

No. 12-60041

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

**GENON WEST, L.P., FORMERLY KNOWN AS
RELIANT ENERGY, ALSO KNOWN AS ETIWANDA, L.L.C.**

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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STATEMENT REGARDING ORAL ARGUMENT

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

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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on a petition for review filed by GenOn West, L.P. (formerly known as Reliant Energy, also known as Etiwanda, L.L.C.) (“the Company”), and the cross-application of the National Labor Relations Board (“the Board”) for enforcement of a Board order finding that the Company committed several unfair labor practices. The Board had jurisdiction over the proceeding

below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. The Board’s Decision and Order issued on December 30, 2011, and is reported at 357 NLRB No. 172. (D&O 1-22).¹

The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties, and the Company is based in Texas. The Company’s petition for review filed on January 18, 2012, and the Board’s cross-application for enforcement filed on March 16, 2012, were timely because the Act places no time limit on the initiation of enforcement or review proceedings. The Utility Workers of America, AFL-CIO (“the Union”) has intervened on behalf of the Board.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by promising employees benefits if they voted against the Union and violated Section 8(a)(1) and (3) by withholding benefits from employees to discourage them from joining or supporting the Union.

¹ “D&O” references are to the Board’s Decision and Order. “Tr.” references are to the hearing transcript, and “GCX,” “CPX,” and “RX” references are to the exhibits introduced by the Board’s General Counsel, the Charging Party (the Union), and the Company, respectively. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) and (3) of the Act by causing its contractor, Fluor Daniel, to remove employee Baeza from the facility because of his union activity.

STATEMENT OF THE CASE

This case involves the unfair labor practices that the Company committed in the critical weeks preceding a Board-conducted election among the Company's employees to decide whether they would choose the Union as their exclusive-bargaining representative. After losing the election, the Union filed with the Board an unfair labor practice charge. The Union also filed a timely objection to conduct affecting the results of the election, which was coextensive with two of the unfair labor practice allegations. After an investigation, the Board's Acting General Counsel consolidated the representation and unfair labor practices cases for hearing and issued a consolidated complaint.

The complaint alleged that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promising employees improved benefits to discourage support for the Union. The complaint alleged further that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by withholding certain benefits from employees and by causing one of its contractors to remove employee Richard Baeza from its facility because of his union activity.

After the hearing, the administrative law judge issued his recommended decision and order finding that the Company had violated the Act as alleged. The judge also determined that the Company's unfair labor practices committed during the critical weeks leading up to the election warranted setting aside the election and ordering a new election to be held. On review, the Board affirmed the judge's rulings, findings, and conclusions and adopted the recommended order, as modified. (D&O 1-6, 20-22.) The subsections below are summaries of the Board's findings of fact and its Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Parties' Relationships

The Company, a Texas-based energy company, owns several electric power generating plants, including one in Etiwanda, California, where the events of this case arose. Approximately 37 operation and maintenance employees work at the Etiwanda facility. (D&O 1, 11-12; GCX 1h.) Between 1997 and April 2001, the Company contracted with Southern California Edison ("SCE") to provide operation and maintenance services for its Etiwanda facility. (D&O 1, 12; Tr. 159-62.) During this time frame, the Union represented SCE operation and maintenance employees at the facility. In early 2001, SCE created an affiliate company, Edison Operation & Maintenance Services ("EOMS"), and transferred its operation and maintenance contract with the Company to EOMS. The Union

continued to represent the operation and maintenance employees after EOMS assumed the contract. (D&O 1, 12; Tr. 31-34, 177.)

B. The Company Terminates Its Contract with EOMS and Assumes Operation of the Etiwanda Facility

On April 1, the Company terminated its agreement with EOMS. (D&O 1, 12; Tr. 164-66, 174.) Thereafter, the Company officially assumed the operation of the Etiwanda facility and hired employees to perform the plant's day-to-day operations. (D&O 1, 12; Tr. 174, 185.) It encouraged employees of SCE and EOMS who had worked at the Etiwanda facility to become employees of the Company, but did not ultimately hire a majority of former SCE or EOMS employees. (D&O 1, 12; Tr. 36, 177-78, RX15.) The Company thereafter executed an agreement with another contractor, Fluor Daniel, to perform periodic maintenance on major projects. In turn, Fluor Daniel subcontracted some of this work to EOMS. (D&O 1, 12; Tr. 34-35, 82.)

C. The Union Begins To Organize the Company's Employees; Company Employees Approach Employee Baeza with Signed Authorization Cards and Ask Him Questions about the Union

On April 1, the Union, which represented EOMS employees, began to solicit authorization cards from the Company's Etiwanda employees. Richard Baeza, an electrical and safety coordinator assigned to the Etiwanda plant and employed by EOMS, was active in the Union's campaign. Baeza was a 25-year member of the Union, a member of the Union Executive Board, and an elected delegate to the Los

Angeles County Federation of Labor. He wore a union shirt several times a week and participated in off-site union meetings after work. The Company and fellow employees were aware of Baeza's union activity and affiliation, in part because he had worked at the Etiwanda facility as a contractor for "going on 25 years, give or take 8 or 10 years." (D&O 1, 14; Tr. 37, 72, 73, 76-78, 79-81.)

Because he was a well-known union official, during the organizational drive, company employees approached Baeza during lunches and breaks with questions about the Union. They also handed him authorization cards at work and left them on his car windshield. When employees handed him authorization cards, Baeza thanked them and encouraged them to attend the union meetings for more information. He kept these conversations brief, lasting less than a minute. Baeza never distributed any union literature during work time, nor did any representative from the Company, EOMS, or Fluor Daniel ever direct him not to conduct union activity on work time. (D&O 1, 14-15; Tr. 79-80, 123-24.) The Company did not have any rule against solicitation or non-work discussions among employees, and employees often discussed non-work matters during work time. (D&O 2, 15; Tr. 124, 304-05.)

D. The Union Petitions for an Election After the Company Denies that It Is a Successor to SCE and Refuses Voluntarily To Recognize the Union

On April 1, the Union sent a letter to the Company asserting that the Company was a “successor employer” with the obligation to bargain with the Union. (D&O 1, 12; RX3.) On May 4, the Company responded that it was not a successor employer and declined to recognize the Union. (D&O 1, 12; RX2.) On May 4, the Union informed the Company that it had obtained authorization cards from a majority of the Company’s employees and requested that the Company voluntarily recognize the Union. (D&O 1, 12; GCX 2a, 2b.) On May 10, the Company again declined to recognize the Union. (D&O 1, 12; RX1.)

On May 23, the Union filed a representation petition with the Board seeking to represent a unit of operation and maintenance employees at the Company’s Etiwanda facility. (D&O 1, 12; GCX 1h.) After the parties executed a stipulated election agreement, the Board scheduled a secret-ballot election for July 3. (D&O 1 12; GCX 11.)

E. The Company Develops an Incentive Plan that Initially Provides an Opportunity for All Exemplary Company Employees To Earn Substantial Bonuses

In the spring of 2001, California’s severe energy crisis put pressure on the Company to minimize unit outages and ensure that its California plants were operating at maximum efficiency. As one way to attain high performance from its

employees, the Company explored ways to link pay to performance and to recognize and reward significant contributions from exemplary employees. To this end, the Company developed an incentive plan. (D&O 1, 12-13; Tr. 180, 188-89, RX16.)

On May 23, the Company contacted its labor counsel regarding its draft incentive program, seeking comments “early and often.” (D&O 1, 13; RX16.) The Company’s plan described how employees could earn awards for superior performance ranging from \$1000 to \$4000. (D&O 1, 13; GCX 5, RX16.) The Company scheduled implementation of the plan for June. In its May 23 draft of the plan, all company employees were eligible for incentive awards and bonuses, regardless of whether they were represented by a union or would be voting in the upcoming election. (D&O 1, 13; Tr. 249-50, GCX 5, RX16.)

F. The Company Insists on Baeza’s Ouster from Its Property for Collecting Signed Authorization Cards and Answering Questions About the Union

In early June, the Company received reports that Baeza was engaging in union organizing activity during work time. (D&O 1, 15; Tr. 84-87, 269, 342-45, GCX 5, 15.) On the basis of these reports, the Etiwanda supervisor of plant maintenance, Martin Willis, contacted Fluor Daniel Superintendent Jim Biel who told Willis that he had “heard the same rumors.” (D&O 1, 15; Tr. 342-45, GCX 15.) Willis then discussed the matter with Harold Craft, a labor consultant hired by

the Company to assist with the Company's anti-union campaign, who advised Willis that Baeza's actions were "not legal and [] Baeza should be removed from the site." (D&O 1, 15; Tr. 269, 280, 283-84, GCX 15.) After his discussion with Craft, Willis directed Biel to bar Baeza from the plant. (D&O 1, 15; 344-45; GCX 5, 15.)

On June 11, Biel met Baeza in the parking structure when he reported for work at the Etiwanda plant. As Baeza exited his car, Biel informed him that the Company requested his immediate removal from the property because he was "not wanted." (D&O 1, 15; Tr. 84.) Biel referenced Baeza's union activity, referring to it as solicitation, and instructed him to leave the premises. (D&O 1, 15; Tr. 84-87.)

Baeza called his EOMS supervisor, Bud Bernor, and advised him that he was being "kicked off" the property. (D&O 1, 15; Tr. 86.) Bernor told Baeza that he would call him back, and Baeza briefly returned to the jobsite. (D&O 1, 15; Tr. 86.) Fifteen minutes later, Bernor called back and directed Baeza to leave the property to avoid causing friction between EOMS and the Company. (D&O 1, 15; Tr. 89.) Baeza then packed up his tools and notified co-worker Thomas Riddle that, as second in line behind Baeza, Riddle was now "in charge." (D&O 1, 15; Tr. 83, 91.) Baeza briefly talked with Riddle and other employees about how Biel had said that his union activity had caused his removal from the property. Baeza then

left the worksite. On June 12, EOMS reassigned Baeza to another jobsite. (D&O 1, 15; Tr. 87-88, 91, 100.)

After Baeza's removal, Riddle had a conversation with Willis, who told him that the Company removed Baeza because he "was doing union business" on company time. (D&O 1, 15; Tr. 130.) Willis also told Riddle that the Company would prefer to be nonunion, because "they could treat their employees better" without the Union. (D&O 1, 15; Tr. 130.)

G. Two Weeks Before the Election, the Company Announces the Incentive Program to Employees, Excluding, for the First Time, Its Etiwanda Employees from Receiving the Bonuses and Awards; Etiwanda Employees Learn about the Program and Their Ineligibility To Participate

On June 14, southwest operations manager, Matt Greek, sent an email to management officials describing the incentive program and attaching an explanatory letter addressed to employees. The email informed managers that the program was effective immediately for all the operation personnel at the Company's California facilities, with the exception of "represented employees at Coolwater and employees covered by an election petition at Etiwanda."² (D&O 1, 13; CPX 2.) The email instructed managers to "distribute the attached [letter] to all eligible employees." (D&O 1, 13; CPX 2.) The Company generated and

² Coolwater was another company-owned facility with employees represented by another union. (D&O 12 & nn.4 & 5; GCX 10.)

distributed the letters from about June 14 to 19.³ (D&O 1, 13; GCX 4, 5, 8, CPX 2.)

The letter notified employees that the incentive program for operation employees at the California facilities would be effective from June until October. According to the letter, eligible employees had the opportunity to earn a \$500 per month bonus if plant performance levels exceeded certain threshold values established by the Company. The program also allowed for discretionary awards of up to four times the bonuses based on monthly performance. The letter explained that “[r]epresented employees and those currently covered by an election petition are not eligible for this extraordinary program.” (D&O 1, 13; GCX 4.)

Although the letter’s intended audience was eligible employees, which did not include the Etiwanda employees who would soon be voting in an election, these employees nonetheless received copies of the letter. Some of them received copies of the letter from other eligible employees, while others found copies had been placed in their work cubbyholes. Consequently, the employees were aware of the letter and discussed among themselves the incentive program and their exclusion from it. (D&O 1, 13-14; Tr. 131-34.)

³ The letters were identical with the exception that each letter reflected the respective date that it was generated. (D&O 13.)

H. The Company Continues To Remind Employees that They Are Ineligible for the Incentive Program and that Implementation of the Program Is Not Guaranteed If the Union Wins the Election; the Company Disseminates a “Vote No” Letter; the Union Loses the Election

In the weeks after the Company announced the incentive program, labor relations consultant Craft conducted “buzz” meetings “to educate employees as to their rights” in the upcoming election. (D&O 1, 13; Tr. 283-84, GCX 16.) At one such meeting in late June, after the Company distributed the letter announcing the incentive program but prior to the election, employees asked questions about the program. In response, Craft advised employees that whether they ultimately received bonuses and awards under the program would depend on negotiations with the Union, if the Union won the election. (D&O 1, 13; Tr. 291-93.)

On June 24, plant manager, Danny Ross, issued a letter to employees to “respond to several rumors and concerns.” (D&O 1, 14; GCX 9.) The letter notified employees that the Union’s petition for an election prohibited the Company “from improving existing wages or benefits during the course of a union campaign.” (D&O 1, 14; GCX 9.) Ross’ letter referenced two distinct benefits that were presently unavailable to employees—the incentive plan and “double time for holidays at other plants.” (D&O 1, 14; GCX 9.) The letter advised employees that whether they would ever receive these benefits would be determined by negotiations if the Union won the election. The letter reminded employees that

“the [U]nion can only ask [for the benefits]. The Company is the only one in a position of giving the benefits.” (D&O 1, 14; GCX 9.)

In closing, the letter re-emphasized that the increased benefits “have been implemented in all of our California plants [that] are not represented by a union, and who are not in the process of an organizational campaign.” (D&O 1, 14; GCX 9.) The letter also remarked on the current union campaign and told employees that “**we don’t need a union to interfere with the process.**” (D&O 1, 14; GCX 9 (emphasis in original).) Ross concluded the letter by asking the employees to “trust me by giving me a year in a non-union setting to prove to you what I feel would be in your best interest,” and urging them to “**vote no** on the day of the election.” (D&O 1, 14; GCX 9 (emphasis in original).)

On July 3, the Board conducted an election, which the Union lost by a vote of 23 to 9, with 1 challenged ballot. On July 6, the Union filed an objection to conduct affecting the results of the election and an unfair labor practice charge alleging that the Company violated the Act. On January 4, 2002, the Regional Director issued a report on the investigation of the election objection, consolidated the objection with the unfair labor practice complaint, and directed a hearing. (D&O 11; GCX 1j.) The administrative law judge found that the Company violated the Act by promising increased benefits to employees if they voted against the Union and by withholding benefits to employees to discourage them from

joining or supporting the Union. The judge found further that the Company violated the Act by causing Fluor Daniel to remove Baeza from the property because of his union activity. On the basis of those findings, the judge also found that the election must be set aside and a second election be held. (D&O 15-18, 20-22.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of these facts, the Board (Chairman Pearce and Member Becker; Member Hayes dissenting) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promising employees improved benefits under the incentive plan if they voted against the Union. The Board also found that the Company violated Section 8(a)(1) and (3) (29 U.S.C. § 158(a)(1) and (3)) by withholding incentive plan benefits and double pay for holidays from unit employees to discourage membership in and support for the Union while giving those benefits to non-union employees. The Board further found that the Company violated Section 8(a)(1) and (3) of the Act by causing its contractor, Fluor Daniel, to remove employee Baeza from its facility because of his union activity.⁴ (D&O 5, 20-21.)

⁴ The Board severed the representation case (No. 31-RC-8023) and remanded it to the Regional Director for the purpose of conducting a second election. (D&O 6.) That case is not before the Court because a Board order in a certification proceeding is not a final order and thus not directly reviewable by the courts under

The Board's Order requires the Company to cease and desist from the unfair labor practices found and, in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act (29 U.S.C. § 157). The Board also ordered the Company to notify Fluor Daniel that it has no objection to Baeza returning to its Etiwanda facility or any of its other facilities, to make Baeza whole for any loss of earnings, and to expunge from its files any reference to the unlawful demand to remove Baeza from the facility. The Order further includes a make-whole remedy for employees who suffered any loss of earnings as a result of the discriminatory withholding of the incentive plan and increased pay for holidays. Finally, the Board ordered the Company to post a remedial notice. (D&O 5.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by promising employees benefits if they voted against the Union and violated Section 8(a)(3) and (1) of the Act by withholding benefits because of the pending election. The Company readily acknowledges that it premised those benefits decisions on the Union's representation petition and that it made that reason eminently clear to its employees. That is to say, the employees

Section 10(e) of the Act (29 U.S.C. § 160(e)). *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964); *Bishop v. NLRB*, 502 F.2d 1024, 1027 (5th Cir. 1974).

fully understood that because they were contemplating union representation, they were ineligible for lucrative benefits under the incentive plan and that their ineligibility would likely continue if the Union won the election. It was clear that the only way to ensure that they would receive the benefits would be if the Union lost the election. Under these circumstances, the Board reasonably determined that the Company failed to act—as it must—as if the Union were not present when it made decisions concerning benefits for its employees during the critical period between the filing of a petition and the election. The Company's weak claim of confusion over precedent and its reliance on labor advice from counsel are insufficient to overcome the Board's finding that the Company's conduct was coercive and violated the Act.

Substantial evidence also fully supports the Board's finding that the Company violated Section 8(a)(1) and (3) of the Act by its actions leading to the removal of Baeza from his worksite at the Etiwanda facility. The Board reasonably determined that Baeza, who was rightfully on the premises and whose conduct had no effect on or interference with work production, suffered unlawful reprisal from the Company for collecting signed authorization cards from employees who approached him during their breaks, briefly answering their questions about the Union, and encouraging them to attend union meetings. The Company did not establish the existence of any no-solicitation policy under which

it could have lawfully prohibited all forms of solicitation, and failed to demonstrate otherwise that it had a legitimate management interest in excluding Baeza from his jobsite. The Company's insistence that case law regarding access rights of nonemployee union organizers permitted its unlawful restraint of Section 7 rights is simply misplaced.

STANDARD OF REVIEW

The Board bears "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Thus, when its "interpretation of what the Act requires is reasonable, in light of the purposes of the Act and the controlling precedent of the Supreme Court, courts should respect its policy choices." *Elec. Workers Local 702 v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000) (internal quotations omitted); accord *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (when the Board engages in the "difficult and delicate responsibility of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review"). The Court must "respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.'" *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)).

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 (5th Cir. 1978). The "substantial evidence" test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). Therefore, under the substantial evidence standard, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. As this Court has observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line*, 577 F.2d at 1014 n.3.

"In determining whether the Board's factual findings are supported by the record, [the Court does] not make credibility determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007). The Board's adoption of the administrative law judge's credibility determinations must be upheld absent a showing that they are unreasonable, self-contradictory, based upon inadequate reasons or no reason, or unjustified. *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007).

ARGUMENT**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED THE ACT BY PROMISING EMPLOYEES BENEFITS IF THEY VOTED AGAINST THE UNION AND BY WITHHOLDING BENEFITS FROM EMPLOYEES TO DISCOURAGE THEM FROM JOINING OR SUPPORTING THE UNION**

The Company, facing an imminent union election after having just recently assumed control over operations at the Etiwanda plant, used both the promise and withholding of benefits to dissuade employees from supporting the Union. Before learning of the filing of the representation petition, the Company had developed an incentive program to address California's energy crisis under which all employees at its California plants stood to earn up to an additional 25 percent of their annual salary. Once the Union filed for an election, however, the Company impliedly promised the benefits to Etiwanda employees only if they refrained from union activity and voted against representation. The Company then implemented the incentive program, making it clear through meetings and written communications that employees contemplating union representation were excluded from the benefits. The Company repeatedly reminded employees during the critical weeks between the petition filing and the election of their exclusion and blamed the Union for that decision.

A. Applicable Principles

Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce” employees in the exercise of their statutory rights. 29 U.S.C § 158(a)(1). The broad purpose of this section is to guarantee the right of employees to organize for mutual aid and protection without employer influence. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). An employer violates Section 8(a)(1) by granting an increase in wages or benefits, or withholding such an increase, during an election campaign for the purpose of persuading employees to vote against the union. *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964); *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 96 (5th Cir. 1970). An employer’s decision to grant benefits to some employees and withhold them from others to persuade employees to vote against the union also violates Section 8(a)(3), which bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). *See NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 297-98 (5th Cir. 1969).

As the Supreme Court has said, “[w]e have no doubt that [Section 8(a)(1)] prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably

calculated to have that effect.” *Exch. Parts*, 375 U.S. at 409. During an election campaign, when the paramount concern is to protect against interference with employee free choice, “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *Id.*

Thus, during the pendency of a union representation proceeding, an employer must act—including either in the granting or withholding benefits—“precisely as it would if the union were not on the scene.” *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998); *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005) (“It follows that an employer may not withhold a wage increase that would have been granted but for a union organizing campaign.”). In determining whether an employer has acted lawfully in granting or withholding benefits during an election campaign, the Board weighs four factors to assess the effect on employee free choice. *See B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991); *Holly Farms Corp.*, 311 NLRB 273, 274 (1993) (examining same four factors in both unfair labor practice cases and election objection cases); *accord Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 908 (6th Cir. 1997). The Board considers “(1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of

employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit.” *B&D Plastics*, 302 NLRB at 245.

The Board’s standard in such pre-election benefit cases is an objective one. *See Gulf States Cannerys*, 242 NLRB 1326, 1327 (1979), *enforced*, 634 F.2d 215 (5th Cir. 1981). In determining that a grant or withdrawal of benefits is objectionable, the Board thus draws an inference that the withdrawal or grant of benefits during the critical period between the filing of an election petition and the election is coercive. *B&D Plastics*, 302 NLRB at 245. The Board, however, permits an employer to rebut that inference by coming forward with a legitimate explanation, other than the pending election, for the timing of its change in benefits. *Id.*

Whether an employer’s conduct is coercive within the meaning of Section 8(a)(1) of the Act is a factual question for the specialized expertise of the Board. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Likewise, an employer’s motivation for conferring or withholding benefits is a factual question and the Board’s finding is therefore conclusive if supported by substantial evidence on the record as a whole. *See Pedro’s, Inc. v. NLRB*, 652 F.2d 1005, 1007 (D.C. Cir. 1981); *NLRB v. Cell Agric. Mfg. Co.*, 41 F.3d 389, 393-94, 395 (8th Cir. 1994).

B. The Board Reasonably Found that the Company Violated Section 8(a)(1) of the Act by Promising Employees Improved Benefits if They Voted Against the Union

The Board properly applied the above principles to the facts and determined that the Company violated Section 8(a)(1) of the Act by promising its employees financial benefits under the incentive program only if they were not represented by a union or covered by an election petition. That is to say, the Board ultimately concluded that the Company would have granted the incentive program to employees at all of its California facilities, including Etiwanda, in the normal course of business operations had the Union not been on the scene. (D&O 1, 16.) The Board's conclusion in this regard is entirely reasonable and amply supported by substantial evidence.

In finding that the Company's conduct violated the Act, the Board considered the four factors enumerated above: the size of the benefit, the number of employees receiving it, how employees would view it, and the timing. With regard to the size of the benefit, the Board noted that the amount was "very significant"—employees could earn up to 25 percent of their annual income. (D&O 1, 16-17; GCX 17.) Promise of such a substantial financial benefit only to employees with no union affiliation "would certainly have the effect of discouraging [the Etiwanda employees] from supporting the Union." (D&O 17.)

With regard to the number of employees, the Board found that it was “considerable,” as the program applied to employees at three of the Company’s plants and only excluded those employees already represented by a union or covered by a representation petition. (D&O 17.) “Thus all employees understood that only those relatively few who were involved with a union would not be eligible for the benefit.” (D&O 17.) The Board concluded that there could be little doubt that such an implicit promise to receive benefits if employees refrained from union activity and voted against the Union would have a chilling effect on the Etiwanda employees, voting in the upcoming election. (D&O 1, 17.)

With respect to the third factor, the Board determined that the circumstances under which the Company announced the program and how employees learned of the program would compel the Etiwanda employees to reach but one conclusion: they would be covered by the program if the Union were not on the scene. (D&O 17.) Indeed, letters to employees expressly stated that the bonuses and awards under the incentive program were not available to any employee represented by a union or covered by a representation petition. As the Board explained, “[s]uch conduct would have had the certain effect of discouraging employees from supporting the Union.” (D&O 17.)

Lastly, the timing of the promised benefits also supports the finding that the Company’s conduct interfered with employee free choice. The Company informed

the employees two weeks before the election about the incentive program and that union affiliation would negate eligibility. (D&O 1, 17.) Accordingly, the Board found that the timed release of the information was “intended to interfere with the exercise of the employees’ Section 7 rights.” (D&O 17.)

After weighing these four factors and determining that they established coercive conduct, the Board examined whether the Company had demonstrated that it would have taken the same action regardless of the pending election. As the Board observed, however, the Company failed to offer a legitimate explanation as to why it excluded Etiwanda employees from the program. (D&O 1, 17.)

Moreover, the Company did not notify the employees that it would defer the benefits until after the election, regardless of the outcome, an action that the Board has held to provide a safe harbor.⁵ (D&O 1, 17.)

The Board also considered the circumstances surrounding the Company’s creation and implementation of the incentive program to determine whether the

⁵ Board law provides a safe harbor for an employer that fears that benefit changes while an election petition is pending will subject it to unfair labor practice charges. For example, the employer may postpone an increase until after the election and notify the employees that it is doing so for the sole purpose of avoiding the appearance of attempting to interfere with employees’ free choice in the forthcoming election. *See Uarco, Inc.*, 169 NLRB 1153, 1154 (1968). The employer must, however, make it clear that the increase will occur regardless of the outcome of the election and must avoid disparaging or undermining the union by implying that it stands in the way of the employees’ receipt of the increase. *See NLRB v. Aluminum Casting & Eng’g Co.*, 230 F.3d 286, 293 (7th Cir. 2000); *NLRB v. Otis Hosp.*, 545 F.2d 252, 256 (1st Cir. 1976).

Company would have implemented the program for all employees, including those at its Etiwanda facility, but for the impending election. The Board observed (D&O 15) that California's energy crisis precipitated the Company's development of the program in April or May, and that the Company did not intend—originally—to exclude any employees at any of its five California facilities. According to the Board, the Company changed its attitude toward the Union as it was finalizing the incentive program. (D&O 15.) “The most obvious change in its attitude was the sudden exclusion of represented employees and those covered by a representation petition from the ‘extraordinary incentive program.’” (D&O 15.)

Further, given that the Company's stated goal was to operate its facilities at maximum efficiency, the Board found that the Company would most assuredly want to encourage *all* of its operation and maintenance employees at *all* of its plants to be as productive as possible. (D&O 16.) Accordingly, the Board determined that the Company implicitly promised the incentive program to Etiwanda employees only if they refrained from supporting the Union, which “would have had the effect of interfering with the employees’ right to freely choose their bargaining representative by discourage them for voting for the Union.” (D&O 16.) *See, e.g., Goodyear & Tire Rubber Co.*, 170 NLRB 539 (1968), *modified on other grounds*, 413 F.2d 158 (6th Cir. 1969); *Bendix-Westinghouse Automatic Air Brake Co.*, 185 NLRB 375 (1970), *enforced*, 443 F.2d

106 (6th Cir. 1971). On the basis of these factors, the Board concluded that the Company's conduct was unlawfully coercive.

C. The Board Reasonably Found that the Company Violated Section 8(a)(1) and (3) of the Act by Withholding Benefits from Employees To Discourage Them from Membership In and Support for the Union

As discussed above (pp. 20-22), the Company had an obligation to act as if the Union were not on the scene with regard to benefits during a pre-election critical period between the filing of the election petition and the election. The Company "did just the opposite." (D&O 17.)

In finding that the Company's withholding of benefits violated Section 8(a)(1) and (3), the Board relied on the circumstances surrounding the announcement and implementation of the incentive program and increased holiday pay. Specifically, the Company's first communication with employees about the incentive program, the June 14 letter, informed the employees that the reason for their ineligibility from the lucrative program was because they had sought union representation. (D&O 17-18.) Employees also learned that employees at the Company's plants without any union affiliation would, in fact, immediately reap the benefits of the incentive program. (D&O 18.) The Company's second written communication, the June 24 letter, repeated this message. That letter, which also urged the employees to vote no in the upcoming election, informed them once again of their ineligibility for the incentive program because of the impending

election and advised them further that they would not be receiving “double time for holidays.” (GCX 9.)

The Company proffered no reason for the denial of the benefits, other than the employees’ interest in being represented by the Union. Therefore, these letters “would reasonably suggest to Etiwanda employees that if the Union won the election, they would continue to forfeit” the benefits the Company was providing to the non-union employees. (D&O 18.) The Company also reinforced its coercive message that union affiliation would have an adverse effect on benefits by failing to assure the employees that it would defer implementation and that they would receive the benefits regardless of the election’s outcome. (D&O 18.)

In short, the Company rested its decision to withhold the benefits of two programs solely on factors related to the Union. This decision making process directly contravenes the Act and the Board’s requirement that employers act as if the union were not on the scene in making benefits decisions during the critical period. *See Exch. Parts*, 375 U.S. at 409. The Company’s conduct interfered with employee free choice and constitutes discrimination “against those who are distinguishable only by their participation in protected activity and that such discrimination may to some extent discourage membership in a labor organization by inducing the employees to vote against the union.” *Great Atl.*, 409 F.2d at 298.

Thus, the Board's findings that the Company violated Section 8(a)(1) and (3) are entitled to enforcement.

D. The Company's Contentions Are Meritless

The Company challenges the Board's finding by arguing (Br. 26-28) that the administrative law judge "conflated the inquiry about promising benefits with withholding them." (Br. 27.) The Company's assertion falls short. As the Board explained "the conclusion [that the Company simultaneously promised and withheld the incentive program benefits] correctly reflects both aspects of [the Company's] conduct: withholding the benefit from employees because they engaged in union activity and implicitly promising them that benefit if they refrained." (D&O 1 n.6.)

The Company also claims that "the program was designed independent of any union election," and therefore, the Company "easily satisfies the Supreme Court's test in *NLRB v. Exchange Parts*." (Br. 26.) The Company's claim misses the mark. It was not the impetus for the program that the Board found ran afoul of the Act. Rather, the Board determined that the Company violated the Act by its deliberate and calculated promise of benefits to employees if they refrained from union activity and, therefore, voted against representation.

Further, the Board rejected the Company's claim that it was "concern[ed] about not wanting to commit an unfair labor practice." (D&O 15.) The Board

expressly found that the Company's decision "was part of the strategy to defeat the Union's organizational efforts, which [the Company] had embarked upon." (D&O 16.) In support of its finding that the Company sought to avoid union representation at the Etiwanda facility, the Board relied on an August 2000 power point presentation for company managers that pointedly observed "competitors have broken [the Union]." (D&O 16; RX 10.) The Board inferred that the Company, like its competitors, sought to "break" the Union. (D&O 16.) The Board also observed that the Company had hired Craft to "fight the organizational effort," and one measure of his success in his job was the Union losing the election. (D&O 16 & n.11; Tr. 276-77.)

The Company trots out (Br. 33-34) the familiar claim that Board law in this area fails to provide adequate guidance and leaves employers in "a Catch-22." (Br. 33.) In dismissing similar concerns, the Board has emphasized that "[t]he law in this area is clear. . . . The critical inquiry is whether the [employer's actions] were for the purpose of influencing the employees' vote in the election and were of a type reasonably calculated to have that effect." *Noah's Bay Area Bagels*, 331 NLRB 188, 189 (2000); *see also Otis Hosp.*, 545 F.2d at 255 (responding to employer's claim of "potential confusion and unfairness in rules" by emphasizing that an employer must support its decision to grant or withhold benefits during an election campaign with "very specific facts"). Contrary to the Company's claims,

the principles outlined above (pp. 20-22) provide “comprehensible standards and guidelines for employer conduct during the critical period prior to a representation election.” *Id.*

The Company’s reliance on *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312 (5th Cir. 1994), is unavailing. In *Marshall Durbin*, the Court determined that the employer had not unlawfully delayed a wage increase prior to an election. 39 F.3d at 1321. One factor upon which the Court relied was the employer’s posting of a lengthy excerpt from a legal publication to explain, in *neutral* terms, the decision to withhold the wage increase. *Id.* at 1323. Here, the Company displayed no similar informative neutrality. In its first communication with employees about the program, the Company simply informed the employees that they were not eligible for the incentive program because they were “covered by an election petition.” (GX17.) In a second communication, the Company asserted that the law prohibited it from improving existing wages and benefits during an election campaign, an inaccurate statement under the circumstances of this case.⁶ (GCX 9.) The Company conveyed this single statement, however, in the broader context of its urging employees to vote no, exposing its belief that it did not need “a union to interfere,” and advising employees that the benefits were not guaranteed even if

⁶ As shown above, the Company is only prohibited from granting or withholding benefits that are intended to interfere with employee free choice, and the Board provides safe harbor guidance for employers on how to implement benefits changes without accruing unfair labor practice liability. *See* p. 25 n.5

the Union won the election. And, once again, that letter reminded employees that, “YES! These benefits have been implemented in all of our California plants which are not represented by a union and who are not in the process of an organizational campaign.” (GCX 9.) This communication is a far cry from the neutral, legal treatise excerpt posted by the employer in *Marshall Durbin*.

Further, in *Marshall Durbin*, the Court determined that the employer had not blamed the union, *see* 39 F.3d at 1323, unlike here where the Company repeatedly informed employees that the Union and upcoming election were the reason for its decisions with regard to the incentive program. The employees learned in no uncertain terms that, absent the pending election and if they voted against representation, they, like their coworkers across California, would be eligible to earn up to an additional 25 percent of their annual salary and to receive the increased holiday pay.

It bears repeating that the Company does not contest that the incentive program was a benefit initially conceived for *all* employees at its California plants. Indeed, in its brief to this Court, the Company notes (Br. 35) that not granting the benefit to Etiwanda employees was, in fact, not in its “business interest.” Given the clear legal standard that the Company was required to act as if the Union were not present in making benefits changes, this admission alone provides substantial

evidence for the Court to uphold the Board's finding, and further distinguishes it from *Marshall Durbin*.

With respect to increased holiday pay, the Company asserts (Br. 36) that there is no evidence to support a finding that "anyone was ever offered double pay." The Board expressly found (D&O 1 n.6), however, that the June 24 letter from plant manager Ross informing employees that they were not eligible for increased holiday pay, while employees at other plants were eligible, "was sufficient proof, because it is properly treated as a party admission by [the Company]." Further, the Company's assertion does nothing to undermine the Board's finding (D&O 18) that whether employees at other plants actually received additional holiday pay "is not the point." Rather, the "crucial" point is that "the Etiwanda employees reasonably assumed, based on the contents of the June 24 letter from Ross, that they were not getting what other employees had, namely double time, because of the representation petition." (D&O 18.) The Company fails even to acknowledge this finding.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY CAUSING ITS CONTRACTOR, FLUOR DANIEL, TO REMOVE EMPLOYEE BAEZA FROM THE FACILITY BECAUSE OF HIS UNION ACTIVITY

The Board reasonably found that Baeza was engaged in protected union activity when he was at his worksite performing work for Fluor Daniel, a company

contractor. He limited his activity to collecting signed authorization cards, briefly answering questions posed to him by company employees during their lunch and other non-work times, and encouraging them to attend union meetings after work. Baeza's protected activity never interfered with work production, nor did it violate any work rule. On this record, the Company cannot show that the Board's finding that the Company violated the Act by directing Fluor Daniel to remove Baeza from the Etiwanda facility because of his union activity is unsupported by substantial evidence.

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, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act establishes that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” under Section 7 of the Act. 29 U.S.C. § 158(a)(1). In turn, Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage

membership in any labor organization.” 29 U.S.C. § 158(a)(3).⁷ This section therefore clearly prohibits discrimination on the basis union-related activity. *See, e.g., Radio Officers’ Union of Commercial Tels. Union v. NLRB*, 347 U.S. 17, 39 (1954).

An employer need not be the direct employer, however, to be found liable for such discriminatory actions. “[I]t is well settled that an employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affects the working conditions of the latter’s employees because of the union activities of those employees.” *Dews Constr. Corp.*, 231 NLRB 182, 183 n.4 (1977) (citing cases), *enforced*, 578 F.2d 1374 (3rd Cir. 1978); *accord NLRB v. Pneu Elec., Inc.*, 309 F.3d 843, 857 (5th Cir. 2002). As we now show, the Company violated the Act by directing its contractor, Fluor Daniel, to remove Baeza from the Etiwanda facility because of his union activity.

B. The Board Reasonably Found that Baeza Was an Employee Engaged in Protected Union Activity

The Board reasonably found (D&O 1-5) that the Company unlawfully directed Fluor Daniel to remove employee Baeza from his workplace at the Etiwanda facility because of his protected union activity. As an initial matter, the

⁷ A violation of Section 8(a)(3) also results in a “derivative violation” of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Company does not dispute that Baeza was engaged in union activity in support of its employees' organizing efforts. Nor could it readily contest that fact given that, as shown at pp. 5-6, the credited evidence establishes that Baeza was an active and well-known union official who had worked at the Etiwanda facility during much of his 25 years of union affiliation. Because he was well known as an employee knowledgeable about the Union, the Company's employees naturally approached him during lunches and breaks with questions about the Union and passed him signed union authorization cards. During those encounters, Baeza briefly answered the employees' questions and encouraged them to attend upcoming union meetings for more information.

The Company similarly does not contest that the reason that it directed Fluor Daniel to remove Baeza from the Etiwanda facility was because he was engaged in those union activities in support of its employees' organizing efforts. Accordingly, the Board's finding that the Company unlawfully directed that Baeza be removed from the facility must be upheld if the Board reasonably found that Baeza's union activity was protected by the Act. The Board's finding of protected activity is fully supported by the credited evidence and consistent with the law.

In finding Baeza's activity was protected, the Board first noted (D&O 3) that Baeza was working at the Etiwanda facility as an employee within the meaning of Section 2(3) of the Act, which broadly defines the statutory term "employee" and

expressly provides that the term “shall not be limited to the employees of a particular employer.” 29 U.S.C. §152(3). As the Supreme Court has explained, and the Board acknowledged here, that broad definition “‘was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own.’” (D&O 3, quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978)). Thus, as the Board concluded, “Baeza clearly was engaged in concerted activities in support of employees of an employer other than his own—activities that were protected by the Act, absent a finding that Baeza’s Section 7 rights must yield to some legitimate [employer] interest.” (D&O 3.)

The Board and courts recognize both property rights and management interests as legitimate interests to which an employee’s Section 7 rights may properly be required to give way under certain circumstances. The Supreme Court has observed, however, that the Board must strike a different balance when employees already rightfully on an employer’s property carry on organizational activity, because when “employees are ‘already rightfully on the employer’s property,’” it is “the ‘employer’s management interests rather than [its] property interests’ that primarily are implicated.” *Eastex*, 437 U.S. at 573 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521-22 n.10 (1976)).

Here, the Board properly applied these principles and determined (D&O 3) that Baeza’s rightful presence at the facility to perform his job foreclosed any infringement on the Company’s property rights. Baeza was present at the worksite pursuant to a contractual relationship between his employer, EOMS, and Fluor Daniel and the Company. (D&O 3.) Because the Company’s property rights “centered on the right to exclude others,” the Board properly found that they are not implicated where Baeza “was *not* seeking access to the worksite to engage in organizational activity.” (D&O 3) (emphasis added). Accordingly, the Board reasonably concluded that only the Company’s management interests, if any, might be implicated.

With respect to the Company’s management interests, the Board invoked (D&O 4) the doctrine, pursuant to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that governs employees engaged in organizational activity while at work. Specifically, *Republic Aviation* and its progeny establish the principle that an employer may not lawfully implement a broad no-solicitation rule on company property during non-work time. 324 U.S. at 803-05. On the other hand, “[i]t is [] within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours.” *Id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944)).

An employer's failure to act, however, has consequences; namely, in the absence of such a rule, the Board demands that an employer demonstrate an actual interference with or disruption of work. *See, e.g., NLRB v. Mueller Brass Co.*, 501 F.2d 680, 684 (5th Cir. 1974) (distinguishing *Patio Foods v. NLRB*, 415 F.2d 1001 (5th Cir. 1969), on the ground that there was no showing of any actual or potential for disrupting, distracting, or interrupting employees who were working); *Greentree Elecs. Corp.*, 176 NLRB 919, 919-20 (1969), *enforced*, 432 F.2d 1011 (9th Cir. 1970); *Selwyn Shoe Mfg. Corp.*, 172 NLRB 674, 676 (1968), *modified on other grounds*, 428 F.2d 217 (8th Cir. 1970). In other words, where an employer wholly neglects its right to prohibit solicitation during working hours and promulgates no rule at all, "the employee activity that *could* otherwise be prohibited retains its protected character." *Cont'l Grp., Inc.*, 357 NLRB No. 39, 2011 WL 3510489, at *3 (2011) (emphasis in original).

Here, the Company does not challenge the Board's factual determination that the Company had no rule prohibiting employees from solicitation or discussions of non-work matters during work time.⁸ In the absence of a no-solicitation rule, the Company was thus required to show that it demanded Baeza's removal because his activities interfered with or disrupted work. Substantial

⁸ Notably, the Board expressly found that Baeza did not engage in any solicitation, but only responded to employees who approached him with signed cards and questions. (D&O 4.)

evidence soundly supports the Board's conclusion that the Company failed in this regard.

As the Board found, and the Company does not challenge, there was “absolutely no evidence that Baeza was not performing his job properly, or that he was distracting employees in the performance of their job duties.” (D&O 4, 19-20.) The Board also relied on Baeza's unrefuted and credited testimony that his interactions with employees on company time were “minimal” and “very brief, limited to receiving signed authorization cards.” (D&O 4, 20); *see, e.g., Trico Indus.*, 283 NLRB 848, 848 n.1, 851-52 (1987) (employee's brief conversations with union president during work time did not lose the Act's protection, where the conversations did not violate any published rule or interfere with production). Under these circumstances, the Board properly found that the Company failed to make a showing of disruption. “[T]hat failure matters under well-established labor law principles,” and, as such, the Board reasonably found that Baeza's activity did not interfere with any management interest. (D&O 5.)

C. The Company's Arguments Are Without Merit

The Company lodges various challenges to the Board's decision with respect to Baeza's Section 7 rights in this case. As we show below, none of its claims withstands scrutiny.

Predictably, the Company argues (Br. 38-41) that the Board should have applied *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), to determine that Baeza had no Section 7 rights when he engaged in union activity while at his worksite. The Company's objection is not persuasive. Under *Lechmere*, an employer may restrict access to its property by nonemployee union organizers who would be trespassers, unless the employees are beyond the reach of reasonable union efforts to communicate with them. 502 U.S. at 534; accord *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). In direct response to the Company's claim and its cited cases, the Board reasonably explained that "the Supreme Court's decisions in *Babcock & Wilcox* and *Lechmere* and the Board's decision in *New York New York*, [356 NLRB No. 119, 2011 WL 1113038 (2011) ("NYNY"), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *petition for en banc reh'g denied*, Docket No. 11-1098 (D.C. Cir. July 6, 2012),] . . . do not bear on the situation here, where a statutory employee has been retaliated against for engaging in protected concerted activity while at his workplace to perform work."⁹ (D&O 5.) As the Board stated (D&O 3), Baeza was not seeking access to the Company's property to engage in organizational activity like the nonemployee union organizers in *Lechmere*—he was already there to perform work and thus rightly on the property. Neither his minimal and brief

⁹ The D.C. Circuit's July 6, 2012 denial of the petition for a rehearing *en banc* in *New York New York v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012), puts to rest the Company's suggestion (Br. 43-44) that that decision is on shaky ground.

interactions with company employees nor his receipt of authorization cards changes the analysis. Further, because such access cases are not otherwise applicable here, the Company's attempt (Br. 44-45) to factually distinguish *NYNY* is of no consequence.

In erroneously asserting that *Lechmere* controls this case, the Company contends (Br. 39) that Baeza was acting as a nonemployee union organizer who could be barred from accessing its property. This claim is contrary to relevant precedent. The Board has determined, with court approval, that off-duty contractor employees exercising organizational rights at their worksite, which is owned by another employer, enjoy Section 7 rights and that *Lechmere* does not permit the property owner to exclude them from the property. *See NYNY*, 2011 WL 1113038, at *18. Similarly, in *ITT Industries, Inc. v. NLRB*, 413 F.3d 64 (D.C. Cir. 2005), the D.C. Circuit upheld the Board's finding that off-site employees who were employees of the same company, but worked at a different facility, had Section 7 rights in attempting to organize similarly situated employees of the same employer at a different facility. *Id.* at 68. These cases demonstrate the falsity of the Company's claim (Br. 39) that the Board and courts end the inquiry with whether the individual is an employee or nonemployee of the property owner.

The Company further asserts (Br. 41) that "*Lechmere* is binding in its bright-line distinction between employees exercising their own rights and nonemployees

attempting to exercise derivative rights.” What the Company fails to note, however, is that any such distinction is only relevant when an individual seeks access to an employer’s property to exercise *derivative* Section 7 rights. Indeed, in *Lechmere*, the Supreme Court explained that the “critical distinction” is between employee activity protected by Section 7, which nonderivatively “guarantees the right of self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities,” and the activities of nonemployees “to whom [Section] 7 applies only derivatively.” 502 U.S. at 533 (rights of nonemployee union organizers derive from the right of employees to learn about the advantages of self-organization). Here, as the Board reasonably found, Baeza was himself an employee engaged in protected union activity and acting in concert with the organizing efforts of the Company’s employees. As such, Baeza was exercising nonderivative Section 7 rights.

The Company vaguely claims (Br. 42) that the Board’s current decision is somehow infirm because in *Pneu Electric, Inc.*, 309 F.3d 843 (5th Cir. 2002), this Court vacated, in part, a prior Board order involving similar issues. In *Pneu Electric*, this Court directed the Board to reexamine the rights of contractor employees in light of *Lechmere*. As the Board here expressly noted (D&O 4 n.21) in response to the Company’s contention, it has now thoroughly examined those rights in *NYNY*. As the D.C. Circuit has explained, the Board “is not obligated to

justify its interpretation anew with every application if it has done so adequately in a previous decision.” *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001).

Further, as the Board recognized, in *Pneu Electric*, this Court “enforced the Board’s order against the property owner with respect to the discharge of its contractor’s employees for engaging in protected activity on the owner’s property.” (D&O 4 n.21.) The Company’s actions here are identical to those in *Pneu Electric*—reprisal against another employer’s employee for his union activity while that employee was rightly on the owner’s property to perform work. Accordingly, *Pneu Electric* supports, rather than undermines, the Board’s decision here.

The Company also asserts (Br. 46) that the Board “relie[d] on *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), to ignore the compelling evidence that [the Company] had a good-faith belief that Baeza’s activities were not protected.” The Board did not fail to consider any such evidence. Rather, the Company failed, as the Board noted (D&O 4 n.22), to challenge the findings that Baeza had only minimal conversations with employees during their breaks, simply collected signed authorization cards that the employees passed him, and did not disrupt work production. Further, the Company failed to challenge the Board’s finding that the Company did not investigate Baeza’s alleged solicitation. These failures

“foreclosed” the Company’s argument that it acted with a good-faith belief that Baeza was engaging in unprotected activity. (D&O 4 n.22.) In other words, the Company’s failure to challenge the Board’s findings of fact regarding these matters precluded a defense of good-faith belief because the facts established that no misconduct, in fact, occurred. (D&O 4 n.22.)

The Company’s claim (Br. 48) that the Board’s decision somehow confers *Republic Aviation* rights “on anyone who works for any employer and happens to be on a given property” is pure hyperbole and finds no basis in the Board’s rationale or the facts of this case. The Board simply found—on these facts—that Baeza was a statutory employee against whom the Company retaliated for engaging in protected union activity while at his place of employment to perform work.

The Company erroneously maintains (Br. 49) that a Section 8(a)(3) violation requires a showing of union animus under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Here, because the Company directed Baeza’s removal admittedly on the basis of his union activity, the reprisal itself constitutes a violation of Section 8(a)(3) and (1), without

consideration of *Wright Line*'s analysis.¹⁰ As the Board noted here (D&O 2), “*Wright Line* is inapplicable in such circumstances.”

Lastly, the Company goes to great lengths (Br. 49-56) to challenge the *Wright Line* analysis of the administrative law judge. The Board, however, unambiguously rejected that portion of the judge's recommended decision, finding *Wright Line* wholly inapplicable. (D&O 2.) Given the Board's clear decision not to apply *Wright Line*, Board counsel declines to address the Company's irrelevant challenges to the judge's reasoning that the Board rejected.

In sum, the Company has offered no basis for this Court to disturb the Board's reasonable finding that the Company violated the Act by directing Fluor Daniel to remove employee Baeza from the Etiwanda facility because of his protected union activity.

¹⁰ *Valmont Industries, Inc. v. NLRB*, 244 F.3d 454 (5th Cir. 2001), does not advance the Company's argument. (Br. 49.) *Valmont Industries* involved discipline pursuant to a lawful policy—thus, the dual-motivation analysis delineated in *Wright Line* was appropriate. Here, the Company had no such rule in place, but, instead, acted purely on the basis of retaliating against Baeza for his union activity.

CONCLUSION

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

Respectfully submitted,

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July 2012

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

GENON WEST, L.P., FORMERLY KNOWN	:
AS RELIANT ENERGY, ALSO KNOWN	:
AS ETIWANDA, L.L.C.	:
	:
Petitioner/Cross-Respondent	:
	: Case No. 12-60041
v.	:
	: Board Case No.
NATIONAL LABOR RELATIONS BOARD	: 31-CA-25155
	:
Respondent/Cross-Petitioner	:

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit 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 a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC
this 11th day of July 2012

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	:
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,759 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, is identical to the hard copy of the Board's brief filed with the Court and served on the petitioner/cross-respondent. The Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 11.0.6100.645. According to that program, the CD-ROM is free of viruses.

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