally explained that they would lose other incentives as well, including meals, cups, and T-shirts. (A 428; 53-54, 165-67, 173-74, 308-09.)

D. OHL Takes Disciplinary Action Against Union Activists Dotson, Jones, and Smith

In July and August, OHL employees' began to more openly pass out union literature and talk to their coworkers about the benefits of being in a union. Before long, OHL managers disciplined three prominent union supporters: Renal Dotson, Carolyn Jones, and Jerry Smith. (A 436; 30, 55, 128, 273-76, 287, 404, 407.)

1. The Company issues Renal Dotson a disciplinary warning, tells him to find another job, and then discharges him

After working for OHL as a temporary employee for approximately 8 months, OHL hired Renal Dotson as a full-time employee in March. He worked as a "reach truck driver," which is similar to the work of a fork lift operator. Dotson's duties included placing delivered products in their assigned places and bringing products from their stored locations to employees who packed the product for shipment. (A 438; 93-95.)

In May, Dotson became interested in the union organizing campaign after talking to his coworker Carolyn Jones. Thereafter, he spoke to employees about the Union, distributed prounion literature, and attempted to get coworkers to sign union authorization cards. Dotson kept his union materials in a blue folder that he placed in a pocket in his truck. On July 30, while Dotson was briefly away from his truck, he noticed Operations Manager Jim Windisch at his truck. Dotson approached Windisch and asked him what he was doing. Windisch refused to

respond and simply left. Dotson then saw that his pieces of prounion literature were scattered on the floor of his truck. (A 438; 96-102.)

On July 31, the morning after Dotson saw Windisch in his truck, Dotson's supervisor, Barbara Oyugi, approved him to work overtime to assist in a labeling project. He began his overtime by placing special labels on a product for shipment to a customer. After performing this task for some period, other employees were running out of product. Brittany Newberry, who was coordinating the project, told Dotson that he needed to go and get the truck to obtain replenishments. Part of Dotson's job as a truck driver was to provide additional product, called replenishments, for those who need them in order to keep employees from being idle. As he was setting off to help Newberry, Tiffany Robertson, another employee, also requested replenishments. When Dotson returned with the product that Newberry needed, he prepared to assist Robertson. Newberry told Dotson to "go ahead" and help her. (A 438; 103-08, 140-43.)

When Operations Manager Windisch came to work that morning, he noticed Dotson performing the replenishments. Without talking to Dotson, he asked Oyugi about Dotson working overtime. Oyugi explained that she had told him to come in to help with the special labeling work. Windisch said that he observed Dotson doing replenishments, not special labeling, and that they would have to talk to him. Nothing more was said about the matter at that time. (A 438; 231-33.)

Four days later, on August 4, Windisch called Dotson into his office. He told Dotson that he had seen him doing replenishments the morning of July 31, even though he was assigned overtime to work on special labeling. Dotson explained that the other employees had run out of product, and they asked him to help. Dotson further explained that Oyugi had told him that it was part of his job to assist other employees when they needed additional product. Windisch then issued a written discipline, reflected as a "verbal discussion" in an Employee Performance Report. The report was dated August 2, because it had been prepared in advance of the meeting. Windisch had not consulted Oyugi about issuing the discipline. (A 438; 108-11, 231-33, 345.)

On August 26, Windisch called Dotson into a meeting with himself and Area Manager Phil Smith. Area Manager Smith began questioning him about why he was at the Company. When Dotson, not knowing why he was called into the meeting, asked what was happening, Area Manager Smith repeated his question: "Why you here with this company? Why you working for this company? Why don't [you] go down Holmes Road somewhere and find a new job?" (A 439; 116-18.) Dotson explained that he needed to make money, and said, "Hey, I just want to go out and do my job. That's all I want to do." (A 439; 118, 245-46.)

After being permitted to leave, Dotson returned to the task he was performing on his truck. When another employee asked for replenishments,

Dotson explained that he could not help because he did not "want to get another write-up." (A 439; 119.) Windisch overheard Dotson and directed him to "go to see Van Young," which he did. *Id*. At that point, Human Resources Manager Van Young discussed a transfer from the current account Dotson was working on to another account. Windisch arrived and stated that he wanted Dotson to be disciplined because he would not provide the replenishments as asked by the other employees. Without issuing any discipline, Van Young asked what Dotson had been working on before the meeting. Dotson explained, and then he was directed to go back to work. (A 439; 119-23.)

The next day, August 27, Human Resources Manager Van Young sent an email to upper-level management, reporting that Dotson "is working hand in hand with the crew that is trying to drive a union into OHL Memphis." (A 436; 273-76, 404-05.)

The following day, August 28, OHL terminated Dotson's employment. That morning, he arrived at work on time, but he missed the short meeting that begins the shift. (A 439; 123-24.) Shortly after the meeting, his supervisor, Barbara Oyugi, saw him working, and she told him that he needed to report to Human Resources. When he got there, Van Young, Area Manager Smith, and Windisch were there. Area Manager Smith told Dotson that he had "violated Company policy and that was it." (A 440; 125-26.) Dotson asked, "What for? What is the

company policy?" But the managers simply said he was discharged and gave him a separation notice that had already been prepared. (A 440; 126-27, 348.) It stated that Dotson was discharged for "violation of company policy failure to follow mgmt instructions." *Id*. Dotson wrote on the form, "for not showing up to a morning meeting." *Id*.

2. The Company issues Carolyn Jones a warning and then suspends her

OHL hired Carolyn Jones as an Auditor on August 7, 2007. As described above, she was an integral part of the Union's organizing campaign at OHL. She took a lead role recruiting other employees and getting them interested in the Union. In a weekly report for the week ending August 17, Human Resources Manager Van Young described to upper-level management the "presumed union activity" at OHL, and she cited Carolyn Jones and Jerry Smith as the "presumed chairs of this drive." (A 436, 441; 2-14, 287, 407.)

On August 27, as Jones was leaving the warehouse and passing through the security area metal detector to go on break, the detector beeped. Operations Manager Windisch was there when it beeped and told Jones to go to the back of the line. She did so, stating that it would just make her break "a little bit longer." She then went through without a beep on the second pass and went on break. (A 441; 24-25.)

The next morning, August 28, Jones was called to Van Young's office. Van Young, Windisch, and Area Manager Phil Smith were present. Jones had a previously-scheduled appointment to be at her son's school around noon, and she told the managers this. Smith responded it would only take a few minutes and then told Jones that security had reported that she had not gone "to the back of the line when [she] was suppose to." (A 441; 18.) Jones responded that she had gone to the back of the line and did not know why security would say that. She also told the managers that this was a "waste of time and she needed to be at the school." (A 441; 18-19.) Jones then requested that the security guard be brought into the meeting to confirm what happened. *Id*. Windisch said the Company was "not going to do it that way." (A 441; 250.) Area Manager Smith then stated that security also said that "you're always complaining. You always just have something to say every time he tells you something." (A 441-42; 19.) Jones responded, "this just don't make any sense." *Id*.

Jones then said that Windisch was at the security entrance that morning and knew what happened. But Windisch shook his head and said "nope." (A 442; 121.) At this point, Jones asked if he was "going to sit here and lie in my face and say that I did not go to the back of the line when you know I went to the back of the line." *Id*. During the conversation, Jones accused Windisch of being a "lying

sack of crap," and expressed her frustration saying, "I did go to the back of the line. And I can't believe you're sitting here lying in my face." *Id*.

Area Manager Smith then handed Jones a written warning, which had previously been prepared. Jones read it over and told the managers it was all false. Instead of signing the paper as requested, Jones wrote "10 witnesses" on the sheet, indicating there were others in line that could corroborate what she was saying. Prior to issuing the discipline, the managers never questioned any of the other employees who had been in the secured area that day. (A 442; 20-21, 341.) Jones then turned to the human resources manager and said, "this is not procedure. You don't . . . normally operate like this . . . you would have asked me my side of the story." (A 442; 20-21.) Jones then said they were "trying to do to me the same thing you did to Dotson." *Id*. By the time the meeting ended, Jones had missed her son's school meeting, and she left to go to lunch. (A 442; 26.)

After Jones returned from her lunch break, she was called into another meeting with Area Manager Smith, Windisch, and Van Young. OHL's Corporate Employee Relations Manager Laura Reed was on the speaker telephone. Reed explained that the other managers had just described the earlier meeting and said that Jones had been disrespectful. She went on to say that they decided to issue Jones a 5-day suspension. (A 442; 29-32, 307, 343.) Jones protested by asking Reed how it was possible to come to such a conclusion without getting her side of

the story first. (A 442; 30.) Reed replied, "Well, I'm going by what management said because they are management." *Id*. Jones then asked Reed whether "they" told her that "we were organizing a Union in this place?" *Id*. Reed replied, "No," despite having received at least 2 weekly reports relating to the organizational activity at OHL. *Id*. Jones asked whether "they" had told her that Renal Dotson was fired "for trying to organize?" Reed replied, "Well, I don't know about that, Ms. Jones." *Id*. Jones finished by saying she was "not backing off." *Id*.

3. The Company discharges Jerry Smith

Jerry Smith started working for OHL on October 15, 2007. He was Carolyn Jones' boyfriend, and she got him interested in the Union. As with Jones and Renal Dotson, Smith was integral to the Union's organizing campaign and took an active role by attending union meetings, passing out prounion literature on breaks, and telling coworkers about the benefits of joining a union. OHL considered Jerry Smith one of the "presumed chairs" of the organizing drive. On August 28, the same day Renal Dotson was terminated and Carolyn Jones suspended, Jerry Smith was also terminated. (A 436, 444; 55, 57-64, 287, 407.)

Shortly after Carolyn Jones received her written warning for not going to the back of the line, Jerry Smith saw her crying. She had just walked past Area Manager Phil Smith and Operations Supervisor Windisch – all three of them were inside the secured area. Jerry Smith was some distance away on the other side of

the security fence – outside the secured area. He was unaware she had been disciplined and called out, "What's the problem?" (A 444; 27, 66-72.) Employee Athena Cartwright was nearby and heard Jerry Smith ask, "Is everything okay?" (A 444; 168-69.) At that point, Area Manager Smith turned and started walking fast towards the fence. With the fence and about 4 to 5 feet between them, Area Manager Phil Smith asked Jerry Smith who he was talking to, and Jerry Smith responded, "to both of you." (A 444; 70.) In a stern voice, Area Manager Smith then said, "any problem with Carolyn isn't between you and I. You don't have anything to do with this." (A 444; 314.) As this brief conversation occurred, Jones had walked through the metal detector and made her way to Jerry Smith. She told Jerry Smith that they should go "because you know what they're trying to do." (A 444; 26-29.) They then clocked out and left for lunch. *Id*. The nearby security guard never got out of her seat during the interchange between Area Manager Smith and Jerry Smith. (A 444; 70-71.)

When Jones and Jerry Smith returned from lunch, OHL managers called them into separate meetings. As discussed above, OHL suspended Jones for 5 days. Jerry Smith met with Area Manger Phil Smith, Windisch, and Van Young. Area Manager Smith handed Jerry Smith an Employee Performance Report that said he was terminated. The report described Jerry Smith as confrontational with both Area Manager Smith and Windisch. The report also said that OHL

discharged him for "improper conduct." (A 444-45; 73-75, 77-78, 349-50.) Area Manager Smith told Jerry Smith that "no violence is accepted," and that he "felt threatened" by what Jerry Smith had said. (A 445; 75-76.) Jerry Smith turned to Phil Smith and asked, "You really mean to tell me I threatened you by saying, 'What's the problem?'" Manager Smith said, "[Y]es, I did." *Id*. That was Jerry Smith's last day of work.

E. Following Dotson's and Smith's Discharges and Jones' Suspension, OHL Human Resources Manager Van Young Contacts the Police To Have Union Agents Removed from Public Property

On August 31, the Union's staff organizers, Benjamin Brandon and Curtis Hawkins, went to OHL's Remington warehouse to distribute union literature and talk to employees who were on their lunch break. (A 431-32; 192-94.) A security guard noticed them by the entrance but outside the Company's property line and contacted Area Manager Smith. He said that "they" were blocking the road and also explained that he did not know what they were doing. (A 431; 262-63.) Area Manager Smith then called Human Resources Manager Van Young and told her that the security guard had reported "some gentlemen [were] out there and they were stopping the employees going in and out . . . ." (A 431; 262-63.) Area Manager Smith then went out to investigate. As he approached, Jerry Smith, who had been discharged just days before, and Carolyn Jones, who was serving a 5-day

suspension, arrived to help pass out the union literature. (A 431-32; 79-83, 192-94, 406.)

Area Manager Smith asked the group to leave and said that they were trespassing. Brandon replied that they were not on the Company's property and "that it was public property and [that they] had a legal right to handbill there." (A 432; 80-87, 794-98.) At the warehouse, there is a large white line adjacent to a stop sign that marks the line dividing OHL's property and public right-of-way. Brandon, Hawkins, Jerry Smith, and Jones were all on public property when Area Manager Smith arrived. Nonetheless, Manager Smith directed Brandon to "go across the street." (A 431-32; 197.) Brandon refused to leave. At that point, Van Young approached and asked Manager Smith if he had called the police. He said that he had not, and Van Young stated that she was "doing it." (A 431-32; 197-98, 263.) The union supporters were on public property side of the white line when Van Young contacted the police. (A 432; 81-82, 197-99.)

Shortly thereafter, two police officers arrived in one vehicle. They spoke with Brandon and told him that Manager Smith had claimed that they had crossed the white line onto company property. Brandon denied the allegations on behalf of the group. The police did not direct the union supporters to move. The officers remained for a few minutes and then left. The police did not issue any citations. (A 432; 85, 198-202.)

F. OHL Prohibits "Offsite" Employees from Engaging in Solicitation and Distribution at the Company, and Operations Manager Ewing Interrogates Employees About Their Union Activity

On September 18, a group of employees, whose work day ended early, joined the Union's staff organizer and Jerry Smith in an attempt to distribute union literature at a different entrance of OHL's Remington warehouse. (A 433; 33-34, 41, 202.) A wide two-lane driveway provides access to the warehouse gate, which is approximately 30 feet from the public street. When the group arrived to leaflet the Remington warehouse employees, Jerry Smith and the staff organizer remained on the public area by the street. OHL employees, including Carolyn Jones, entered OHL's property but did not cross into an internal area that was surrounded by a fence and gate. Jones went to an area near the driveway that went to the employee parking lot. (A 433; 36-42, 203-04.)

Soon after Jones arrived, OHL's Operations Supervisor Greg Bradsher confronted her and said that "[she was] going to have to leave OHL premises immediately." (A 433; 37.) Jones responded that she was an OHL employee and had the right to handbill "my coworkers." *Id*. Bradsher asked her to handbill on the street where she had been on previous occasions. *Id*.

Union staff organizer Brandon, while remaining on the public side of the property line, called to Bradsher and stated that the OHL employees had the "right to handbill there to their coworkers." (A 433; 205-09.) Bradsher replied that he

did not care; he wanted them "off the property." *Id*. Brandon replied that they were not leaving, and that the OHL employees had a right to handbill. *Id*.

Bradsher left and returned with Area Manager Kelvin Davis, who began to approach Jones. Davis announced, "you all going to have to leave the premises right now," and then said, "You're on company property and you're not allowed." (A 433-34; 38-39, 208-09.) Jones again stated the she was an employee. Jones then retrieved her badge from her vehicle and showed it to Davis. But he was undeterred and said, "well, you're going to have go to the street where you were . . . you're not allowed to do this on [OHL] property." *Id*. Jones continued leafleting. As Jones stood next to the driveway, employees leaving stopped their vehicles for a moment to receive the materials. Jones explained that they "only stop[ped] if they wanted to stop." She was not standing in front of vehicles blocking traffic, and employees who chose to stop only did so briefly to receive the literature. (A 433-34; 38-42.)

About a week later, on September 25, employees Carolyn Jones and Kamisha Watson, on their nonworking time, went to the Remington warehouse to talk to the employees. When they observed employees coming out of the warehouse for their afternoon break, Watson went to greet the employees; they were in an area outside of the building. When Jones approached them, a security guard came out of the building and told her that she was "going to have to leave

the premises." (A 434; 38-39, 136-39, 147-49, 157-60.) Jones responded that she had a right to be there. *Id*. The guard said that he was "just doing what they told me to do" and went back inside.

Jones started to talk to her coworkers about the Union. (A 434; 43, 146-50.) Operations Manager Roy Ewing, who knew that Jones was an employee, came out and told her, "you know you can't be out here doing this stuff." *Id*. Jones replied that she was trying to get her coworkers "signed up," referring to having them support the Union, and that she was "not doing anything wrong." *Id*. She said that "federal law gives me that right." *Id*. Ewing asked Jones to come to his office, but Jones declined saying, "No, let's just stay on the outside." Ewing told her that she did not work at the Remington warehouse and that she would have to leave. Jones replied that she did work for OHL. Ewing responded, "Yeah, but you don't work in this building, so you going to have to leave the premises." Jones chose not to push the issue further; she said, "okay," and then left. (A 434; 43-44.)

After Jones left and the break for the Remington employees was over, Ewing asked the employees returning to work from the break to come together so that he could talk to them. Ewing then questioned the employees: "What did they say?" (A 434; 150-51.) He also asked them about the pamphlets Watson and Jones were passing out. *Id*. One employee, David Freeman, answered, "they didn't say nothing." *Id*. Another employee, Jeovunte Gant, replied that they "were giving us

some union literature," to which Ewing inquired, "Well, did you guys accept any of the literature? Do you understand what they're talking about?" (A 434; 160-61.) Other than Freeman and Gant, none of the other employees said anything, and everyone went back to work. (A 434.)

G. Human Resources Manager Van Young Tells Employees They Will Lose Their Jobs if They Participate in an Economic Strike and Additionally Describes that It Would Be Futile To Select a Union

Around October 9, Human Resources Manager Van Young conducted a meeting with 25 to 30 employees. During the meeting, she told the employees if they went on strike, they "would be replaced by temps and a lot of you all will lose you all's jobs." (A 432; 154-55.) She stated that OHL had some leeway in whether the employees could come back if they were engaged in an economic strike, and she said this without further explanation. (A 432; 152-55, 156.)

During the same meeting, Van Young additionally described what negotiations would be like if the employees voted in a union. Van Young explained that there could be no contract. She said that the Union could propose a contract, but the Company could take a position that it "can't do that." She said the Union's negotiators would then have to rewrite their proposals, and "they'll be doing that for the next 10 years before they get a contract." (A 432; 155, 163-64.)

H. Area Manager Phil Smith Confiscates Prounion Literature from the Breakroom Prior to the Ending of Breaks

As certain employees continued in their efforts to organize a union, they tried to spread their message by communicating to coworkers in the OHL breakroom. On October 15, employees Jennifer Smith and Shelia Childress were on the 11:00 a.m. morning break. They sat together at one of the tables in the breakroom and picked up and began reading some union literature. As they read the literature, Area Manager Smith came into the room. He then proceeded to take the union literature off the other tables, "balling the papers up." Area Manager Smith took and discarded the materials on the other table before the morning break had ended. (A 430; 176-77, 178-81.)

The next day, October 16, employee Mark Yelverton arrived at work prior to the start of his shift and went to the breakroom. He placed prounion literature printed on blue paper on the tables. As he left to get to his work area, he heard his name called. He turned and Area Manager Smith was holding the blue papers. Yelverton saw Area Manager Smith raise the blue papers over his head and then proceed to tear up the union literature as he hollered out, "Not in my warehouse." (A 430; 188-90.) Yelverton then saw Area Manager Smith throw the papers into a garbage can. (A 430; A 191.)

Later that morning, another employee, K.C. Foster, observed Area Manager Smith pick up prounion literature off the tables in the breakroom during the break

that began at 10:00 a.m. She heard him say, "[i]t's time to clean up," as he began to remove and ball up the prounion literature from the tables. (A 430; 182-87.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 9, 2011, a three-member panel of the Board (Chairman Pearce and Members Becker and Hayes) issued its Decision and Order. The Board found that OHL violated Section 8(a)(1) of the Act (29 U.S.C. § 158(1)) by: coercively interrogating employees regarding their own and others' union activities; threatening employees with loss of the gain-share program and other benefits if they selected the Union; telling employees who support the Union that they should find another job; confiscating prounion literature from breakrooms prior to the end of breaks; threatening employees with loss of their jobs if they participate in an economic strike; threatening that it would be futile for employees to select the Union as their collective-bargaining representative; contacting the police to have union agents removed from public property; interfering with employees' right to distribute literature to their fellow employees in nonworking areas on nonworking time; and prohibiting OHL employees from engaging in lawful solicitation and distribution at an OHL location at which they did not work. The Board additionally found that OHL violated Section 8(3) and (1) of the Act (29 U.S.C. § 158(3) and (1)) by warning and discharging Renal Dotson, warning and suspending Carolyn Jones, and discharging Jerry Smith. (A 424, 446.)

To remedy the violations, the Board's Order requires OHL to cease and desist from engaging in the above-described unfair labor practices. Affirmatively, the Board's Order directs OHL to rescind the discriminatory discipline issued to Renal Dotson and Carolyn Jones; offer Renal Dotson and Jerry Smith full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; make whole Renal Dotson, Carolyn Jones, and Jerry Smith for any loss of earnings and other benefits suffered as a result of the discrimination against them; remove from its files any reference to the unlawful warning and discharge of Renal Dotson, the unlawful suspension of Carolyn Jones, and the unlawful discharge of Jerry Smith, and notify them that this has been done and the actions will not be used against them in any way. OHL is also required to post a remedial notice. (A 424, 426.)[3]

[3] The Board's Order requires posting of the remedial notice "in all places where notices to employees are customarily posted" and "distributed electronically . . . , if the [employer] customarily communicates with its employees by such means." (A 424-25, Member Hayes dissenting). *See also J. Picini Flooring*, 356 NLRB No. 9 (2010). Although OHL cites the electronic posting requirement as an issue (Br. 4), it failed to address it in any other way in its opening brief. Consistent with Rule 28 of the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived. Fed. R. App. P. 28(a)(9)(A). This Court has repeatedly refused to consider passing references to vague and unsupported claims, and it has consistently ruled that an opening brief "must contain" citations to the authorities and record that support the petitioner's arguments. *See Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB,* 363 F.3d 437, 441 (D.C. Cir. 2004) (citing cases).

SUMMARY OF ARGUMENT

This case involves numerous unfair labor practices committed by OHL during its employees' campaign to organize a union. Substantial evidence supports the Board's findings that OHL violated the Act by interrogating and threatening employees and by repeatedly working to prevent employees from communicating with their coworkers about their terms and conditions of work and the idea of forming a union.

Substantial evidence also supports the Board's findings that OHL disciplined Renal Dotson, Carolyn Jones, and Jerry Smith because of their union activity. OHL was well aware of, and does not contest, these employees' union involvement. And in the context of the managers' unlawful threats, interrogations, and other behavior, OHL repeatedly demonstrated its animus towards the employees' union activity. Significantly, Dotson's and Smith's discharges and Jones' warning and suspension occurred shortly after internal communications to upper-level management singled them out as the prominent union supporters at OHL. As the credited facts demonstrate, the employees' union activity was a motivating factor in OHL's decision to discipline them. In response, OHL fails to meet its burden of showing that it would have taken the same adverse action against these employees even if they had not engaged in protected union activity.

To defend against the various violations, OHL repeatedly relies on discredited evidence without providing sufficient reasons for the Court to overturn the Board's credibility determinations. OHL also is unable to demonstrate that any of the Board's conclusions was contrary to well-established law.

STANDARD OF REVIEW

This Court "accords a very high degree of deference to administrative adjudications by the NLRB." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (citation omitted). In reviewing the Board's decision, the Court must uphold the Board's findings of fact, and the Board's application of law to particular facts are "conclusive," if supported by "substantial evidence on the record considered as a whole." Section 10(e) of the Act (29 U.S.C. § 160(e)). *Accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Board's factual findings should not be disturbed, even if a reviewing court on *de novo* review would reach a different result. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 306 (D.C. Cir. 2003). And the Board's determination of questions of motive is "give[n] even greater deference" by the Court. *See Frazier Indus. Co. v. NLRB*, 213 F.3d 750, 756 (D.C. Cir. 2000); *see also Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995). Thus, the "Board is to be reversed only when the record is 'so compelling that no reasonable factfinder could fail to find' to the

contrary." *United Steelworkers of Am. Local 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993) (*quoting INS v. Elias-Zacarias*, 502 U.S. 478, 484 (1992)).

Moreover, this Court gives great deference to an administrative law judge's credibility determinations, as adopted by the Board. *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1246 (D.C. Cir. 1994). Indeed, this Court defers to such credibility determinations unless they are "hopelessly incredible," "self-contradictory," or "patently unreasonable." *NLRB v. Capital Cleaning Contractors*, 147 F.3d 999, 1004 (D.C. Cir. 1998); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OHL VIOLATED SECTION 8(a)(1) OF THE ACT BY ITS NUMEROUS ACTS OF INTERFERENCE, RESTRAINT, AND COERCION AGAINST EMPLOYEES IN RESPONSE TO THEIR UNION ORGANIZING CAMPAIGN

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer's conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *Avecor*, 931 F.2d at 931; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

B. OHL Coercively Interrogated Employees Regarding Union Activity

It is well settled that an employer violates Section 8(a)(1) of the Act by coercively interrogating employees about their union support and activities. *See Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991); *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987). In determining whether an employer's interrogation has a reasonable tendency to coerce, the Board appropriately considers the totality of the circumstances. *See Rossmore House*, 269 NLRB 1176, 1178 and n.20 (1984), *aff'd sub nom., Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Southwire Co. v. NLRB*, 820 F.2d at 456.

The credited facts show high-level managers questioning employees about their union sympathies and the union activities of others. (A 431, 434, 446.) First, Human Resources Manager Van Young, a high ranking manager with disciplinary responsibilities, contacted Undenise Martin at her home via telephone and asked her whether she had heard anything about the union activities at OHL. After Martin said she had heard "some talk," Van Young pushed further and asked why the employees would want to organize a union. (A 431; 251-53, 270.) Second, Operations Manager Roy Ewing pulled a group of workers together to talk about the Union right after the employees were returning from a break in which union

supporters were attempting to pass out prounion literature.[4] Ewing asked the employees, "What did they say? What is the pamphlets about?" One employee, David Freeman, responded that "they didn't say nothing." Another employee, Jeovunte Gant said that they were handing out union literature. The manager then pushed for more information and asked whether the employees took the information or if the employees knew what the union supporters were talking about. (A 434; 150-51, 160-61.)

These facts fully support the Board's finding that OHL managers coercively interrogated employees about their union sympathies and the union activities of other employees. As the Board observed (A 431, 434), none of the interrogated employees had been open about their union sympathies at the time they were questioned. Thus, Van Young's and Ewing's questions were aimed at discovering new information about the employees' personal interest in the Union and information about other employees' union activities.[5] Additionally, the managers did not inform the employees of any legitimate reason for questioning them. And

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[4] Board Member Hayes found it unnecessary to pass on whether Manager Ewing's questioning violated Section 8(a)(1) because he felt any finding would be cumulative of Van Young's unlawful interrogation and not affect the remedy.

[5] OHL cannot rely (Br. 39) on *SFO Good-Night Inn*, 352 NLRB 268 (2008), *incorporated in*, 357 NLRB No. 16 (2011), *court review pending*, Nos. 11-1295 and 11-1325 (D.C. Cir. filed August 18, 2011) (awaiting oral argument). Van Young and Ewing did not merely announce that they wondered why an employee would want to join a union; they asked the employees questions about union activity that called for answers.

the managers gave no assurances against reprisals. Perhaps tellingly, the employees who were questioned gave brief evasive answers. *See Perdue Farms, Inc., Cookin' Good Div. v. NLRB,* 144 F.3d 830, 835-36 (D.C. Cir. 1998) (employer coercively interrogated employees where employer did not know employees' union sympathies, questions appeared to seek information about individual union activities, and employer gave no assurances against reprisal); *Midwest Reg'l Joint Bd. Amalgamated Clothing Workers of Am., AFL-CIO v. NLRB,* 564 F.2d 434, 443 (D.C. Cir. 1977) (interrogation unlawful where employer failed to explain purpose of questions, did not offer assurances against reprisals, and employee hedged in reply).

Additionally, the managers made their inquiries in the context of OHL's antiunion campaign, which included threats of loss of benefits and jobs, and employee discharges and suspensions – just to name a few. In those circumstances, the Board had ample reason to find that the managers' questioning tended to be coercive. *Jeffrey Mfg. Div., Dresser Indus., Inc. v. NLRB,* 654 F.2d 944, 946-47 and n.3 (4th Cir. 1981) (interrogation coercive where surrounded by employer hostility toward advent of union). OHL's claims (Br. 38-40), that its managers' simply made innocuous, rhetorical, and open ended statements that were at worst *de minimus*, ignores Van Young's and Ewing's questions about the employees' union activity and the context in which they were made.

C. OHL Unlawfully Threatened Employees with Loss of Benefits

The Board also reasonably found that OHL made a variety of unlawful threats. It is well settled that employer statements threatening to penalize employees if they choose union representation violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *Avecor, Inc. v. NLRB,* 931 F.2d 924, 931 (D.C. Cir. 1991) (citing *Southwire Co. v. NLRB,* 820 F.2d 453, 457 (D.C. Cir. 1987)).

The credited evidence again clearly showed that OHL's Area Manager Phil Smith threatened employees with the loss of benefits if the employees were to select the Union. In July, he told union supporter Jerry Smith that he "didn't know what . . . he was risking," that he "could lose his gain shares . . . if a union" came in. (A 428.) A month later, he told a group of employees that they would "absolutely not" be eligible for the gain-share bonus if a union came in and that other benefits such as lunches, shirts, and cups would no longer be provided if the employees selected the Union. (A 428.) As found by the Board, such threats are well-established violations of the Act. *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 466 (2001) (threats that employees would lose profit sharing, holiday pay, and vacation if they selected a union found unlawful).

OHL (Br. 43-44) has shown no basis for overturning the credited account the employees' version of the threats. As this Court has observed, "[t]he mere fact that conflicting evidence exists is insufficient to render a credibility determination

'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required." *Parsippany Hotel*, 99 F.3d at 426. And the Board succinctly addressed OHL's argument (Br. 44) that Area Manager Smith was merely repeating company policy. Even under this defense, the manager was echoing a policy that unlawfully restricted benefits to nonunion employees. (A 428) (citing *Niagara Wires, Inc.*, 240 NLRB 1326, 1328 (1979)); *see also Melville Confections, Inc. v. NLRB*, 327 F.2d 689, 691-92 (7th Cir. 1964).

D. OHL Unlawfully Told Renal Dotson, an Active Union Supporter, that He Should Find Another Job

It is a violation of Section 8(a)(1) for an employer to suggest that an employee, who has shown interest in union activity, should quit. *NLRB v. Almet, Inc.*, 987 F.2d 445, 451-52 (7th Cir.1993) (supervisor unlawfully solicited an employee to quit in order to convince him to stop his prounion activities); *Roma Baking Co.*, 263 NLRB 24, 30 (1982) (a suggestion that employees could quit, rather then unionize, if they were not happy violates Section 8(a)(1)). Renal Dotson was one of the core union supporters at the Company, which is evidenced by the manager emails describing him as "working hand in hand with the crew" trying to bring in the Union. (A 439; 404-05.) Operations Manager Windisch, who at the latest became aware of Dotson's union activities by June 30, called Dotson into his office on August 26, and along with Area Manager Smith, they began to question Dotson. Contrary to OHL's claims (Br. 42-43), the credited

facts show that Area Manager Smith repeatedly asked Dotson why he was working for the Company and why he did not "go down Holmes Road somewhere and find a new job." (A 439, 441; 116-18.) At trial, he admitted that he told Dotson, "if you're not happy with your job . . . you need to look into getting a new one." (A 439, 441; 245-46.) The Board reasonably found (A 439) that this was an unlawful solicitation of a union activist to quit.

E. OHL Unlawfully Confiscated Prounion Literature

Implicit in Section 7 organizing rights is the "right of employees to inform other employees of union activity and to solicit their interest." *NLRB v. Challenge-Cook Bros. of Ohio, Inc.*, 374 F.2d 147, 153 (6th Cir. 1967). As the Supreme Court has recognized, the employees' workplace is a "particularly appropriate place" to engage in such activity because the jobsite "is the one place where employees . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (citation omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945). Accordingly, employees have the right to distribute union literature during nonworking time in nonworking areas, unless that conduct interferes with production or discipline; indeed employer restrictions on such activity are presumptively unlawful. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491-93 (1978);

Republic Aviation, 324 U.S. at 801-03 and n.10. *See also St. Agnes Med. Ctr. v. NLRB*, 871 F.2d 137, 143 (D.C. Cir. 1989).

Multiple employees on different occasions saw Area Manager Phil Smith picking up prounion literature that had been left on tables in the employees' break area before the employee break had ended. (A 430; 176-79, 182-87.) One employee, Mark Yelverton, saw Area Manager Smith with the prounion literature that Yelverton had just put on the breakroom tables. Area Manager Smith lifted the papers over his head and then ripped them up as he hollered, "Not in my warehouse."[6] (A 430; 190). The employees were clearly engaged in a protected form of distribution when they placed union literature in the break areas for their coworkers to read on their nonworking time. Thus, the Board had ample reason to find (A 430) that the confiscation of that literature was unlawful. *See Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983) (supervisor unlawfully confiscated employee petition left in lunchroom for employees to read and sign); *NLRB v. Transcon Lines*, 599 F.2d 719, 721 (5th Cir. 1979) (employer failed to show why removal of union literature was necessary to maintain plant discipline or production). *See also BJ's Wholesale Club*, 319 NLRB 483, 489-90 (1995); *Jennie-O Foods*, 301 NLRB 305, 338 (1991) (employer unlawfully destroyed prounion handbills left in lunchroom while an employee was present).

[6] Area Manager Smith's comment amplifies, in much more coercive fashion, OHL's general antiunion policy. (A 427.)

The Company's argument (Br. 44-45), that it was attempting to keep the breakroom free of unwanted debris, is without merit. While an employer is allowed to maintain orderly housekeeping rules and pick up discarded trash after a break is over, OHL offers nothing that shows it was privileged to take the prounion literature off the tables while the employees were still on their breaks, as it did here. In any event, OHL made no showing that Area Manager Smith's efforts were necessary to "clean" the breakroom. (A 430.) Indeed, as employee Foster noted, she had never previously observed Area Manager Smith "cleaning up" in the breakroom, and OHL had custodians who cleaned the breakroom. (A 430; 182-87.)

F. OHL Unlawfully Threatened Employees that Selecting a Union Would Be Futile and that They Would Lose Their Jobs if They Participated in an Economic Strike

1. Threat of futility

An employer's message to employees that it will be futile for them to select a union as their bargaining representative for the purpose of improving their conditions of employment has consistently been considered unlawful interference under Section 8(a)(1) of the Act. More specifically, an employer violates the Act when it announces to the employees that, even if a union is selected, there will be no meaningful negotiations because it will simply drag out negotiations over a number of years. *Ring Can Corp.*, 303 NLRB 353, 358 (1991); *Atlas*

Microfilming, 267 NLRB 682, 685-86 (1983); *see also NLRB v. E.I. DuPont de Nemours*, 750 F.2d 524, 527-28 (6th Cir. 1984).

In October, Human Resources Manager Van Young effectively told a group of employees that it was pointless to select a union. The Company attempts (Br. 41) to minimize Van Young's comments by saying "her point" was that it would be a process. But she said the Union could propose a contract, and if OHL takes the position that it "can't do that," they will have to rewrite it, and "they'll be doing that for ten years before they get a contract." (A 432-33; 155, 163, 164.) As found by the Board, this is not a description of the good-faith bargaining required by the Act. (A 433.) Additionally, Van Young's comments were made in the context of other unlawful threats – at the same meeting she said that employees would lose their jobs if they engaged in a strike.

2. Threat of job loss

While an employer can truthfully tell employees they may be subject to permanent replacement in the event of an economic strike, it is not privileged to threaten reprisals against employees that are inconsistent with protections enumerated in the Board's *Laidlaw* decision. *See Eagle Comtronics, Inc*., 263 NLRB 515, 516 (1982). Under *Laidlaw*, economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements not only remain employees, but are entitled to full reinstatement

upon the departure of replacements. *Laidlaw Corp.*, 171 NLRB 1366, 1368-70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969); *see also NLRB v. Int'l Van Lines*, 409 U.S. 48, 50-51 (1972) (employers must place permanently replaced strikers on a preferential hiring list if they offer to return unconditionally); *Larson Tool & Stamping Co*., 296 NLRB 895 (1989). An employer violates Section 8(a)(1) when its threat of permanent replacement is combined with the threat of job loss because it is not reasonable to infer that an employee will interpret this to mean that a *Laidlaw* right exists. *Baddour, Inc.*, 303 NLRB 275, 275 (1991).

The Board, therefore, also reasonably determined (A 424, 432-433) that Van Young unlawfully threatened employees at the October meeting when she told them that they would lose their jobs if they participated in an economic strike. (A 432; 152-55, 156.) By making these statements, OHL unlawfully threatened that it would not rehire employees who chose to engage in protected strike activity.

OHL's assertion (Br. 40), that Van Young merely made an accurate legal statement, misses the point that she coupled her comments with specific threats that the employees would lose their jobs. She did not merely state that they could be permanently replaced. Her statement that OHL had "leeway" failed to indicate the employees had any rights if they chose to go on strike. While an employer may inform employees about its lawful alternatives, Van Young's comments reasonably led the employees to the conclusion that the only outcome was the loss of their

jobs. As the Board has stated, "employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." *Baddour*, 303 NLRB at 275.

G. OHL Unlawfully Contacted the Police To Have Union Agents Removed from Public Property

An employer has no legitimate interest in interfering with union activities that occur away from its property. Therefore, an employer violates Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by attempting to prevent nonemployee union organizers from communicating with employees on public property adjacent to the workplace. Where public property is concerned, "it is beyond question that an employer's exclusion of union representatives . . . violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7." *Roger D. Hughes Drywall*, 344 NLRB 413, 414-15 (2005) (quoting *Bristol Farms*, 311 NLRB 437, 437 (1993)); *see also NLRB v. Schlegel Oklahoma, Inc.*, 644 F.2d 842, 843 (10th Cir. 1981); *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986) (employer unlawfully threatened to call the police and have police cite organizer for trespassing when organizer was distributing handbills from public road); *Gainesville Mfg. Co.*, 271 NLRB 1186, 1188 (1984) (same).

Here, the Board reasonably found that, on August 31, OHL attempted to prevent nonemployee union agents from distributing union literature outside its facility on public property by calling the police. Union staff organizers, Brandon

and Hawkins, arrived at OHL's Remington warehouse a few short days after OHL terminated two of the Union's key employee supporters (Dotson and Smith) and suspended another (Jones). They arrived outside the facility gates and, as the credited evidence shows, remained on the public property side of a white line indicating where OHL's property began. After Jones and Smith arrived to help in the Union's effort, Area Manager Smith asked the group to leave. When they refused, Human Resources Manager Van Young called the police. OHL had no legitimate interest in displacing the individuals, who were attempting to pass out union literature from public property.

OHL's argument to the contrary (Br. 45-46) relies on the discredited testimony of Area Manager Phil Smith that the Union's agents were on company property. *Cf. Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (lawful for employer to have nonemployee union organizer removed from private shopping area parking lot). Again, OHL provided no basis to overturn the Board's credibility determinations. *Capital Cleaning*, 147 F.3d at 1004.

H. OHL Unlawfully Ordered Offsite Employees Engaged in Distribution of Union Literature To Leave the Premises

Offsite employees seeking to organize similarly situated employees at another employer facility are employees that are seeking strength in numbers. In these situations, the Board has found, with court approval, that the core concerns of Section 7, protecting the right to self-organization, are undeniably implicated. *Hillhaven Highland House,* 336 NLRB 646, 649 (2001), *enforced*, 344 F.3d 523 (6th Cir. 2003).[7] In *Hillhaven*, the Board adopted a standard accommodating the Section 7 rights of the property owner's offsite employees and the owner's property rights, which afforded the offsite employees access while recognizing the employer-owner's heightened property concerns. The Board found that the property concerns were accommodated by allowing limitations on access which "where justified by business reasons." *Hillhaven*, 336 NLRB at 648. *See ITT Industries II*, 413 F.3d 64, 73-74 (D.C. Cir. 2005) (Board's test for offsite employees of property owner demonstrates a commitment to analyzing an

[7] Indeed, the Board in *Hillhaven* recognized that "the offsite employee's personal stake in organizing his counterparts at a different employer facility is clearest where he is, or will be, part of a multifacility bargaining unit that includes onsite employees." 336 NLRB at 649. This was the case here. After the hearing, a union election was held, and all three warehouses were included in a single bargaining unit. *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 125 (2011), *appeal docketed*, No. 11-1482 (D.C. Cir. Dec. 16, 2011).

employer's business justifications with greater deference when offsite, rather than onsite, employees are involved).

The Board here applied its standard, approved by this Court, and rationally found that the offsite employees were exercising their Section 7 rights, as they were seeking to organize fellow employees at OHL's Remington warehouse. In balancing the rights involved, the Board noted that OHL provided no credible business justification for excluding the offsite employees from the premises. (A 425, 433-34.) In each instance at issue, the credited evidence shows that offsite-OHL employees were passing out union literature to similarly situated OHL employees in nonworking areas during nonworking time.

On September 18, Holmes Road warehouse employee Carolyn Jones was attempting to pass out union literature to the Remington warehouse employees as they were leaving work near the entrance to the employee parking lot. The credited evidence placed Jones next to the public road and not impeding any traffic. When approached by Area Manager Kelvin Davis, Jones confirmed that she was an OHL employee by showing her badge. Nonetheless, the manager directed her to stop engaging in the protected activity, and he said "[Y]ou're not allowed to do this on [OHL] property." When confronted with opposition, he said, "I don't care. I want them off my property." (A 433-34; 38-42.) His justification during trial, which OHL continues to rely on (Br. 47), was discredited, as Jones

was not posing any safety hazard by passing literature to cars as they left the premises. (A 433-34.) OHL offered no other justification for attempting to impede the employees' Section 7 rights.

Similarly, on September 25, Operations Manager Roy Ewing approached Jones as she was passing out union literature and talking to employees on their breaks outside of the Remington warehouse. Ewing, who knew Jones was an OHL employee, told her that she could not be there "doing this stuff." Jones replied that she was trying to get her coworkers to sign union authorization cards. At that point, Ewing tried to get her to go to his office. Jones said they should just stay outside. Ewing then told her that she did not work at the Remington warehouse and that she would have to leave. At this point, she left. (A 434; 43.) OHL's description of events (Br. 49), that Jones she was attempting to enter the facility, was discredited as multiple employees corroborated Jones' account of what happened. And OHL offers no other justification for having asked Jones to leave. The Board reasonably found that OHL was suppressing the offsite employees' rights to engage in union activities with similarly situated employees.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OHL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY WARNING, SUSPENDING, AND DISCHARGING EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable Principles

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining an employee for engaging in union activities.[8] In *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980). Under the test, if substantial evidence supports the Board's finding that an employee's union activity was a "motivating factor" in the discipline, the Board's conclusion of unlawful discipline must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer's affirmative defense that the employee would have been disciplined even in the absence of protected union activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03; *Wright Line*, 251 NLRB at 1089. *Accord Bally's Park Place*, 646 F.3d at 935; *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1339-40 (D.C. Cir. 1995).

[8] Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization[.]" A violation of Section 8(a)(3) of the Act produces a "derivative" violation of Section 8(a)(1). *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

To establish an employer's discriminatory motive, the Board "considers such factors as the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the employer's action." *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). Evidence that an employer has violated Section 8(a)(1) of the Act supports an inference of union animus. *See Parsippany Hotel*, 99 F.3d at 423-24.

As it reviews the employer's reason for disciplining an employee, the Board may draw reasonable inferences from the credited evidence and may rely on circumstantial as well as direct evidence. *Power, Inc.*, 40 F.3d at 418. Once the Board's General Counsel has made a sufficient showing that the employee's protected conduct was a motivating factor in the employer's decision to discipline, the burden then shifts to the employer to demonstrate that it would have taken the same action even if the employee had not engaged in the protected activity. *Southwest Merch.*, 53 F.3d at 1339 (D.C. Cir. 1995) (citing *Wright Line*, 251 NLRB at 1089).

The Board need not accept at face value the employer's explanation for the discipline if the evidence and the reasonable inferences drawn from it indicate that union animus motivated the discipline. *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Buitoni Food Corp.*,

298 F.2d 169, 174 (3d Cir. 1962). The issue is not whether the employer "could have [disciplined the employee], but whether it would have done so regardless of [his] union activities." *Ready Mixed Concrete v. NLRB*, 81 F.3d 1546, 1553 (10th Cir. 1996) (citation omitted). *See also Roure Bertrand Dupont, Inc*., 271 NLRB 443, 443-44 (1984) ("[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.").

B. Substantial Evidence of Knowledge, Animus, and Timing Show that OHL Was Unlawfully Motivated When It Took Adverse Action Against Renal Dotson, Carolyn Jones, and Jerry Smith

Renal Dotson, Carolyn Jones, and Jerry Smith were heavily active in the organizing campaign, which included talked to employees about the Union, and OHL was well aware of their union activities. Specifically, the three passed out prounion literature, attended Union meetings, and got coworkers to sign union authorization cards. On July 30, Operations Manager Windisch discovered union literature in Dotson's work truck. (A 438, 440.) In a weekly report for the week ending August 17, Human Resources Manager Van Young described to upper-level management that Carolyn Jones and Jerry Smith "are presumed the chairs" of the Union's organizing drive. (A 436; A 287, 407.) And in a separate email to upper-level management dated August 27, Van Young reported that Dotson "is working hand in hand with the crew that is trying to drive a union into OHL Memphis." (A 436; 273-76, 404-05.) Moreover, OHL in no meaningful way

contests that Dotson, Jones, and Smith were engaged in union activities or that it knew about those activities when it made the decision to discipline them.

As the Board found, and as described above, OHL violated Section 8(a)(1) of the Act in numerous ways, which is strong evidence of OHL's animus towards the Union and the employees who engaged in union activity. In addition, the timing between the managers' knowledge of the union activities and the warnings, suspension, and discharges further supports the Board's conclusions that the disciplinary actions were unlawfully motivated. *See Power, Inc.*, 40 F.3d at 418 (D.C. Cir. 1994); s*ee also Phelps Dodge Min. Co., Tyrone Branch v. NLRB*, 22 F.3d 1493, 1502 (10th Cir. 1994) (timing alone may suggest that union animus motivated employer's conduct), *citing NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("An inference of anti-union animus is proper when the timing of the employer's actions is 'stunningly obvious'.") (citation omitted). Indeed, shortly after the union campaign began and OHL learned of the employees' union activity, it disciplined and discharged Dotson, disciplined and suspended Jones, and discharged Jerry Smith. (A 436; 30, 55, 128.) Substantial evidence thus supports the Board's conclusion that the employees' union activity was a motivating factor in OHL's decision to discipline them. Accordingly, the burden is squarely on OHL

to prove that it would have taken the same adverse action against these employees even if they had not engaged in the protected union activity.

C. OHL Failed To Prove It Would Have Given Renal Dotson a Disciplinary Warning or Discharged Him Absent His Union Activity

1. The warning

OHL claims (Br. 22-26) that, even absent his union activity, it would have disciplined Dotson on August 4 because he improperly performed replenishments, when he was supposed to be assisting with a special labeling project. The Board reasonably rejected this defense.

First, as the Board found (A 440), OHL failed to conduct an investigation into the incident. Rather, Windisch drafted the written discipline and issued it to Dotson without hearing Dotson's version of the events or discussing what happened with anyone else involved. Windisch also issued the discipline without discussing the need for it with Dotson's supervisor. Indeed, Windisch did not even tell Dotson's supervisor that he planned to issue the discipline. *Id.*

Second, OHL does not dispute that Dotson's supervisor had previously instructed him to perform replenishments whenever requested to by other employees. Yet, as the Board noted (*id.*), OHL failed to explain how Dotson was "expected to distinguish" between that standing instruction and the expectations when working overtime. Such a distinction would have been particularly difficult to make the morning at issue, because Newberry, who was in charge of the special

labeling project, had given Dotson permission to perform the replenishment. These credited facts demonstrate the error in OHL's claim (Br. 22-23) that Windisch's personal observation of Dotson was sufficient in making the decision to discipline him. If Windisch had taken the time to investigate, he would have learned that Dotson was indeed doing assigned work. As the Board has described, and appropriate here, "the [employer's] failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain are clear indicia of discriminatory intent." *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) (citing *K & M Elec.*, 283 NLRB 279, 291 n.5 (1987)).

Finally, there was no evidence of any other employees ever being disciplined for performing unauthorized work on overtime. And in sum, the Board reasonably found that OHL failed to show that it would have issued Dotson a warning absent his union activities, and thus it violated Section 8(a)(3) of the Act. (A 440.)

2. The discharge

The Board also reasonably rejected OHL's argument that it would have terminated Dotson absent his union activity. OHL argues (Br. 26-29) that the termination was justified because Dotson missed the pre-shift meeting on August 28. However, later that morning, when Area Manager Smith told Dotson that he was being terminated, Dotson was not asked why he missed the meeting. He was

simply told that he had "violated company policy and that was it." (A 441.) The termination notice was already prepared. *Id*.

Despite OHL's claims that it was justified in terminating Dotson (Br. 26-30), OHL's enforcement of its policies about the consequence of missing a meeting undermines its claim. Before the Board, OHL established that the pre-shift meeting was mandatory by relying on its handbook as evidence. But according to the handbook, employees receive points if they are absent or tardy for meetings. After a certain number of points, employees receive discipline according to a progressive scale, which provides for opportunities to correct their behavior. (A 440; 271, 335-37.) Dotson never received points leading up to discipline, and he was not given a lawful lower level of discipline before being discharged. (A 440-41; 346-47.)

Additionally, various employees had previously missed pre-shift meetings for a variety of reasons without OHL issuing discipline much less terminating them. Prior to August 28, there is no evidence that any employee ever received discipline for missing a pre-shift meeting, and certainly no one was discharged. In fact, a number of witnesses testified that they had missed pre-shift meetings and did not get disciplined. (A 441; 131-35, 144-45, 254-56.) OHL fails to explain why Dotson was treated differently. Thus, OHL's reliance on *PHC-Elko* (Br. 27), for the proposition that an employer need not show a prior instance of similarly

treated misconduct where one does not exist, is misplaced. 347 NLRB 1425, 1427 (2006).

Once again, OHL attempts (Br. 28-29) to bolster its argument by using discredited facts. For instance, it cites purported insubordinate behavior by Dotson on August 20. Before the Board, OHL stated it gave Dotson a final warning on this day. As the Board found, however, there was no credible evidence produced at trial substantiating this claim. Dotson was never even made aware of the problems OHL now cites. And subsequent management documents, summarizing issues related to Dotson's disciplinary record, failed to describe the alleged intermediary warning OHL now claims to have given him. (A 439, 440.) As the Board reasonably found, OHL failed to show that it would have discharged Renal Dotson absent his union activity, and therefore, OHL's discharge violated Section 8(a)(3) and (1) of the Act. (A 441.)

D. OHL Failed To Show that It Would Have Disciplined Jones Absent Her Union Activity

OHL also failed to establish that it would have issued the August 28 written warning to Carolyn Jones, and then imposed a 5-day suspension, absent her active involvement in the union campaign. Therefore, those actions violated Section 8(a)(3) and (1) of the Act.

OHL does not contest in its opening brief that it unlawfully issued Jones the disciplinary warning on August 28. Any argument to do so at this point should be

considered waived and rejected. And the Board is entitled to summary enforcement of this issue. *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (merely referring to matter in the opening brief is insufficient) (quoting *Board of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996)).

Although OHL waived its right to argue about Jones' written warning, the underlying facts are relevant to the Board's finding that the subsequent suspension was also unlawful. OHL claimed that it issued the August 28 written warning to Jones because she did no go to the back of the security line after being told to do so by Operations Manager Windisch, when going through the metal detector upon leaving the warehouse the day before. But the evidence demonstrated that Jones did go to the back of the line as instructed. (A 442-43.) OHL's security logs showed no incident involving Jones on August 27: On August 25, Jones is described as complaining about the procedures, but there are no log entries – on any date – about her not going to the back of the line. One witness at trial even remembered Windisch telling Jones to go to the back of the line one day, and Jones complied. (A 443.)

Additionally, there is no evidence that OHL ever disciplined anyone for similar incidents at the metal detector. For instance, on September 11, the security logs described an employee as refusing to go to the back of the line at the metal

detector when instructed to do so. Yet OHL did not discipline him. (A 442; 319-20, 393-403.)

Currently before the Court, OHL claims (Br. 32-36) that it would have suspended Jones for 5 days because she called Windisch a liar at the end of that first meeting on August 28. However, at that meeting, OHL had given Jones the unlawful disciplinary warning for not following Windisch's orders to go to the back of the line. The credited evidence established that Jones had followed Windisch's instructions, and therefore she was justifiably upset about the false accusation. Moreover, when she questioned her managers about the already prepared disciplinary warning, they were not interested in hearing her side of the story. Likewise, when she asked to bring in the security guard to corroborate her version of the event, the managers refused. And when she appealed to Windisch to tell the truth, Windisch lied. (A 443.) Based on the evidence, the Board reasonably found that Jones was provoked and was justified in becoming upset. *See NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 852 (1st Cir. 1982) (citing cases); *Well Bred Loaf, Inc.*, 280 NLRB 306, 319 (1986); *E.I. DuPont de Nemours*, 263 NLRB 159, 160 (1982) (citing *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965)), *enforced*, 750 F.2d 524 (6th Cir. 1984).

Even apart from OHL's provocation, Van Young admitted that the issuance of a 5-day suspension was unprecedented in length. (A 424, 442; 307.)

Additionally, other employees had challenged OHL managers and even called them liars. (A 442; 352, 353, 363, 392.) For example, in August 2008, another employee had called Area Manager Phil Smith a "damned liar" during an argument about compensation. (A 442; 88.) When OHL attempted to issue the employee an Employee Performance Report, he tore it up without reading it. The discipline was never reissued. (A 442; 90-91.) Given that OHL had tolerated that incident, the Board reasonably rejected OHL's claim that it would have suspended Jones for her remark absent her union activity.[9]

E. OHL Failed To Prove It Would Have Discharged Jerry Smith Absent His Union Activity

OHL argues (Br. 30-32) that it was justified in discharging Jerry Smith because he violated OHL's policy that prohibits "aggressive or hostile behavior that creates a reasonable fear of injury to another person." The allegation defies the credited facts.

The incident in question involved Jerry Smith, who was located on one side of a fence, and Area Manager Smith, who was on the other. Jerry Smith had noticed Carolyn Jones, his coworker and girlfriend, crying. She was some distance

[9] Contrary to OHL's assertion (Br. 35), the Board did a proper *Wright Line* analysis of Jones' discipline and reasonably found that she was unlawfully suspended. The Board, as it stated (A 443), did not rely on *Atlantic Steel*. 245 NLRB 814 (1979). The Board's statement that Jones' indiscrete remark, provoked by accusation of an offense that she did not commit, "did not deprive Jones of the protections of the Act" should not be read otherwise. The Board was saying that Jones' reaction to the discipline did not change the fact that the 5-day suspension violated Section 8(a)(3).

away, and it was loud inside the fenced in warehouse security area, so he shouted, "What's the problem?" Area Manager Smith, who claimed to have felt threatened, immediately made his way towards the fence to confront Jerry Smith. Area Manager Smith then sternly said, "any problem with Carolyn isn't between you and I. You don't have anything to do with this." (A 444; 70, 314.)

In addition to the fact that it seems illogical for someone who feels threatened to move closer to the alleged danger, credited witnesses who were nearby described nothing remarkable about the interaction. Indeed, Area Manager Smith and Jerry Smith were standing on opposite sides of the fence and at least 4 to 5 feet apart. The security guard on the scene nearby never stood up or said anything. Operations Manager Jim Windisch was also nearby. There was no cursing or physical interaction. After the brief interaction, employee Smith and Carolyn Jones went to lunch, and then they returned to work. (A 445; 28, 71, 169-72.)

Despite the insignificant nature of the incident, later that afternoon, OHL's managers called Jerry Smith into the office to summarily discharge. As the Board found, once again, OHL conducted little or no investigation. Although, the Human Resources Manager Van Young argued that she checked the security guard's report, it was written by a guard that did not witness the interaction. And she did not talk directly to the guard that witnessed what had happened. (A 445.) Multiple

other witnesses were on the scene, including Jones and Athena Cartwright who discredited Area Manager Smith's account that Jerry Smith had clenched his hands. And management never questioned them about the event. Rather, management relied almost exclusively on Area Manager Smith's version of the story. This lack of investigation, again, illustrates the discriminatory intent of the OHL. *Bantek West, Inc.*, 344 NLRB 886, 895 (2005).

Disparate treatment further illustrates the discrimination involved here. Area Manager Smith had previously been involved in an argument about compensation with a male employee approximately the same size as Jerry Smith. The incident occurred about a year before Jerry Smith was terminated, when there was no active union campaign. During that dispute, the employee got within 12 inches of Area Manager Smith's face and called him a "damned liar," and then removed his glasses and stated that he "was going to get [his] money." Area Manager Smith responded, "You want to make me get ghetto with you. We can take this outside." *Id*. Windisch had to push the employee back. Yet OHL did not follow through on disciplining that employee. (A 445; 88-92.) Moreover, the Board reasonably found it "inconceivable" that Area Manager Smith, who admittedly stated he did not feel threatened by the employee during the dispute over compensation, felt threatened by Jerry Smith asking "What's the problem." (A 436.) Therefore, it was reasonable for the Board to find that OHL's stated

reason for discharging employee Smith was pretextual, and that it failed to otherwise demonstrate that it would have discharged him absent his union activity. (A 446.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny OHL's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board
May 2012

ADDENDUM

STATUTES

Sec. 7 of the Act (29 U.S.C. § 157) provides:

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

Sec. 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

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;
>
> ***
>
> (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;

Sec. 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) 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.

***

(e) 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 proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. . . . 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.

***

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

***

(j) Injunctions – The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

FEDERAL RULES

Sec. 28(a)(9)(A) of the Federal Rules of Appellate Procedure provides in relevant part:

(a) The appellant's brief must contain,

(9)(A) the argument, which must contain [the] appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies[.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 11-1481 & 12-1064
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	26-CA-23497
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,618 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 6th day of June, 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
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	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 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 addresses listed below:

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Dated at Washington, DC
this 6th day of June, 2012