Oral Argument Scheduled September 14, 2012

Nos. 11-1212, 11-1445, 11-1446

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS

Petitioners/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

GARNER/MORRISON, LLC

Petitioners/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

ON PETITIONS 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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SOUTHWEST REGIONAL COUNCIL OF CARPENTERS	)	
Petitioner/Cross-Respondent	)	Nos. 11-1212, 11-1445, 11-1446
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 28-CA-21311
GARNER/MORRISON, LLC	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties, Intervenors, and Amici

1. The Board is the respondent and cross-petitioner before this Court.

2. Garner/Morrison, LLC (the "Company") was a respondent in the underlying proceeding before the Board and is a petitioner and cross-respondent before this Court.

3. Southwest Regional Counsel of Carpenters (the "Carpenters") were respondents in the underlying proceeding under the Board and are petitioners and cross-respondents before this Court.

4. International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL-CIO-CLC (the "Painters") were the charging party in the underlying proceeding before the Board.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on May 27, 2011 and reported at 356 NLRB No. 163. The Board also issued an Order Denying Motion for Reconsideration dated August 18, 2011.

C. Related Cases

There are no pending related cases in any other United States Court of Appeals including the District of Columbia Circuit.

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Dated at Washington, D.C.
this 29th day of June

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A.	Joint Appendix
Act	National Labor Relations Act
Board	National Labor Relations Board
Br.	Opening Brief from the Petitioners
Carpenters	Southwest Regional Council of Carpenters
Company	Garner/Morrison, LLC
General Counsel	General Counsel of the National Labor Relations Board
JX	Joint Exhibits in Volume II of the Joint Appendix
Owners	Owners of Garner/Morrison, LCC: Cliff Garner, Gary Travis Garner, and Chris Morrison
Painters	International Union of Painters and Allied Trades, District Counsel #15, Local Union #86, AFL-CIO-CLC
Petitioners	Garner/Morrison, LLC and the Carpenters

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These consolidated cases are before this Court on the petitions of the Southwest Regional Council of Carpenters ("the Carpenters"), and Garner/Morrison, LLC ("the Company" and collectively "the Petitioners"), to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board order issued against the Carpenters and the Company. The Board's Decision and Order issued on May 27, 2011, and is reported at 356 NLRB No. 163.[1]

The Board had jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act,[2] as amended ("the Act"), which empowers the Board to prevent unfair labor practices. The Carpenters and the Company filed petitions for review on November 16, 2011, and the Board filed its cross-application for enforcement on June 10, 2011; both are timely as the Act contains no time limit for seeking enforcement or review of Board orders.

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[1] "A." references are to the joint appendix, and "JX" references are to the joint exhibits in Volume II of that appendix. References preceding a semicolon are to the Board's findings; references following a semicolon are to the record evidence supporting those findings. "Br." refers to the Petitioners' opening brief.

[2] 29 U.S.C. § 151, § 160(a).

This Court has jurisdiction pursuant to Section 10(e) and (f) of the Act,[3] which provides for the filing of petitions for review and cross-applications for enforcement of final Board orders in this Circuit. As explained by the Petitioners, the Section 8(a)(1) unlawful interrogation claim remanded by the Board has been adjudicated and dismissed and requires no further proceeding. (A. 11 n.3.) Accordingly, the Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act.[4]

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board's finding that the Company engaged in unlawful surveillance of its employees in violation of Section 8(a)(1) of the Act when it corralled its employees to a meeting with the Carpenters, strongly endorsed the Carpenters, subjected its employees to pro-Carpenters propaganda, and then stayed in the room and saw the Carpenters solicit union authorization cards from its employees.

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[3] 29 U.S.C. § 160(e) and (f).

[4] *Id.*

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(2) of the Act by unlawfully assisting and recognizing the Carpenters, and the Carpenters unlawfully accepted such assistance recognition in violation of Section 8(b)(1)(A) of the Act when the Company coerced its employees into signing union authorization cards and then hastily signed a Section 9(a) agreement with the Carpenters on the spot.

3. Whether the Board acted within its broad discretion in formulating a remedy that restores the status quo by ordering the Petitioners to cease and desist from their unfair labor practices, and the Company to withdraw its unlawful recognition of the Carpenters.

STATEMENT OF THE CASE

This unfair labor practice case originally came before the Board on a complaint issued by the Board's General Counsel on May 31, 2007, pursuant to charges filed by the International Union of Painters and Allied Trades, District Council #15, Local Union #86, AFL-CIO-CLC ("the Painters"). (A. 45-46; 490-504.) The complaint alleged, *inter alia*, that the Company violated Section 8(a)(1) of the Act by surveilling employees at a unionization meeting.[5] (A. 37; 493-504.) It further alleged that the Company violated Section 8(a)(2) of the Act by assisting the Carpenters in obtaining union authorization cards from its employees and by

[5] 29 U.S.C. § 158(a)(1).

recognizing the Carpenters as its employees' representative when they did not represent an uncoerced majority of the Company's employees.[6] The complaint also alleged that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting the Company's unlawful assistance and recognition.[7] (A. 37; 493-504.)

Following a hearing, an administrative law judge issued a decision recommending dismissal of the complaint in its entirety. (A. 65; 83.) The General Counsel and the Painters filed exceptions. (A. 127, 142, 155.) In a Decision and Order issued on January 27, 2009, and reported at 353 NLRB 719, a Board consisting of two members found several violations, in disagreement with the judge. (A. 65.) The Company and the Carpenters filed petitions for review with the Court of Appeals for the District of Columbia, and the Board filed a cross-application for enforcement. On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*,[8] holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. As a result, this Court remanded the case for further processing by a properly-constituted Board.

[6] 29 U.S.C. § 158(a)(2); § 158(b)(1)(A).

[7] 29 U.S.C. § 158(b)(1)(A).

[8] 130 S. Ct. 2635 (2010).

On May 27, 2011, a three-member panel of the Board issued the Decision and Order now before the Court. (A. 37.) The Board (Chairman Liebman, Members Becker and Pearce), again in disagreement with the judge, found that the Company unlawfully engaged in surveillance of its employees and unlawfully assisted and recognized the Carpenters, and that the Carpenters unlawfully accepted the Company's assistance and recognition and unlawfully entered into a memorandum agreement with the Company. (A. 37-38.) Thereafter, the Petitioners filed a motion for reconsideration, which the Board denied in an Order that clarified its May 27, 2011 remedial Order. (A. 11 n.2.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. In December 2003, the Company Hires Its First Employee and Immediately Signs a Collective-Bargaining Agreement with the Carpenters

The Company, an Arizona Corporation owned by Cliff Garner, his son Gary Travis Garner, and Chris Morrison (collectively, "the Owners"), engages in drywall installation and painting in office buildings and at commercial construction sites. (A. 38; 224-27, 265.) When the Company commenced business in November 2003, the Owners performed all necessary manual labor. (A. 38; 284-85, 293-94.) In early December, the Company hired its first employee, James

Brian Boyles, who assisted the Owners with carpentry work such as drywall installation. (A. 38; 227, 266, 294, 438.)

On December 3, 2003, before hiring additional employees, the Company signed a memorandum agreement with the Carpenters ("2002 MOA"). (A. 38, 46; 233, JX 1.) The 2002 MOA was a short-form agreement providing that a majority of the employees performing work under that agreement supported the Carpenters. (A. 38; JX 1 §8.) It bound the parties to a master agreement in effect between a multiemployer association representing drywall and lathing contractors in Southern California and several labor organizations, including the Carpenters ("2002 Master Agreement"). (A. 38; JX 1, 5.) The 2002 Master Agreement, which was effective by its terms through 2006, covered work performed by painters and tapers as well as work generally understood to be carpentry, such as drywall installation. (A. 46; 233-35, 547, JX 5.)

The 2002 Master Agreement contemplated that signatory employers sometimes hired painters and tapers through the Painters, a rival union. To accommodate this potential conflict, the Carpenters, in the 2002 Master Agreement, agreed that they would not assert jurisdiction over an individual employer's painters and tapers (also called drywall-finishing employees) if the employer had a collective-bargaining agreement with the Painters covering those employees:

> The [Carpenters] Union understands and recognizes that the [multi-employer association] and its members are signatory to a collective bargaining agreement with the [Painters Union] . . . covering drywall finishing . . . work. The parties agree that [the finish-work provision of Article I] shall apply only to those signatory employers who are not already signatory to a collective bargaining agreement with the [Painters Union] . . . covering the drywall finishing . . . as described in Article I Section 6 of the agreement and who choose to assign that work to the [P]ainters. The [Carpenters] Union agrees not to invoke or enforce [the finish-work provision] or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the [Painters Union] . . . covering the drywall finishing . . . and who chooses to assign that work to the [Painters] . . . .

(A. 38; JX 6 §6f.)

B. In April 2004, the Company Hires Employees To Paint and Tape and Signs Collective-Bargaining Agreements with the Painters Effective from April 2004 to March 2007

In April 2004, the Company began hiring painters and tapers. (A. 38; 227, 332.) It entered into two collective-bargaining agreements with the Painters, one covering tapers and the other covering painters (collectively, "the Painters' Contracts"). The Company and the Painters entered these agreements pursuant to Section 8(f) of the Act,[9] which, to accommodate the unique requirements of the construction industry, allows construction-industry employers to recognize a union

[9] 29 U.S.C. § 158(f). When an 8(f) agreement expires, an employer may refuse to bargain with an incumbent union and may unilaterally change terms and conditions of employment because the union enjoys no presumption of continuing majority support. *See John Deklewa & Sons*, 282 NLRB 1375, 1385-86 (1987), *enforced* 843 F.2d 770, 777 (3rd Cir. 1988) (explaining the "basic principles" of an 8(f) relationship).

as the exclusive bargaining representative of its employees before a majority of employees have chosen the union. The Painters' Contracts were effective by their terms through March 31, 2007. (A. 38; 227-28, 237-38, 332, JX 7, 10-14.)

C. In 2006, the Company Agrees to a Second Contract with the Carpenters that Precludes the Carpenters from Competing with the Painters If the Painters Contracts Remain in Effect

On January 16, 2006, the Company and the Carpenters entered into a successor short-form memorandum agreement ("2006 MOA") effective through June 30, 2007. The 2006 MOA bound the Company to the terms of the 2002 Master Agreement and any subsequent Carpenters master agreements. (A. 38; 172-73, 235, 334, JX 2 §§1 & 8.) On July 1, 2006, a new master agreement ("2006 Master Agreement"), effective through June 2010, replaced the 2002 Master Agreement. (A. 38; 173, JX 6.) The new Master Agreement contained a narrower jurisdictional provision requiring the Carpenters to refrain from competing with the Painters "as long as such [Painters] contract remains in effect." (A. 38; JX 6 § 7g.)

D. The Painters Request Recognition as the Section 9(a) Representative of the Company's Painters and Tapers, but the Owners Do Not Respond; Instead, the Owners Approach the Carpenters About Extending Recognition To Cover Those Employees

In January 2007, a few months before the Painters' Contracts were due to expire, the Painters began collecting signed authorization cards from the Company's painters and tapers. (A. 38, 47-48; 426-27, 457, JX 18.) In February,

the Painters met with Company Owner Morrison to tell him that they "want[ed] to go 9(a) status."[10] (A. 340.) The Painters gave Morrison a letter dated February 8 entitled "Showing of Support Notice Section 9A-NLRB" that requested recognition under Section 9(a) of the Act as the representative of a majority of the Company's painters and tapers. The letter proposed that a neutral party examine the Painters' authorization cards and confirm that the Painters represented a majority of those employees. (A. 38, 48, 340-41, 455-57, JX 17, 18, 20.)

Morrison accepted the document but did not respond. The Painters waited and then reiterated their request for Section 9(a) recognition to Morrison on March 20. (A. 38, 48; 342-43, 424-26, 457.) Morrison insisted on additional time to consider the request and discuss it with the other Owners. (A. 39, 48; 426.)

Meanwhile, the Owners privately determined they were unlikely to go with the Painters. Instead, Morrison called the Carpenters about setting up a meeting and extending recognition to the Carpenters covering the painters and tapers. (A. 39, 49; 239, 260, 336, 347, 377-78.) At the meeting, the Carpenters said that their contract would kick in and cover the Company's tapers and painters if the Painters'

[10] 29 U.S.C. §159(a). A Section 9(a) agreement may be lawfully entered into only when the union represents a majority of employees. When it expires, the employer is required to bargain with the incumbent union, and may not unilaterally change terms and conditions of employment. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (after expiration of a Section 9(a) agreement, an employer must bargain in good faith for new agreement and may not implement unilateral changes).

Contracts expired. (A. 49; 258, 336-37, 358.) The Carpenters also said they could meet with employees to explain the transition. (A. 49; 338.) Morrison agreed to get back in touch once the Company made its final decision. (A. 48; 338, 379-80.)

On March 30, the day before the Painters' Contracts were due to expire, the Painters followed up again with Morrison, who told them he was still conferring with his partners. (A. 39, 48; 345-46, 458-59.) When the Painters offered to extend their contracts, Morrison said to fax the extensions, but he never signed them. (A. 39, 49; 240-41, 346, 459.) The Painters warned Morrison they "could start proceedings" if left without a signed extension or Section 9(a) recognition. (A. 49; 347.)

After the Owners decided against the Painters, Morrison called the Carpenters to inform them of the decision. Morrison and the Carpenters set up a meeting between Carpenters representatives and the Company's painters and tapers for the following day, April 2. (A. 39, 49; 241-43, 338:5-7.)

E. The Company Tells Its Painters and Tapers To Attend an Important Meeting at Which the Owners Urge Employees To Join the Carpenters and Grant Section 9(a) Recognition to the Carpenters; the Same Day, the Painters File Representation Petitions with the Board

On the morning of April 2, 2007, the Owners gave instructions to tell the Company's painters and tapers to attend an important meeting that afternoon at a Marriott Hotel. (A. 39, 49; 315:7-11, 431:10-15.) The Company did not inform

employees of the meeting's purpose, specifically telling a supervisor charged with gathering employees not to disclose that information. (A. 39, 41; 431:17-20, 432:13.) Nonetheless, nearly every employee attended. (A. 39; 244, 315, 348:19-25.) When they arrived, the employees found a meeting room staffed by 15-16 Carpenters' representatives, 3 Carpenters' health-care representatives, the Owners, and now-Field Superintendent James Brian Boyles. (A. 39; 243-44, 350.)

The Carpenters began the meeting by introducing Company Owner Morrison, who urged the employees to listen to the Carpenters' presentation. (A. 39; 197:8-9, 246, 319.) Morrison told employees the Carpenters were offering "a good thing" and provided a better benefits package than the Painters. (A. 318:10-14, 319:8-9, 395:22-23.) The Carpenters had "a lot to offer[,]" he said, and "[t]his is the way we would like to go." (A. 37 n.7; A. 323:21-22, 395:19-20.) He then introduced a Carpenters official after adding, "we think [this] is a good deal." (A. 39; 246:24-25.)

The Carpenters told the assembled employees about their size and strength, and emphasized their "good relationship" with the Company. (A. 39; 318:22-25, 396:2-8.) In an hour-long presentation, the Carpenters explained their benefits, apprenticeship program, and dues structure. (A. 39; 197-99, 247, 271, 319, 410, JX 15.) Throughout their presentation, the Carpenters told employees they were "glad to have you on our team." (A. 39; 693, 701, JX 15: 3, 11.)

Company Owner Travis Garner spoke next. He told employees he had worked as an employee under Carpenters' benefits, that it was in the employees' best interest to choose the Carpenters, and that the Carpenters' retirement package was better than the Painters' package. (A. 39; 203:24-25.) Together with the Carpenters, Garner invited employee questions for the Carpenters. (A. 39; 248:11-15.) When an employee asked about switching from Painters to Carpenters benefits, Owner Morrison explained that he had switched and his transfer went very smoothly. (A. 39; 352:3-14.)

After answering employees' questions, the Carpenters' representatives asked the employees to go to tables at the back of the room to sign documents. The employees were presented with the Carpenters' benefits packages and solicited by Carpenters' representatives to sign union authorization cards. (A. 39; 200-01, 215:10-14, 222:2-12, 319:10-19.) While the employees were at the back tables, the Owners and Field Superintendent Boyles remained in the front of the room and could see the employees. (A. 39; 249:5-10, 353.)

Minutes later, the Carpenters approached Morrison and Garner, "flashed" union authorization cards in front of them, and requested voluntary recognition as the Section 9(a) exclusive bargaining representative of the Company's painters and tapers. (A. 39; 252:4-20, 353-54, 399.) The Company agreed and Morrison signed a Recognition Agreement and a 2007-10 Memorandum Agreement ("2007

Agreement") with the Carpenters dated April 2. The 2007 Agreement incorporated the Carpenters' 2006 Master Agreement. (A. 39; 253:1-6, 353-54, 370, 399-400, JX 3 §1, JX 4.)

In the meantime, shortly before noon on April 2, the Painters filed election petitions with the Board seeking to represent the painters and tapers. (A. 39; 180, JX 21, JX 22.) The petitions arrived by fax at the Owners' office while they were attending the meeting at the Marriott Hotel where employees were being asked to sign cards authorizing the Carpenters to serve as their exclusive Section 9(a) representative. (A. 39; 253:3-13, 461, JX 21 & 22.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On May 27, 2011, the Board (Chairman Liebman and Members Becker and Pearce) issued its Decision and Order. The Board found, in disagreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by surveilling its employees' protected union activities at the April 2 meeting with the Carpenters. The Board also found that the Company violated Section 8(a)(2) of the Act by assisting the Carpenters in obtaining union authorization cards from the Company's painters and tapers, and by recognizing the Carpenters as the employees' representative when they did not have the support of an uncoerced majority of employees. (A. 37-38, 40-42.) The Board further found that the Carpenters violated Section 8(b)(1)(A) of the Act by accepting the Company's

unlawful assistance, and by accepting recognition as the employees' representative and entering into and giving effect to the 2007 Agreement at a time when they did not represent an uncoerced majority of those employees. (A. 38, 40, 43.)

To remedy these unfair labor practices, the Board's Order requires the Company to cease and desist from surveilling its employees' protected activities; assisting the Carpenters in obtaining union authorization cards; recognizing the Carpenters as the tapers' and painters' collective-bargaining representative when the union does not represent an uncoerced majority of its employees; giving any effect to the unlawful recognition; or, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. (A. 43.) The Board's Order also directs the Carpenters to cease and desist from accepting the Company's assistance in obtaining union authorization cards; accepting the Company's recognition when they do not represent an uncoerced majority of employees; entering into and giving effect to a memorandum covering company employees at a time when the Carpenters do not represent an uncoerced majority of employees; or, in any like or related manner, restraining or coercing employees in the exercise of their Section 7 rights. (A. 44.)

Affirmatively, the Board's Order directs the Company to withdraw and withhold recognition from the Carpenters as the collective-bargaining representative of its tapers and painters unless and until the Carpenters are duly

certified by the Board as the collective-bargaining representative of those employees, and to post a remedial notice.[11] (A. 43-44.) The Board's Order also directs the Carpenters to reimburse employees, excluding those who voluntarily joined the Carpenters before April 2, 2007, for all initiation fees, dues, and other moneys paid by them or withheld from them pursuant to the terms of the dues-check-off and union-security clauses incorporated in the 2007 Memorandum Agreement, and post a remedial notice. (A. 44.)

SUMMARY OF ARGUMENT

It is axiomatic that an "example[] of conduct constituting unlawful assistance [is] directing employees to meet with a union representative to sign an authorization card and having a supervisor or company official present when cards are signed . . . "[12] And that is precisely what happened here. Within a single day, the Company corralled its employees to a meeting with the Carpenters at which the Owners strongly endorsed the Carpenters, and then looked on while the Carpenters solicited union authorization cards from its employees. The Company unlawfully surveilled its employees by staying in the room and watching while the Carpenters

[11] In its Order Denying Motion for Reconsideration, the Board clarified its May 27, 2011 Order by noting that it should not be interpreted as requiring Board certification before the Company may lawfully recognize the Carpenters or any other union as its employees' Section 8(f) representative. (A. 11 n.2.)

[12] *Dairyland USA Corp.*, 347 NLRB 310, 312 (2006), *enforced* 273 F. App'x 40 (2d Cir. 2008).

lobbied employees to sign union authorization cards. The Board reasonably concluded that in these circumstances, the presence of company owners tended to coerce employees into acceding to their employer's wishes that they join the Carpenters.

Not only did the Company collaborate with the Carpenters to orchestrate the scene for the coercive solicitation of union authorization cards, it also communicated that its employees should join the Carpenters. Employees were told by the highest level of management that the Carpenters offered "a good deal" and were "the way we would like to go." (A. 246:24-25, 318:9-18.) Then, the minute the union cards were signed, the Company—faced with the Painters' competing demand for Section 9(a) recognition based on their claim of majority support—hastily cemented the deal before employees could change their minds. The Board reasonably found that by engaging in this course of conduct, the Company unlawfully assisted and recognized the Carpenters, and the Carpenters unlawfully accepted the assistance and recognition.

The Board appropriately exercised its broad discretion in ordering a remedy for these unfair labor practices that restores the status quo ante. The Company and Carpenters built their Section 9(a) relationship on union authorization cards tainted by unlawful coercion. Accordingly, the Board rightfully ordered the Company to cease and desist from assisting and recognizing the Carpenters as the Section 9(a)

collective-bargaining representative unless and until the Carpenters are duly certified by the Board. The Petitioners' challenge to this aspect of the remedy fails because it overlooks the Board's clarification that its remedial Order "should not be interpreted as requiring a Board certification" before the Company may lawfully recognize the Carpenters (or any other union) as its employees' Section 8(f) representative. (A. 11 n.2.)

STANDARD OF REVIEW

This Court "accords a very high degree of deference to administrative adjudications by the NLRB."[13] In reviewing the Board's decision, the Board's factual findings should not be disturbed, even if a reviewing court on de novo review would reach a different result,[14] and inferences drawn from the facts by the Board are entitled to substantial deference.[15] The Board's application of law to particular facts is "conclusive" if supported by "substantial evidence on the record

[13] *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011) (internal citation omitted).

[14] *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).

[15] *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

considered as a whole."[16] The Court will abide the Board's interpretation of the Act unless it has "no reasonable basis in law" or is "fundamentally inconsistent with the structure of the act."[17] Therefore, the Court's review of the Board's findings "is quite narrow."[18]

ARGUMENT

I. Substantial Evidence Supports the Board's Finding that the Company Violated Section 8(a)(1) of the Act by Engaging in Unlawful Surveillance

A. Section 8(a)(1) of the Act Forbids Employers From Coercing Its Employees by Surveilling Their Union Activities

Section 7 of the Act 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 . . . ."[19] Section 8(a)(1) of the Act implements that guarantee by providing that

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[16] 29 U.S.C. § 160(e)); *accord Universal Camera Corp.*, 340 U.S. at 488; *Avecor, Inc.*, 931 F.2d at 928; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 952 (D.C. Cir. 1988).

[17] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979).

[18] *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000).

[19] 29 U.S.C. § 157.

"[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in [Section 7]."[20]

It is well settled that surveillance of union activity violates Section 8(a)(1) if it interferes with, restrains or coerces employees in the exercise of protected activities.[21] The applicable test is objective and measures whether an employer's conduct has a tendency to coerce a reasonable employee, "regardless of [its] actual impact in a particular case."[22] An employer need not see the entirety of union activity for the Board to find unlawful surveillance.[23]

B. Substantial Evidence Supports the Board's Finding that the Company's Presence and Ability To Watch Employees While the Carpenters Pressured Them To Sign Union Authorization Cards Was Coercive

Ample evidence supports the Board's finding (A. 40-41) that the Company engaged in coercive and therefore unlawful surveillance of its employees during the April 2 meeting. The Company concedes it set up the meeting (Br. 21) to let

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[20] 29 U.S.C. § 158(a)(1).

[21] *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 419-20 (D.C. Cir. 1996); *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 266 (D.C. Cir. 1993); *UAW v. NLRB*, 455 F.2d 1357, 1367-68 (D.C. Cir. 1971).

[22] *See Nat'l Steel & Shipbldg. Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998); *accord Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988) ("to the extent that the Company suggests that evidence of actual intimidation is necessary to establish a violation of section 8(a)(1), it is simply wrong").

[23] *Morehead City Garment Co.*, 94 NLRB 245, 255 (1951), *enforced in relevant part* 191 F.2d 1021, 1022 (4th Cir. 1951).

the Carpenters recruit its painters and tapers. At the meeting, the Owners sat in view of the employees and enthusiastically recommended the Carpenters. The Owners proclaimed the Carpenters offered "the better package[,]" were "the way to go" (A. 41; A. 203:24-25, 318:9-18), and said: [w]e think it is a good deal." (A. 246:24.) The Owners then urged employees to listen to the Carpenters' presentation (A. 318:9-18, 351:18-20), a presentation the Owners participated in. (A. 246-48, 248:11-15, 315:10-17.) During their presentation, the Carpenters referred to the employees as if they were already union members, welcoming them and saying they were "glad to have [them] on our team." (A. 39; 693, 701, JX 15 at 3, 11.) After the Carpenters finished their presentation, the Owners remained in the room and solicited questions from their employees, gaining insight into their level of support for the Carpenters. (A. 248:12-24.) One Owner even answered an employee's question himself, further cementing the impression that management was allied with the Carpenters and wanted employees to "join them." (A. 39; 352:3-13.) As the question and answer period ended, the Owners repeated their support for the Carpenters. (A. 323.)

With the Company's endorsement ringing in their ears, employees were solicited by the Carpenters to go to the back of the room to "join up with them" (A. 41; 200:21-23) and "sign up with these cards" to "sign up for the union[.]" (A. 41; 319:10-19.) The Company's Owners, together with Field Superintendent Boyles,

remained present during and after the Carpenters' invitation and could witness their workers' decision-making process. They could readily observe which employees proceeded to the back of the room where the Carpenters' representatives were soliciting employees to sign authorization cards, and where the signing took place. (A. 249:1-12.) The Owners could also surveil which employees avoided the Carpenters by not proceeding to the back of the room. Such explicit surveillance married with coercion tends to interfere with the right of employees to "be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways."[24]

In short, the Company directly observed its employees engage in one of the most fundamental rights protected by Section 7 of the Act: deciding whether or not to join a labor organization. The Board, with judicial approval, has found such obvious and open surveillance of union meetings to have a reasonable tendency to coerce employees in the exercise of their free choice of bargaining representative.[25]

[24] *Flexsteel Indus.*, 311 NLRB 257, 257 (1993).

[25] *Morehead City Garment Co.*, 94 NLRB 245, 255 (1951), *enforced in relevant part* 191 F.2d 1021, 1022 (4th Cir. 1951).

C. Petitioners' Arguments Misstate the Standard of Review and Are Without Merit

The Petitioners offer a cornucopia of inapplicable standards of review and legal tests in an attempt to obscure the simple and well-trodden principles that control this case. (Br. 28-42.) The standard of review is whether substantial evidence supports the Board's factual findings, not those of the administrative law judge, whose determinations are not entitled to deference but merely comprise part of the record as a whole.[26] This standard "is not modified when the Board and its examiner disagree."[27] In any event, the Board did not disagree with or disturb the judge's credibility rulings; instead, the Board drew different inferences and legal conclusions from the evidence, which is the Board's prerogative.[28] Indeed, when the record contains substantial evidence in support of two different factual conclusions, the choice is the province of the Board.[29] With respect to legal determinations, this Court defers to the Board's conclusions given its "expert

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[26] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

[27] *Teamsters Local 20 v. NLRB*, 610 F.2d 991, 995 (D.C. Cir. 1979).

[28] *Laborers' Dist. Council of Georgia & South Carolina v. NLRB*, 501 F.2d 868, 874, n.16 (D.C. Cir. 1974).

[29] *Teamsters Local 20*, 610 F.2d at 995 (no special weight granted to inferences and legal conclusions drawn from the facts by administrative law judge).

knowledge of labor relations[.]"[30] Lastly, the well-established test for unlawful surveillance is objective, not subjective, and does not turn on whether an individual employee felt coerced.[31]

There is no merit to the Petitioners' contention (Br. 23, 36, 39) that company surveillance could not have been coercive because the employees' union activity was "open." The Petitioners ignore that employees attended the meeting only because the Company asked them to do so—without informing them of the meeting's true purpose. It was not until the employees were assembled at the meeting that Carpenters representatives, seconded by the Owners' endorsements, started urging the employees to sign union authorization cards. In these circumstances, the Petitioners can hardly claim that the employees—many of whom had recently signed cards authorizing the Painters to serve as their exclusive representative—attended the meeting with the intention of publicly partaking in union activity on behalf of the Carpenters.

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[30] *NLRB v. Milk Drivers & Dairy Emps., Local 388*, 531 F.2d 1162, 1165 (2d Cir. 1976) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804 (1945)).

[31] *See Nat'l Steel & Shipbldg. Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) ("An employer violates § 8(a)(1) if its actions have merely a 'tendency to coerce, [regardless of their] actual impact' in a particular case."); *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988) (proper question "is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of employee rights under the Act").

In any event, the cases cited by the Petitioners (Br. 23, 37-38) regarding open union activity are distinguishable. For example, in *Sunshine Piping Inc.*, unlike the instant case, employees wore union paraphernalia at work and openly solicited colleagues to sign union authorization cards on the employer's premises in its lunchroom and parking lot.[32] *Aladdin Gaming* is similarly distinguishable, as it involved employees with explicit union affiliation soliciting authorization cards on the employer's premises in public areas patronized by employees and management alike.[33] Moreover, in *Sunshine Piping Inc.* and *Aladdin Gaming*, it was the employees who initiated the union organizing. In stark contrast, the Company and the Carpenters instigated the organizing drive here, and there is no evidence of employee support for the Carpenters before they were summoned to the April 2 meeting. To the contrary, the evidence strongly suggests that prior to April 2, many employees had signaled their support for another union, the Painters, and had signed authorization cards designating the Painters as their exclusive representative. (JX 17 & 18.)

In conflict with their assertion (Br. 23, 36, 39) that employees engaged in "open" union activity, the Petitioners also profess that management was "unaware"

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[32] *Sunshine Piping Inc.*, 350 NLRB 1186, 1193-94 (2007).

[33] *Aladdin Gaming*, 345 NLRB 585, 585-86 (2005), *enforced* 515 F.3d 942 (9th Cir. 2008).

of the activity. (Br. 35.) These incompatible assertions do not withstand scrutiny. The Board's inference of owner knowledge is richly supported: the Owners told employees they should sign up with the Carpenters and were in the room when the Carpenters urged employees to "join up with them" and "sign up with these cards" to "sign up for the union." (A. 41; 200, 319:12-13.) The Board's inference of employer knowledge is further supported by the timing of the meeting, which the Company scheduled to take place immediately on the heels of the Painters' repeated demands for Section 9(a) recognition. Moreover, a Section 8(a)(1) violation turns on the impact of the employer's actions, not the employer's knowledge or motivation: the gravamen of the inquiry is whether reasonable employees would feel coerced.[34] In this case, the Board reasonably inferred that they would.

Contrary to the Company's further argument (Br. 22, 29, 33-35), it is of no moment that company representatives did not see the specific documents each employee signed. Based on the totality of the circumstances, the Board could reasonably infer that employees were influenced by the Company's observation of their decision to go to the back of the room and sign union authorization cards, or to remain seated and not sign. (A. 41.) Petitioners' claim that the Carpenters "never actually demanded that anyone join" the Union (Br. 33) ignores that

[34] *NLRB v. Midwestern Pers. Servs.*, 322 F.3d 969, 977 (7th Cir. 2003).

pressure and coercion can be subtle; as the Supreme Court has observed, even "[s]light suggestions as to the employer's choice . . . may have telling effect" among employees.[35]

Also contrary to the Petitioners (Br. 34-35), the Board appropriately relied on *Morehead City Garment Company* for the principle that obvious and open surveillance of union meetings has a tendency to coerce reasonable employees in the exercise of their free choice of bargaining representative.[36] (A. 41.) This principle applies in a case like the instant one, where the Company's Owners plainly and openly observed their employees' union activity, as the Board found. (A. 38-39.)

More generally, Petitioners err in their assertion (Br. 37) that the Board "deviat[ed] from controlling precedent." The cases cited by Petitioners are distinguishable, and involve far less compelling facts than the instant case.[37] For example, in *Wal-Mart Stores*, which the Petitioners cite (Br. 40), the Board did not find unlawful surveillance because the case merely involved a lone supervisor who

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[35] *Int'l Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 79 (1940).

[36] *Morehead City Garment Co.*, 94 NLRB 245, 255 (1951), *enforced in relevant part* 191 F.2d 1021, 1022 (4th Cir. 1951).

[37] *Nat'l Steel & Shipbldg. Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998); *accord Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

witnessed some public handbilling outside a store for a short time.[38] Watching employees hand out fliers in a public place is a far cry from herding employees into a hotel conference room and monitoring them while a union lobbies for the signing of union cards. *Osco Drugs*, another case cited by the Petitioners (Br. 36), is also factually distinguishable.[39] There the union invited the employer representative to attend a meeting, whereas in the instant case, the Company planned the meeting and told employees to attend.[40] Further, the meeting in *Osco* was attended by a single management-trainee without authority to hire, fire or promote. By contrast, here, all three Owners and a supervisor were present and actively participated in the meeting.[41]

Contrary to the Petitioners (Br. 46-48), the Board appropriately distinguished *Coamo Knitting Mills Inc.* in its Order Denying Motion for Reconsideration.[42] (A. 11 n.4.) In *Coamo*, a single employer representative attended a meeting at which he "could not and did not see any employees signing

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[38] *Wal-Mart Stores*, 340 NLRB 1216, 1223 (2003), *enforced* 136 F. App'x 752 (6th Cir. 2005).

[39] *Osco Drug*, 237 NLRB 231 (1978).

[40] *Id.* at 234.

[41] *Id.*

[42] *Coamo Knitting Mills Inc.*, 150 NLRB 579, 582-83 (1964).

the cards," and he made no attempt to determine which employees attended.[43] By contrast, in the instant case, the Company corralled its employees to an off-site meeting in which all of the Company's Owners not only participated but also could watch as the Carpenters solicited employees to sign cards. Given these starkly different facts, the Board correctly found *Coamo* distinguishable. (A. 11 n.4.) In any event, *Coamo* did not even involve an allegation of surveillance.

Lastly, the Petitioner's final ditch pleas that the Board has created a "per se" rule against "the mere presence of management" (Br. 36), and that the record lacks specific "indicia of coerciveness" (Br. 40), are red herrings intended to cloud the legal inquiry.[44] As this Court has observed, in considering allegations of unlawful surveillance, the Board examines the facts of each case.[45] Based on the circumstances of the instant case, the Board reasonably found that the Company violated Section 8(a)(1) of the Act by coercively surveilling employees at the April 2 meeting.

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[43] *Id.*

[44] *See United Steel & Shipbldg. Co. v. NLRB*, 156 F.3d 1268, 1271 (D.C. Cir. 1998) (rejecting similar contention that Board applied a "per se" rule in surveillance context).

[45] *Id.*

II. Substantial Evidence Supports the Board's Finding that the Company Engaged in Unlawful Assistance and Recognition and the Carpenters Unlawfully Accepted that Assistance and Recognition

A. The Act Requires that Employees' Free Choice of Bargaining Representative Be Untainted By Employer Assistance or Influence

Section 7 and Section 9(a) of the Act guarantee employees freedom of choice and majority rule in their selection of a bargaining representative.[46] Accordingly, the collective-bargaining process must be "free . . . from all taint of an employer's compulsion, domination or influence."[47] These rights are protected by Section 8(a)(2) of the Act, which makes it an unfair labor practice for an employer to interfere with the formation of a labor organization or contribute support to it, and by Section 8(b)(1)(A), which prohibits unions from restraining or coercing employees in the exercise of their Section 7 rights."[48] Thus, an employer violates Section 8(a)(2) and (1) by unlawfully aiding a union in its efforts to obtain majority support in a unit of employees, and by recognizing the union as the exclusive collective-bargaining representative on the basis of an unlawfully assisted majority, and a union violates Section 8(b)(1)(A) by accepting that

[46] 29 U.S.C. §§ 157 and 159(a); *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737 (1961).

[47] *Int'l Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940).

[48] 29 U.S.C. § 158(a)(2); § 158(b)(1)(A); *see District 65, Distrib. Workers of Am. v. NLRB*, 593 F.2d 1155, 1159, 1162 (D.C. Cir. 1978).

assistance and recognition.[49] A violation of Section 8(a)(2) results in a derivative violation of Section 8(a)(1).[50]

In demonstrating unlawful assistance, the Board examines the "totality of the circumstances" surrounding the employer's recognition of the union.[51] In making its determination, the Board considers a number of factors, including whether the employer directed employees to meet with the union;[52] had its supervisors present while union representatives solicited employees to sign union authorization cards;[53] accorded disparate treatment to competing unions;[54] and hastily granted recognition to a favored union.[55] Overall, the Board finds unlawful assistance if the employer's actions have a "tendency to coerce employees in the exercise of

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[49] *See Dairyland USA Corp.*, 347 NLRB 310, 311 (2006), *enforced NLRB v. Local 348-S, UFCW*, 273 F. App'x. 40 (2d Cir. 2008); *Duane Reade, Inc.*, 338 NLRB 943, 944 (2003), *enforced* 99 F. App'x 240 (D.C. Cir. 2004).

[50] *Int. Assn. of Machinists*, 311 U.S. at 80; *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 250 (D.C. Cir. 1991).

[51] *Dairyland USA Corp.*, 347 NLRB at 311-12; *accord District 65*, 593 F.2d at 1161.

[52] *NLRB v. Midwestern Pers. Servs.*, 322 F.3d 969, 977 (7th Cir. 2003).

[53] *Id.* at 978; *NLRB v. Vernitron Elec. Components, Inc.*, 548 F.2d 24, 26 (1st Cir. 1977).

[54] *District 65*, 593 F.2d at 1160; *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993); *Price Crusher Food Warehouse*, 249 NLRB 433, 438-39 (1980).

[55] *Midwestern Pers. Servs.*, 322 F.3d at 978; *NLRB v. Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619, 623 (2nd Cir. 1994).

their organizational rights,"[56] or if the "likely impact upon the employees" of the employer's actions is "sufficiently pervasive to taint the union's majority status."[57] Once an employer unlawfully assists a union in gathering support, "any subsequent recognition of the union is tainted."[58]

B. The Company Unlawfully Assisted and Recognized the Carpenters

As this Court has observed, it is an unfair labor practice for an employer to assist a union in obtaining majority support and to recognize a union based on that unlawful assistance.[59] Here, the Board reasonably found that the Company provided unlawful assistance to the Carpenters. After learning that the Painters had support from a majority of the painters and tapers, the Company rejected the Painters' demands for Section 9(a) recognition, and instead orchestrated the April 2 meeting with the Carpenters. Thus, company representatives summoned the painters and tapers to attend a mysterious meeting where the workers ended up being solicited to join the Carpenters. Such shepherding of employees creates an

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[56] *NLRB v. Link-Belt Co.*, 311 U.S. 584, 588 (1941); *accord Local 1814, Intern. Longshoremen's Ass'n, AFL-CIO v. NLRB*, 735 F.2d 1384 (D.C. Cir. 1984); *Vernitron Elec. Components, Inc.*, 548 F.2d at 26.

[57] *District 65*, 593 F.2d at 1161.

[58] *Windsor Castle*, 13 F.3d at 622-23.

[59] *District 65*, 593 F.2d at 1162 (D.C. Cir. 1978).

impression of employer support for the union and a sense of pressure in support of the union for employees.[60]

The credited testimony shows that, during that meeting, the Company extolled the virtues of the Carpenters. The Company Owners said the Carpenters offered the "better package" and was "the way to go." (A. 41; A. 203:24-25, 318:9-18.) They did not tell employees they could receive health insurance without signing union cards, and instead declared the Carpenters "a good deal." (246:24-25.) Overall, the Company broadcast a clear message: employees should accept the Carpenter's offer.

With the Company's backing, the Carpenters then lobbied employees to sign authorization cards and health insurance cards. While the Carpenters worked the audience of employees, the Owners stayed in the room and could monitor the action. During this brief period, many employees signed up with the Carpenters. Employees complied with the Company's wishes even while not fully understanding the ramifications of their actions; at least one employee signed an authorization card because he believed it was a prerequisite to obtaining health insurance. (A. 326:8-10.) The Board reasonably found that these circumstances

[60] *Vernitron Elec. Components, Inc.*, 548 F.2d at 26 (employer unlawfully assisted union by herding employees to union organizational meeting).

left no doubt that the employees would, to appease their employer, sign up with the Carpenters. (A. 41-42.)

During the same meeting, and based solely on the freshly signed authorization cards, the Company granted Section 9(a) recognition to the Carpenters as the employees' exclusive bargaining representative. The Company signed a three-year agreement hastily, and without bothering to check, count, or even touch the union authorization cards. And all of this happened just days after the Painters said these same employees had signaled their support for the Painters. Such speedy recognition at a time immediately after receiving coerced cards "locked in" majority support that might have otherwise eroded after the employer-assisted organizing ceased.[61]

Further, the Company's rapid decision to sign a Section 9(a) agreement with the Carpenters contrasts sharply with its lackadaisical response to a similar request from the Painters received days earlier.[62] The abrupt change of heart by the employees, many of whom had signed authorization cards for the Painters, also supports an inference that the Company manipulated them. The Board reasonably

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[61] *District 65*, 593 F.2d at 1159 (employer's hasty recognition of coerced cards indicia of unlawful assistance); *Vernitron Elec. Components, Inc.*, 548 F.2d at 26 (same).

[62] *District 65*, 593 F.2d at 1160 (blunt rejection of the demands of two unions and precipitate recognition of a third suggests unlawful assistance).

found that these facts establish unlawful assistance, recognition, and application of the Carpenters' Recognition Agreement and 2007 Memorandum Agreement.[63]

Petitioners err in asserting that the Board premised its finding of unlawful assistance entirely on the Company's unlawful surveillance. (Br. 28, 44, 48.) As discussed above (p. 32-34), the Board based the Section 8(a)(2) violation on many factors, including the Company's directive asking employees to attend an unidentified important meeting with the Carpenters, the presence of management while the Carpenters solicited employees to sign union authorization cards, the favorable treatment afforded by the Company to its preferred union, the Carpenters, and the hasty recognition granted by the Company to the Carpenters. Given the totality of the circumstances,"[64] the Board reasonably concluded that the Company's aid and support of the Carpenters was coercive and unlawful.[65]

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[63] *Vernitron Elec. Components, Inc.*, 548 F.2d at 26 (unlawful assistance when employer shepards employees to meet with union, monitors them while they sign union authorization cards, then hastily recognizes union); *Indus., Tech. & Prof'l Emps. Div., Nat'l Mar. Union of Am. v. NLRB*, 683 F.2d 305, 307 (9th Cir. 1982) (unlawful assistance when employer gives union organizers free access to solicit union authorization cards at its facilities and employer hastily recognizes the union without verifying cards); *Dairyland USA Corp.*, 347 NLRB 310, 310 (2006), *enforced* 273 F. App'x 40 (2d Cir. 2008) (unlawful assistance when supervisor directs employees to meet with a favored union and sign union authorization cards); *Duane Read, Inc.*, 338 NLRB 943, 943-44, *enforced* 99 F. App'x. 240 (D.C. Cir. 2004) (unlawful assistance when employer invites union to organize on company premises and directs employees to meet with union and sign authorization cards).

[64] *Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 80 (1940).

C. The Carpenters Unlawfully Accepted the Company's Assistance and Recognition

The Board also reasonably found (A. 42) that because the Company violated Section 8(a)(2) of the Act by assisting the Carpenters and granting them Section 9(a) recognition based on the tainted authorization cards, the Carpenters violated 8(b)(1)(A) of the Act by accepting the Company's assistance and recognition, and by entering into a collective-bargaining agreement with the Company.[66] By accepting the Company's unlawful assistance and recognition and entering into an agreement based on a tainted showing of majority status, the Carpenters violated the Act.

Petitioners waived their right to make any independent challenges to the Board's finding of the Section 8(b)(1)(A) violation because in their brief, they only argue that the Board erred in finding a violation of Section 8(a)(2).[67] Thus, if the Court upholds the Board's finding that the Company engaged in unlawful assistance and recognition and violated Section 8(a)(2), it should also enforce the

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[65] *See supra* note 63.

[66] 29 U.S.C. § 158(a)(2); § 158(b)(1)(A).

[67] *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 347 (D.C. Cir. 2011) (Board entitled to enforcement of portions of its order not contested in petitioner's opening brief); *New York Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issues not raised until reply brief are waived to prevent sandbagging).

Board's conclusion that the Carpenters violated Section 8(b)(1)(A) by accepting that assistance and recognition.

III. The Board Acted Within Its Broad Discretion in Formulating a Remedy that Restores the Status Quo Ante by Ordering the Petitioners To Cease and Desist from Their Unfair Labor Practices, and To Withdraw the Unlawful Recognition of the Carpenters

A. The Board Is Afforded Broad Discretion in Formulating Remedies

Section 10(c) of the Act empowers the Board to issue an order requiring the violator "to take such affirmative action . . . as will effectuate the purposes of the Act."[68] The Board's discretion in formulating remedies "is a broad one, subject to limited judicial review,"[69] and its choice of remedy must be respected unless the remedy "is a patent attempt to achieve ends other than those which can be fairly said to effectuate the policies of the [A]ct."[70] The Petitioners fail to meet that heavy burden.

B. The Board's Remedy Appropriately Prevents the Petitioners from Benefiting from the Tainted Union Authorization Cards

To remedy the serious unfair labor practices described above (pp. 30-36), the Board, *inter alia*, ordered the Company to cease and desist from assisting and

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[68] 29 U.S.C. § 160(c).

[69] *Fibreboard Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

[70] *Id.* (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)).

recognizing the Carpenters, and from giving effect to the unlawful Section 9(a) recognition of the Carpenters as the painters' and tapers' representative, "unless and until [the Carpenters] has been duly certified by the Board." (A. 43.) This remedy comports with well-settled law.[71] It furthers the purposes of the Act by restoring employee free choice and deterring future similar misconduct.[72] As the Supreme Court stated long ago, "there is no clearer abridgement" of the employees' organizational rights than an employer's unlawful recognition of a minority union, and the union's unlawful acceptance thereof.[73]

The Petitioners attack the Board's May 27, 2011 remedial Order by asserting (Br. 49-57) that it prohibits them from entering into lawful Section 8(f) agreements. This assertion completely overlooks a clarification to the May 27 Order that the Board made in its August 18, 2011 Order Denying Motion for Reconsideration. (A. 11 n.2.) The Petitioners fail to even mention the Board's August 18 Order, which squarely states that the May 27 Order "should not be interpreted as requiring a Board certification of representative before Garner/Morrison may lawfully recognize the Carpenters (or any other labor

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[71] *See supra* note 63.

[72] *Int'l Ladies' Garment Workers,* 366 U.S. at 737; *Indus., Tech. & Prof'l Emps. Div., Nat'l Mar. Union of Am. v. NLRB,* 683 F.2d 305, 308 (9th Cir. 1982).

[73] *Int'l Ladies' Garment Workers,* 366 U.S. at 737.

organization) as its employees' Sec. 8(f) collective-bargaining representative." (A. 11 n.2.)

Again overlooking the clarifying language in the Board's August 18 Order, the Petitioners erroneously contend that the Court should not enforce Sections 1(c) and 2(a) of the Board's May 27 remedial Order, which direct the Company to cease and desist from "giving effect to the unlawful recognition," and to "withdraw and withhold all recognition" until the Carpenters have been certified by the Board. (A. 43.) As the Board explained in its August 18 Order, however, the May 27 Order should not be interpreted as requiring a Board certification before the Company may lawfully recognize the Carpenters or any other union as a Section 8(f) representative. (A. 11 n.2.) Accordingly, the Petitioners err in asserting (Br. 51) that the Court should deny enforcement to Sections 1(c) and 2(a) of the Board's remedial Order.[74]

To the extent the Petitioners' dispute is about the scope of the Carpenters' affirmative obligation under the remedial Order to reimburse employees for dues

[74] In any event, the Petitioners err in relying (Br. 53, 56) on *Zidell Explorations, Inc.*, 175 NLRB 887 (1969), a case that they selectively quote in a misleading way. In *Zidell*, unlike the instant case, the employer alone was responsible for unfair labor practices that arose subsequent to the creation of a Section 8(f) contract. In those very different circumstances, the Board appropriately was concerned about entering an order that would punish a union that was not responsible for any wrongdoing. *Id.* at 890-91. Perhaps "we would have a different case" if only the Company or the Carpenters had committed unfair labor practices here. *NLRB v. Campbell Soup Co.*, 378 F.2d 259, 262 (9th Cir. 1967).

and fees they paid as a result of being coerced into signing the tainted authorization cards, that concern is best addressed in compliance. The Board traditionally defers such backpay issues to the compliance stage of the proceeding.[75] Compliance determinations are routinely made "after entry of a Board order directing remedial action, or the entry of a court judgment enforcing such [an] order."[76] Formal proceedings, including a hearing before an administrative law judge, are instituted when it is necessary to resolve compliance issues.[77] As the Supreme Court has long-observed, compliance proceedings provide the "appropriate forum" for tailoring the remedy to suit the individual circumstances of each case.[78]

[75] *NLRB v. Katz*, 80 F.3d 755, 771 (2d Cir. 1996).

[76] 29 C.F.R. § 102.52.

[77] *Id.* § 102.54.

[78] *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petitions for review and enforcing in full the Board's Order as modified by its August 18, 2011 Order Denying Motion for Reconsideration.

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National Labor Relations Board
June 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS	)	
Petitioner/Cross-Respondent	)	Nos. 11-1212, 11-1445, 11-1446
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 28-CA-21311
GARNER/MORRISON, LLC	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,110 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/ Linda Dreeben
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Dated at Washington, DC
this 29th day of June, 2012

STATUTORY ADDENDUM

STATUTORY ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):**

Section 7 (29 U.S.C. §157)

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

Section 8 (29 U.S.C. § 158)

(a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> * * * *

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents—

> (1) to restrain or coerce
>
> > (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of

a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein[.]

*** * * ***

(f) [Agreement covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 9 (29 U.S.C. § 159)

(a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not

inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10 (29 U.S.C. § 160)

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

* * * * *

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS	)	
Petitioner/Cross-Respondent	)	Nos. 11-1212, 11-1445, 11-1446
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 28-CA-21311
GARNER/MORRISON, LLC	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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

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Dated at Washington, DC
this 29th day of June, 2012