Nos. 12-1054, 12-1137

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRUCE PACKING COMPANY, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 296, AFL-CIO

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(a) *Parties and Amici*: The Board is respondent/cross-petitioner before the Court; its General Counsel was a party before the Board (Board Case Nos. 26-CA-23675 and 26-CA-23734). The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union was the charging party before the Board. Ozburn-Hessey Logistics, LLC ("OHL"), petitioner/cross-respondent before the Court, was respondent before the Board.

(b) *Rulings Under Review*: This case is before the Court on a petition filed by OHL for review of an order issued by the Board on November 30, 2011, and reported at 357 NLRB No. 125. The Board seeks enforcement of that order against OHL.

(c) *Related Cases*: This case has not been before this or any other court. Board counsel are unaware of any related cases either pending or about to be presented to this or any other court.

TABLE OF CONTENTS

Headings **Page(s)**

Statement of jurisdiction 1

Statement of issues presented 3

Relevant statutes and regulations 3

Statement of the case 3

Statement of facts 5

I. The Board's findings of fact 5

A. Company operations and relevant background 5

B. Day-shift sanitation employees support the union and attend union meetings; Supervisor Esparza questions and warns Maciel's wife about employees' union activities 6

C. In a general reduction in force due to a business downturn, the Company discharges Coria, Maciel, Luna, and Rojas 8

D. Supervisor Esparza admits that he selected the day-shift sanitation employees because of their union activities 10

II. The Board's conclusions and order 10

Summary of argument 11

Standard of review 13

Argument 15

I. The Board is entitled to summary enforcement of the uncontested portions of its order 15

TABLE OF CONTENTS

Headings – Cont'd **Page(s)**

II. Substantial evidence supports the Board's finding that the Company discriminatorily selected employee Rojas for layoff in violation of Section 8(a)(3) and (1) of the Act 16

A. The Act prohibits an employer from discharging its employees because of their union activities or sympathies 16

B. The Board properly found that the Company unlawfully discharged Rojas because of his union activity 18

III. The Board did not abuse its discretion in allowing the General Counsel to amend the complaint 25

A. The Board may allow amendment of an unfair-labor-practice complaint, so long as it does not deprive a party of due process 26

B. The Company had sufficient notice that Esparza's statements during the June 19 conversation with Cortez, including the promise of raises, were at issue 29

C. The Company fully litigated the promise-of-raises allegation 30

D. The Company has not shown that it was prejudiced by the complaint amendment 32

Conclusion 35

TABLE OF AUTHORITIES

Cases **Page(s)**

Actavis Elizabeth LLC v. U.S. Food and Drug Admin.,
625 F.3d 760 (D.C. Cir. 2010) 26

Allegheny Pepsi-Cola Bottling Co. v. NLRB,
312 F.2d 529 (3d Cir. 1962) 21

Am. Ship Building Co. v. NLRB,
380 U.S. 300 (1956) 17

Andino v. NLRB,
619 F.2d 147 (1st Cir. 1980) 14

Bally's Park Place, Inc. v. NLRB,
646 F.3d 929 (D.C. Cir. 2011) 14

Bd. of Regents of the Univ. of Wash. v. EPA,
86 F.3d 1214 (D.C. Cir. 1996) 16,33

**Boston Mut. Life Ins. Co. v. NLRB*,
692 F2d 169 (1st Cir. 1982) 21

Cadbury Beverages, Inc. v. NLRB,
160 F.3d 24 (D.C. Cir. 1998) 14

Ceridian Corp. v. NLRB,
435 F.3d 352 (D.C. Cir. 2006) 14

Clark & Wilkins Indus., Inc. v. NLRB,
887 F.2d 308 (D.C. Cir. 1989) 21

Conair Corp. v. NLRB,
721 F.2d 1355 (D.C. Cir. 1983) 27,30,33

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TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Desert Hosp. v. NLRB,
91 F.3d 187 (D.C. Cir. 1996) 28

**Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*,
363 F.3d 437 (D.C. Cir. 2004) 16

George Banta Co. v. NLRB,
686 F.2d 10 (D.C. Cir. 1970) 27,28

George C. Foss Co. v. NLRB,
752 F.2d 1407 (9th Cir. 1985) 31

Grand Rapids Die Casting Corp. v. NLRB,
831 F.2d 112 (6th Cir. 1987) 21

Halstead Metal Prod., A Div. of Halstead Indus., Inc. v. NLRB,
940 F.2d 66 (4th Cir. 1991) 19

Huck Mfg. Co. v. NLRB,
693 F.2d 1176 (5th Cir. 1982) 28

**Hunter Douglas, Inc. v. NLRB*,
804 F.2d 808 (3d Cir. 1986) 21

**Laro Maint. Corp. v. NLRB*,
56 F.3d 224 (D.C. Cir. 1995) 13,18,24

Lion Knitting Mills Co.,
160 NLRB 801 (1966) 27

Local 702, Int'l Bhd. of Elec. Workers v. NLRB,
215 F.3d 11 (D.C. Cir. 2000) 17

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TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Manno Elec.,
321 NLRB 278, 280 n.12 (1996) 18

Metropolitan Edison Co. v. NLRB,
460 U.S. 693 (1983).....17

Microimage Display Div. of Xidex Corp. v. NLRB,
924 F.2d 245 (D.C. Cir. 1991).....18

NLRB v. Blake Construction Co,
663 F.2d 272 (D.C. Cir. 1981).....30

NLRB v. Clark Manor Nursing Home,
671 F.2d 657 (1st Cir. 1982).....16

NLRB v. Curtin Matheson Scientific, Inc.,
494 U.S. 775 (1990).....14

NLRB v. Ferguson,
257 F.2d 88 (5th Cir. 1958) 19

NLRB v. Galicks, Inc.,
__ F.3d __, 2012 WL 678142 (6th Cir. 2012).....14

NLRB v. Mackay Radio & Telegraph Co.,
304 U.S. 333 (1938).....27

NLRB v. R.J. Smith Constr. Co.,
545 F.2d 187 (D.C. Cir. 1976).....31

NLRB v. Roure-Dupont Mfg.,
199 F.2d 631 (2d Cir. 1952).....26

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

NLRB v. Transp. Mgmt. Corp.,
462 U.S. 393 (1983).....17

NLRB v. Tricor Prod., Inc.,
636 F.2d 266 (10th Cir. 1980).....28,31

N.Y. Rehab. Care Mgmt. v. NLRB,
506 F.3d 1070 (D.C. Cir. 2007).....16

Parts Depot, Inc.,
332 NLRB 670 (2000), *enforced*,
24 F.App'x 1 (D.C. Cir. 2001).....21

**Parsippany Hotel Mgmt. Co. v. NLRB*,
99 F.3d 413 (D.C. Cir. 1996).....19

**Pergament United Sales, Inc. v. NLRB*,
920 F.2d 130 (2d Cir. 1990).....26,27,29

**Pioneer Hotel, Inc. v. NLRB*,
182 F.3d 939 (D.C. Cir. 1999).....34

Power Inc. v. NLRB,
40 F.3d 409 (D.C. Cir. 1994).....13,24

Radio Officers' Union v. NLRB,
347 U.S. 17 (1954).....17

Redd-I,
290 NLRB 1115 (1988).....34

Sitka Sound Seafoods, Inc. v. NLRB,
206 F.3d 1175 (D.C. Cir. 2000).....16

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

Spectrum Health-Kent Cmty. Campus v. NLRB,
647 F.3d 341 (D.C. Cir. 2011) 26

Springfield Air Ctr.,
311 NLRB 1151 (1993) 22

S. Nuclear Operating Co.,
524 F.3d 1350 (D.C. Cir. 2008) 17

Staub v. Proctor Hosp.,
131 S. Ct. 1186 (2011) 22

**Tasty Baking Co. v. NLRB*,
254 F.3d 114(D.C. Cir. 2001) 30,33

Traction Wholesale Ctr. Co. v. NLRB,
216 F.3d 92 (D.C. Cir. 2000) 13

United Packinghouse, Food and Allied Workers Int'l Union v. NLRB,
416 F.2d 1126 (D.C. Cir. 1969) 28

United Servs. Auto. Ass'n v. NLRB,
387 F.3d 908 (D.C. Cir. 2004) 14

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 13,14

Visiting Nurse Serv. of W. Mass., Inc. v. NLRB,
177 F.3d 52 (1st Cir. 1999) 26

[*] Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont'd **Page(s)**

W.F. Bolin Co.,
311 NLRB 1118, 1119 (1993), *enforced*,
99 F.3d 1139 (6th Cir. 1996) 18,24

W&M Props. of Conn., Inc. v. NLRB,
514 F.3d 1341 (D.C. Cir. 2008).....13

**Woelke & Romero Framing, Inc. v. NLRB*,
456 U.S. 645 (1982).....15

Wright Line
251 NLRB 1083 (1980), *enforced*,
662 F.2d 899 (1st Cir. 1981).....12,17,22,25,31

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)
Section 7 (29 U.S.C. § 157) 17
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) 3,4,12,15,16,17,19,25,27,29,30,34
Section 8(a)(3) (29 U.S.C. § 158 (a)(3)) 3,4,12,15,16,17,25,30
Section 10(a) (29 U.S.C. § 160(a)) 2
Section 10(b) (29 U.S.C § 160(b)).....26
Section 10(e) (29 U.S.C. § 160(e)) 2,3,13,15
Section 10(f) (29 U.S.C. § 160(f)) 2,3

Miscellaneous

29 C.F.R. § 102.17 26
29 C.F.R. § 102.46(e).....32
29 C.F.R. § 102.46(g) 4,32
29 C.F.R. § 102.48(a).....4
Fed. R. App. P. 28(a)(9)(A).....15
D.C. Cir. R. 28(a).....15

GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Company	Bruce Packing Company, Inc.
Union	Laborers' International Union of North America, Local No. 296

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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

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Bruce Packing Company, Inc. ("the Company") to review, and the cross-application of the National Labor

Relations Board ("the Board") to enforce, the Board's Order issued against the Company. The Board found that the Company committed unfair labor practices by coercively interrogating, threatening, and promising raises to employees to discourage their support of the Laborers' International Union of North America, Local No. 296, AFL-CIO ("the Union"), and discriminatorily discharging four employees because of their union activities.

The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act ("the Act"),[1] which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order issued September 28, 2011, and is reported at 357 NLRB No. 93. (JA 206-219.)[2] It is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3]

Venue is proper pursuant to Section 10(e) and (f) of the Act,[4] which provides that petitions for review and cross-applications for enforcement may be

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[1] 29 U.S.C. §§ 151, 160(a).

[2] "JA" references in this final brief are to the Joint Deferred Appendix filed by the Company. "Br." references are to the Company's opening brief to this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] 29 U.S.C. § 160(e) and (f).

[4] *Id.*

filed in this Court. The Company filed its petition for review on January 25, 2012, and the Board cross-applied for enforcement on March 7, 2012. Both filings were timely, as the Act places no time limitation on such filings.

STATEMENT OF THE ISSUES PRESENTED

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

II. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by selecting employee Rojas for layoff because of his union activities.

III. Whether the Board abused its discretion in granting the General Counsel's motion to amend the complaint.

RELEVANT STATUTES AND REGULATIONS

Relevant provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Union (JA 151, 160), the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Jose Carmen Maciel, Manuel Coria, Daniel Luna, and Federico Nieves Rojas because of their support for the Union, and coercively interrogating and threatening employees with unspecified reprisals if they continued to engage in union activities. (JA 161-168.)

Towards the end of the hearing, Counsel for the General Counsel moved to amend the complaint to allege that the Company also violated Section 8(a)(1) when it unlawfully promised wage increases to employees if they ceased their union activities. (JA 149-150.)

Following a hearing, the administrative law judge issued a decision and recommended Order finding that the Company violated Section 8(a)(1) as alleged in the complaint and violated Section 8(a)(3) by discharging Maciel, Coria, and Luna; the judge dismissed the allegation that the Company discriminatorily discharged Rojas and denied the General Counsel's motion. (JA 211, 218.) The Company excepted to the Section 8(a)(3) violations found and the Section 8(a)(1) interrogation finding, but not to the judge's finding that the Company threatened employees with unspecified reprisals because of their union activities.[5] The General Counsel cross-excepted to the judge's dismissal of the violation involving Rojas and denial of the motion to amend the complaint.

After considering the exceptions, cross-exceptions, and briefs filed by the General Counsel, Company, and Union, the Board affirmed the judge's findings of

[5] The Board adopted that finding (JA 207), in accordance with its Rules and Regulations. 29 C.F.R. § 102.48(a) ("[I]f no exceptions are filed . . ., the findings, conclusions, and recommend[ed] order shall . . . be adopted by the Board and all objections to them shall be deemed waived. . . ."); *see* 29 C.F.R. § 102.46(g) ("No matter not included in exceptions . . . may thereafter be urged . . . in any further proceeding.").

those violations, but reversed her dismissal of the Rojas allegation, granted the General Counsel's motion to amend the complaint, and found that the Company unlawfully promised raises to employees. (JA 206-208.) The facts supporting the Board's decision, and the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. The Board's Findings of Fact

A. Company Operations and Relevant Background

The Company operates two custom meat-processing plants in Woodburn and Silverton, Oregon; the instant case involves the Silverton plant where 200 employees work in various departments. The employees in this case worked in the sanitation department. The Company maintains two sanitation shifts: a day shift from 5:00 a.m. to 4:00 p.m., and a swing shift running from 7:30 p.m. to 6:30 a.m. (JA 206, 211-212, 213 n.11; 16-17, 33)

Thirteen employees, including Manuel Coria, Jose Carmen Maciel, Daniel Luna, and Federico Nieves-Rojas, worked the sanitation day shift, under Supervisor Abel Esparza and nonsupervisory Foremen Juan Briones and Jose Flores. Esparza reported directly to Assistant Sanitation Manager Osmin Martinez—informing him of day-shift employees' performances—and, ultimately, to Sanitation Manager Jorge Mesa. (JA 207, 212; 15-16, 32-33, 98-102, 107-110, 144-145, 199-201.)

Maciel and his wife, Maria Cortez, a production employee, met Esparza in 1997; two years later, they chose Esparza as the godfather of one of their children. Until they were fired in 2009, Maciel, Coria, Rojas, and Luna had been employed at Silverton since 1998, 2000, 2003, and 2007, respectively. (JA 206, 212 n.7, 213; 30-31, 55-56, 197-198.)

B. Day-Shift Sanitation Employees Support the Union and Attend Union Meetings; Supervisor Esparza Questions and Warns Maciel's Wife About Employees' Union Activities

Seeking "better treatment" from Supervisor Esparza and "better wage[s]," in May 2009,[6] employees Coria, Maciel, and Luna began assisting the Union in organizing the Silverton facility. (JA 23-26, 28.) Coria distributed union literature and had daily conversations about the Union with Maciel and Luna at the end of their shifts and during breaks in the lunchroom, which was visible from Supervisor Esparza's office. Coria also gave Foreman Flores a union pamphlet, entitled "STOP[:] 35 THINGS YOUR EMPLOYER CANNOT DO," which explained employees' rights under the Act, and assured Flores that joining a union was not illegal. (JA 211-212; 22-28, 40-41, 169-172.)

Coria frequently communicated with the Union's representatives and encouraged co-workers to attend union meetings, which Coria hosted at his house.

[6] All subsequent dates are in 2009, unless otherwise stated.

The Union held two meetings in May and one on June 20, which Maciel and Luna also attended. (JA 212 & n.6; 22-28, 39-41, 194.)

Employee Rojas first learned of the Union's organizing campaign in June. Rojas began eating lunch with his friends, Coria and Maciel, and discussed the benefits of union representation during their breaks. Rojas agreed that he wanted the Union to improve how Supervisor Esparza treated them and thought the Union would be "good," favoring representation. (JA 212, 218; 46-48.)

On Friday, June 19, Supervisor Esparza called Maciel's wife, Maria Cortez, on her cell phone as she traveled home from work with another employee. They spoke for approximately 80 minutes, primarily about a co-worker's sexual harassment accusation against Esparza. Toward the end of the conversation, Esparza wanted Cortez to confirm that employees "were forming a group to get the Union in [at Silverton]." She responded that she did not understand why he was asking her, since he already knew about it. Esparza then warned that employees "should be careful because this was a delicate thing." He asked Cortez to tell Maciel and Coria that he had raises for them, and that "they should be very careful because this was really [. . .] very delicate." Esparza also told her not to worry about the Union because he was on their side, and assured her that he would get her a raise as well. Finally, Esparza commented that he knew there was a union

meeting on Saturday and that on Monday, he "would know" who attended and what had transpired. (JA 206, 212; 56-64, 66, 173-187.)

C. In a General Reduction in Force Due to a Business Downturn, the Company Discharges Coria, Maciel, Luna, and Rojas

During the week of June 22, company executives determined that they needed to effectuate a general reduction in force to account for the sharp decrease in production levels since 2007. On June 25, President Glen Golomski and Human Resources Director Jacobo de Soto met with department managers and directed them to reduce staff by 10% in each department within two days. Golomski and de Soto instructed department managers to base decisions on attitude, departmental needs, and discipline, with the goal of keeping the best employees. (JA 213; 73, 76-82, 84-89.)

Following the June 25 meeting, Sanitation Manager Mesa told Assistant Sanitation Manager Martinez to choose the day-shift and swing-shift employees from Silverton and Woodburn. At Silverton, 4 of 16 day-shift employees, and 5 of approximately 28 swing-shift employees were terminated. The Silverton day-shift employees selected for layoff were Coria, Maciel, Luna, and Rojas. (JA 213; 101-102, 106, 202-205.)

According to Martinez, Mesa gave him no numerical guidelines on how many people to select. Martinez said, based on "experience," he knew how many workers were needed to maintain production levels and he evaluated 70

employees' work performances in 30 minutes, making his decision in another 30 minutes. Martinez stated that he chose the day-shift employees based on oral performance reports from Supervisor Esparza between September 2008 and June 2009, and on his own observation of the other day-shift employees. (JA 213-214; 101-104, 112-114, 121-124, 135-136.) Martinez never reviewed any personnel files, or spoke to Foremen Briones and Flores about employees' work performances. (JA 125-134; 190-193.) The Company did not call Foreman Briones as a witness. (JA 214 & n.21.)

According to Martinez, he selected Rojas because of his poor attendance record. Every 2 or 3 months over the course of a year, Esparza told Martinez that Rojas frequently called into work late and was absent. (JA 214; 119-120, 132-134, 147.) Rojas had been late to work 7 times in 2009. (JA 209 n.9; 188-189, 195-196.)

Martinez gave Sanitation Manager Mesa a handwritten list of the four prospective day-shift layoffs. On Friday, June 26, Mesa and Martinez met with Human Resources Director de Soto and read him the list of names. (JA 213; 92, 104-106, 202-205.)

On Monday, June 29, the Company terminated 42 Silverton employees. When Coria, Maciel, Luna, and Rojas arrived that morning, Foreman Flores told them to go to Supervisor Esparza's office to meet with Esparza and De Soto. De

Soto explained that they had to discharge them because of the economy and low production level, and encouraged them to apply for unemployment. Maciel and Coria protested that the Company should first terminate less senior employees and workers who were in the country illegally; Rojas said he "kind of" understood his selection because he had occasionally been absent. De Soto responded that the decision had already been made. Assistant Sanitation Manager Martinez was not present at the meeting. (JA 207, 213-215; 18-22, 34-38, 93-96.)

D. Supervisor Esparza Admits That He Selected the Day-Shift Sanitation Employees Because of Their Union Activities

Night-shift employee Mauro Navarro was also terminated on June 29. Afterwards, Navarro spoke about it with Supervisor Esparza, his friend of 15 years, because he figured that Esparza "would tell [him] the [truth]." Navarro asked him why the Company fired some of its employees. Esparza replied that "he had chosen the people from the dayshift . . . because they were stirring things up [by] meeting with the Union." Navarro responded that he was not involved in the organizing efforts and asked why he was discharged. Esparza informed him that Supervisor Rodriguez had selected the night-shift employees. (JA 207, 215; 52-54.)

II. The Board's Conclusions and Order

On September 28, 2011, the Board (Chairman Pearce and Members Becker and Hayes) found that the Company violated Section 8(a)(3) and (1) of the Act as

alleged in the complaint. Agreeing with the judge, the Board found that the Company unlawfully interrogated Cortez about employees' union activities; threatened employees with unspecified reprisals if they engaged in union activities; and discharged Coria, Maciel, and Luna because of their union activities. The Board reversed the judge's dismissal of the Rojas allegation and denial of the General Counsel's motion to amend the complaint to allege an unlawful promise of wage increases, and found that additional violation. (JA 207-209.) Member Hayes would have affirmed the judge's ruling in its entirety. (JA 208 n.7, 209 n.9.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order requires the Company to offer employees Maciel, Coria, Luna, and Rojas full reinstatement to their former jobs, or to substantially equivalent positions if those jobs no longer exist, and to make them whole for any loss of earnings and other benefits as a result of the Company's discrimination. Lastly, the Board ordered the Company to post and electronically distribute remedial notices at its Silverton, Oregon facility. (JA 206, 209-210.)

SUMMARY OF ARGUMENT

This case involves numerous unfair labor practices, ranging from unlawful statements to discriminatory terminations, which the Company committed in an

effort to quash its employees' quest for Union representation. In its opening brief, the Company only disputes two of those unfair labor practices—Rojas' unlawful discharge and Esparza's unlawful promise of wage increases. Accordingly, the Board is entitled to summary enforcement of the uncontested portions of its Order. The Company also does not challenge the Board's credibility resolutions, upon which its unfair-labor-practice findings rest. As to the contested findings, substantial evidence supports the Board's decision and the Company's arguments do not pass muster.

First, the Company violated Section 8(a)(3) and (1) by selecting employee Rojas for layoff because of his Union support. The General Counsel met his *Wright Line*[7] burden of showing that Rojas' union activity was a motivating factor in his selection. Significantly, Esparza admitted that he chose the day-shift workers, which necessarily included Rojas, because "they were stirring things up" with the Union. Moreover, the Board properly imputed Esparza's antiunion bias to Martinez, the ultimate decisionmaker, because Esparza had substantial input in the layoff decisions. Furthermore, the credited evidence does not substantiate the Company's defense that Martinez would have chosen Rojas even without Esparza's input and Rojas' union activity.

[7] 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

Second, the Board did not abuse its discretion when it granted the General Counsel's motion to amend the complaint to conform to the evidence and found an unlawful promise of wage increases. The Board's rules and regulations allow complaint amendment any time before the Board issues its order. Here, the General Counsel's amendment provided notice before the hearing closed, and the parties fully litigated the promise of raises. Thus, the Company has not established a due process violation.

In sum, the Court should enforce the Board's Order in full.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."[8] The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole,[9] and the Court reviews the Board's application of the law to particular facts under the "substantial evidence" standard.[10] Indeed, this Court gives great deference to the Board's findings as to motive[11] and the reasonable inferences that

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

[9] 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

[10] *Traction Wholesale Ctr. Co.*, 216 F.3d at 99.

[11] *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008); *see Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (court is "even more deferential" to Board's determination of motive); *see also Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994) ("Motive is a question of fact, and the

the Board draws from the evidence, even if the reviewing court might have reached a different conclusion *de novo*.[12] And it is well settled that, where the Board has disagreed with the judge, "the standard of review with respect to the substantiality of the evidence does not change."[13] The Court will affirm the Board's interpretation of the Act "as long as it is rational and consistent."[14] Finally, the judge's credibility determinations, as adopted by the Board, will be upheld unless they are "patently insupportable."[15]

[Board] may rely on both direct and circumstantial evidence to establish an employer's motive . . . .").

[12] *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004).

[13] *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 n.4 (D.C. Cir. 2011) (internal quotation marks omitted); *accord Universal Camera Corp.*, 340 U.S. at 496; *see NLRB v. Galicks, Inc.*, __ F.3d __, 2012 WL 678142, at *4 (6th Cir. 2012) ("The Courts of Appeal[s] exercise the same level of utmost care in reviewing the record in all cases, regardless of whether the Board and the ALJ reached opposite inferences and conclusions."); *Andino v. NLRB*, 619 F.2d 147, 151 (1st Cir. 1980) ("The standard is not modified when the Board and . . . judge disagree.").

[14] *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *Ceridian Corp. v. NLRB*, 435 F.3d 352, 356 (D.C. Cir. 2006).

[15] *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998).

ARGUMENT

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

In its opening brief to the Court, the Company does not contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by discharging employees Maciel, Coria, and Luna for supporting the Union, or that it violated Section 8(a)(1) by coercively interrogating employees about their union activities and sympathies and threatening employees with unspecified reprisals because of their union activity. Therefore, the Company has waived appellate review of those issues. Also, before the Board, the Company never excepted to the judge's finding of a threat of unspecified reprisals, so the Court lacks jurisdiction to review it.[16]

The Federal Rules of Appellate Procedure, and the rules of this Court, require the Company to present its "contentions and the reasons for them" in its opening brief.[17] A party's failure to raise an issue in the opening brief abandons it, and this Court need not consider that issue if the party later raises it in its reply

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[16] *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (Section 10(e) of the Act precludes court of appeals from reviewing claim not raised to the Board).

[17] Fed. R. App. P. 28(a)(9)(A); D.C. Cir. R. 28(a) (parties' briefs must contain "items required by FRAP 28").

brief.[18] Since the Company failed to challenge the aforementioned unfair labor practices, the Board is entitled to summary enforcement of the uncontested portions of its Order.[19] Nevertheless, uncontested violations do not disappear because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the [disputed] issues are considered."[20]

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY DISCRIMINATORILY SELECTED EMPLOYEE ROJAS FOR LAYOFF IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

A. The Act Prohibits an Employer From Discharging Its Employees Because of Their Union Activities or Sympathies

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

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[18] *Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (refusing to consider claim because company "made no such argument in its opening brief. . ."); *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (merely referring to argument in opening brief is insufficient to preserve it); *see Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000) (issues mentioned in opening brief but not argued until reply brief were waived).

[19] *See N.Y. Rehab. Care Mgmt. v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (granting summary enforcement for uncontested violations).

[20] *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982).

organization."[21] A violation of Section 8(a)(3) also constitutes a "derivative" violation of Section 8(a)(1),[22] which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[23]

Finding a violation under Section 8(a)(3) usually turns on whether an employer's action against an employee "was motivated by an antiunion purpose."[24] Indeed, as this Court recognizes: "Motive is a question of fact, and the [Board] may rely on both direct and circumstantial evidence to establish an employer's motive. . . ." Where motive is at issue, the Board applies the test articulated in *Wright Line*[25] and approved by the Supreme Court.[26] Within this framework, the General Counsel must show that protected conduct, such as union activity, was a

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[21] 29 U.S.C. § 158(a)(3).

[22] *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 n.6 (D.C. Cir. 2008); *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

[23] 29 U.S.C. § 158(a)(1); *see* 29 U.S.C. § 157 (guaranteeing employees the right to "form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection").

[24] *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 311-13 (1956); *accord Radio Officers' Union v. NLRB*, 347 U.S. 17, 43-44 (1954); *Local 702, Int'l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000).

[25] 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

[26] *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397 (1983).

motivating factor in the employer's decision to take adverse employment action.[27] The burden of persuasion then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the union activity.[28] To establish this defense, the employer "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."[29]

B. The Board Properly Found That the Company Unlawfully Discharged Rojas Because of His Union Activity

First, the General Counsel met his initial burden of showing that Rojas' union activity was a motivating factor in his termination. Rojas engaged in union activity when he discussed the Union with Maciel and Coria during their lunch breaks and expressed his support for union representation. Although the Company heavily relies (Br. 7, 23) on Coria's and Rojas' testimony that they intended their Union activity to be secret, it obviously was not a well-kept secret because Esparza

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[27] *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995); *Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991); *Manno Elec.*, 321 NLRB 278, 280 n.12 (1996).

[28] *Laro Maint. Corp.*, 56 F.3d at 228; *Microimage Display*, 924 F.2d at 252; *Manno Elec.*, 321 NLRB at 280 n.12.

[29] *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996).

revealed his knowledge of the day-shift workers' union activity in his conversations with Cortez and Navarro. It is undisputed that Esparza coercively interrogated Cortez about their activities, threatened that employees "should be careful because [supporting the Union] was a delicate thing," and promised raises for Maciel and Coria, the two most ardent Union supporters, if they ceased their union activity.[30] (JA 206, 212; 60-64.) Moreover, contrary to the Company's assertion (Br. 22) that there is no direct evidence showing the Company's knowledge of Rojas' union activity, Navarro's credited testimony—that Esparza admitted to choosing the day-shift employees, collectively, because "they were stirring things up . . . meeting with the Union"—provides exactly that.[31] (JA 208; 54.)

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[30] *See supra* note 18 and accompanying text; *see also Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996) (evidence that employer contemporaneously violated Section 8(a)(1) of the Act supports inference of union animus).

[31] *See Halstead Metal Prod., A Div. of Halstead Indus., Inc. v. NLRB*, 940 F.2d 66, 71 (4th Cir. 1991) ("A factor that evidences discriminatory motivation is an employer representative's admission of unlawful intent."); *NLRB v. Ferguson*, 257 F.2d 88, 92, 93 (5th Cir. 1958) (direct evidence that animus motivated employer's decision may be overcome only if it is "so destroyed by other facts and circumstances that it cannot be credited as crucial" and "the employer's explanation [must be] so overwhelming that it [makes] this contrary evidence unacceptable as a matter of law.").

The record also overwhelmingly demonstrates that Supervisor Esparza had "substantial input" in the layoff selection decisions, so Martinez did not act alone.[32] (JA 207, 208, 216; 101-104, 107-120, 141-145, 147.) The judge discredited Martinez's testimony that he *alone* made the day-shift layoff selections, finding it implausible that he "took only half an hour to decide how many positions would be eliminated . . . and no more than another half hour to decide on the employees to be terminated." (JA 214; 125-126.) And, as the judge observed (JA 214), Martinez's "memory proved deficient," since he did not remember Esparza's reports about other employees' misconduct or that another employee reported late to work 8 times in 2008. (JA 128-134.) Additionally, the judge found unpersuasive Martinez's "laconic" description of other employees' performances as "good." (JA 208-209, 213-214, 216; 121-124.) The Company does not challenge (Br. 22 n.1) the Board's decision to credit Cortez's and Navarro's testimony—showing Esparza's union animus and knowledge—where it differed from Esparza's account, and to discredit Martinez's uncorroborated testimony. (JA 206, 213-214.)

Though the Company suggests otherwise (Br. 21-22), the Board correctly imputed Esparza's knowledge to Martinez. The Board, with circuit court approval, has held that an employer can be liable under the Act, where a supervisor's

[32] *See supra* at 9-10.

knowledge of employees' union activity and unlawful motivation leads to the company's discharge of those employees, even though the deciding manager did not have union animus or knowledge of that union activity.[33] Indeed, "[o]therwise, companies will be able to accomplish impermissibly motivated discharges without penalty through the simple expediency of dividing their personnel functions and insulating top management from common knowledge."[34] The primary focus in such cases is whether the supervisor influenced or played a significant role in the

[33] *See, e.g., Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 311-13 (D.C. Cir. 1989) (upholding Board's finding that employer unlawfully discharged employees because of their union activity, where Board imputed supervisor's knowledge of activity to employer); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117-18 (6th Cir. 1987) (granting enforcement though ultimate decisionmaker was unaware of discharged employee's union activity); *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 815 (3d Cir. 1986) (where supervisor had union animus and his recommendation "played a part in the ultimate decision," employer may be held to have acted out of union animus); *Boston Mut. Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (supervisors exhibited union animus and decisionmaker fired union steward in "direct response" to what they told him); *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962) (affirming Board's imputation of manager's union animus to company president, where manager's antiunion-motivated report that pro-union employee engaged in misconduct led president to discharge that employee); *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000) (vice president's selection of employee for layoff was "based primarily" on supervisor's biased evaluation, which "provided the nexus for showing that the decision to lay off [the pro-union employee] was the result of unlawful discrimination"), *enforced*, 24 F. App'x 1 (D.C. Cir. 2001) (per curiam).

[34] *Hunter Douglas, Inc.*, 804 F.2d at 815.

decision.[35] Here, the credited evidence is clear, as found by the judge and Board: the day-shift employees, including Rojas, engaged in union activity; Esparza knew about it and harbored union animus; and, given Esparza's unchallenged blunt admission that he chose the four day-shift layoffs because of their union activity, Esparza had at least substantial input into the decision to discharge Rojas (and three other employees). In light of that overwhelming evidence, the Company concedes (Br. 21-22 & n.1) that the General Counsel met his initial *Wright Line* burden.

Second, with the General Counsel having satisfied that burden, the Company has not proved, through credited evidence, that Martinez would have chosen Rojas even without Rojas' union activity and Esparza's biased input. (JA 208.) As discussed,[36] the judge discredited Martinez regarding how the day-shift employees were chosen, including his claim that he *alone* made the day-shift layoff selections, and his vague, unreliable testimony that retained employees' work performances were "good." (JA 208-209, 214, 216; 104, 121-124.) Additionally, the

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[35] *See* cases cited in note 33. *See also Springfield Air Ctr.*, 311 NLRB 1151, 1151 (1993) (finding discharges unlawful because, even if board of directors made final decision, "the unlawful motivation of the [employer's] president would be imputed to the [employer] . . . where [the president] had direct input into the decision"). *Cf. Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (holding that employer is liable under Uniformed Services Employment and Reemployment Rights Act if supervisor's actions are motivated by antimilitary animus, intended to cause adverse employment action, and are proximate cause of employment action).

[36] *See supra* at 20.

Company's suggestion (Br. 24) that Esparza corroborated the *reason* for Rojas' layoff is incorrect. Given the Company's (discredited) position that Martinez acted alone, Esparza's testimony only establishes that he previously reported on Rojas' attendance. (JA144-145, 147) Thus, Esparza corroborated Rojas' attendance infractions, not the Company's account for Rojas' layoff.

Moreover, Martinez did not engage in any independent investigation: he did not review any documents or personnel files, or even take notes during his conversations with Esparza. (JA 209, 213-214; 104, 125-126, 135-136.) That hasty investigation does not implicate the decision to effectuate the reduction in force (Br. 26), only the unlawful selection of the day-shift discriminatees. And the Company has not proved that Martinez applied his purported layoff-selection criteria in a consistent manner, since he did not discharge N. Luna, who was disciplined for having a heated argument with another employee and for misusing company equipment, or M. Rodriguez, who arrived to work late eight times in 2008. (JA209, 214; 128-134, 191-193) Nor did the Company show that Rojas' work record was singularly poor among day-shift employees, given Luna's misconduct and Rodriguez's comparable history of tardiness.

The Company's observation (Br. 27) that there is no record evidence that Rodriguez's attendance problems continued into 2009 is misleading. On cross-examination, Martinez did not recall that Rodriguez had any attendance problems,

let alone that Rodriguez was late eight times in 2008. (JA 132-134.) Martinez's inability to remember Rodriguez's attendance record, as well as the disciplinary issues of N. Luna, illustrates that Martinez did not comparatively analyze the day-shift employees' work performances and therefore could not have chosen the laid-off day-shift employees without Esparza's input. (JA 128-134.) The Company's assumption that the General Counsel should have delved into Rodriguez's 2009 attendance is unfounded. Because the attendance issue was the Company's defense and Rodriguez's 2008 attendance was comparable to that of Rojas, it bore the burden of demonstrating why Rodriguez was not terminated, including offering any evidence that Rodriguez improved in 2009. In a similar vein, by arguing that it need not demonstrate Rojas was the worst employee (Br. 27), the Company misses the point: at the time of the layoffs, it did not know how Rojas measured up against other employees because the Company never bothered to make that comparison.

Furthermore, an employer's showing that a legitimate reason existed for its adverse employment action is insufficient to satisfy its burden of persuasion; rather, it must "persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."[37] (JA 208.) The Board acknowledged that Rojas' attendance record could have provided a

[37] *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996); *accord Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228 (D.C. Cir. 1995); *Power Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

legitimate reason for firing him. (JA 209.) However, the Company has not shown that Martinez would have chosen Rojas, absent Esparza's unlawfully motivated input in the decision. (*Id.*) The Company has shown only that Rojas had attendance problems (which *could have* formed the basis for his discharge), not that it actually selected Rojas for that reason. Similarly, Rojas' statement that he "kind of" understood the decision only demonstrates that Rojas knew his attendance was poor and *could* serve as a valid reason for his layoff. In light of Martinez's discredited explanation of the selection process and Esparza's admission that union animus caused the day-shift employees' selection for layoff (JA 18-22), the Board reasonably concluded that the Company would not have terminated Rojas absent his involvement with the Union. Therefore, the Company has not met its *Wright Line* burden.

Since substantial evidence supports the Board's finding that Rojas' union activity was a motivating factor in his layoff, and the Company has not refuted that showing, the Court should uphold this violation of Section 8(a)(3) and (1).

III. THE BOARD DID NOT ABUSE ITS DISCRETION IN ALLOWING THE GENERAL COUNSEL TO AMEND THE COMPLAINT

The Company's sole challenge to the Board's unlawful-promise-of-raises finding is that, in allowing the General Counsel to amend the complaint to allege that additional violation, the Board denied the Company due process. (Br. 17-18, 28-34.) However, the Company has not proved a due process violation.

A. The Board May Allow Amendment of an Unfair-Labor-Practice Complaint, So Long As It Does Not Deprive a Party of Due Process

Courts have long deferred to the Board's decisions regarding complaint amendments, reviewing them for abuse of discretion.[38] The Act provides that a complaint "may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon."[39] Likewise, the Board's Rules and Regulations provide for motions to amend the complaint "until the case has been transferred to the Board," as well as "after the case has been transferred to the Board . . . at any time prior to the issuance of an order. . . ."[40] And it is well-settled that agencies, including the Board, are vested with wide discretion in applying their rules and regulations.[41]

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[38] *E.g.*, *NLRB v. Roure-Dupont Mfg.*, 199 F.2d 631, 633 (2d Cir. 1952) (no abuse of discretion for Board to allow amendment of complaint that "simply conformed the pleadings to proof which had already been adduced"); *see also Visiting Nurse Serv. of W. Mass., Inc. v. NLRB*, 177 F.3d 52, 60-61 (1st Cir. 1999) ("Courts liberally interpret the NLRB's power to amend a complaint.").

[39] 29 U.S.C. § 160(b); *accord Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (2d Cir. 1990).

[40] 29 C.F.R. § 102.17.

[41] *See Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 n.7 (D.C. Cir. 2011) (Court will defer to Board's interpretation of its own regulations if it is "neither plainly erroneous nor inconsistent with the regulations") (internal quotation marks and citation omitted); *Actavis Elizabeth LLC v. U.S. Food and Drug Admin.*, 625 F.3d 760, 763 (D.C. Cir. 2010) (agency interpretation of its own regulations is entitled to judicial deference).

Indeed, the Board has long held that where a matter has been fully litigated and the complaint amendment simply conforms the pleadings to the proof, the motion to amend should be granted.[42] In sum, the Board may allow amendment of a complaint any time before issuing its order, as long as it does not abridge a respondent's due process rights.[43]

Due process "requires the Board to afford an alleged violator notice and an opportunity for a hearing on a charge under the Act."[44] The Second Circuit has stated that "[d]ue process is satisfied when a complaint gives a respondent fair notice of the acts alleged to constitute the unfair labor practice and when the conduct implicated in the alleged violation has been fully and fairly litigated."[45] This Court has stated that "[t]he Board may [only] make findings or order remedies

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[42] *See, e.g.*, *Lion Knitting Mills Co.*, 160 NLRB 801, 802 (1966) (granting motion to amend because matter was fully litigated and amendment conformed complaint to evidence, where General Counsel sought at end of hearing to additionally allege that supervisor's antiunion statement to former employee violated Section 8(a)(1)); *see also Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C. Cir. 1983) (recognizing Board's ability to conform complaint to evidence, as long as parties understand issues during the hearing).

[43] *See Pergament United Sales, Inc.*, 920 F.2d at 134.

[44] *Id.*

[45] *Id.*; *accord George Banta Co. v. NLRB*, 686 F.2d 10, 17 (D.C. Cir. 1970); *see NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938) (respondent was not denied due process where record showed that it understood issue and was afforded full opportunity to justify its actions).

on violations [] charged in the General Counsel's complaint or litigated in the subsequent hearing."[46] Ultimately, "[t]he burden of showing prejudice from assertedly erroneous rulings is on the party claiming injury."[47]

In this case, at the end of the hearing, the General Counsel sought to conform the pleadings to the proof by amending the complaint to allege that the Company, by Esparza, promised wage increases to employees if they ceased their union activity. (JA208; 149) Though it complains (Br. 28-35) that the Board denied it due process, the Company had notice of that issue, and fully and fairly litigated it. Indeed, where courts agree that the Board may find a wholly unalleged violation if a party has notice of the issue and it was fully litigated, the complaint amendment can hardly have violated due process.[48] Therefore, the Company has not proved a due process violation and the Board did not abuse its discretion in granting the General Counsel's motion.

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[46] *George Banta Co.*, 686 F.2d at 17.

[47] *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996).

[48] *See, e.g., United Packinghouse, Food and Allied Workers Int'l Union v. NLRB*, 416 F.2d 1126, 1134 n.12 (D.C. Cir. 1969); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187-88 (5th Cir. 1982); *NLRB v. Tricor Prod., Inc.*, 636 F.2d 266, 271 (10th Cir. 1980).

B. The Company Had Sufficient Notice That Esparza's Statements During the June 19 Conversation with Cortez, Including the Promise of Raises, Were At Issue

The Company had notice of the conduct on which the General Counsel based his charges. As the Second Circuit stated, "The primary function of notice is to afford respondent an opportunity to prepare a defense by investigating the basis of the complaint and fashioning an explanation of events that refutes the charge of unlawful behavior."[49] The Company knew at the outset that the General Counsel would elicit testimony about the June 19 Esparza-Cortez conversation, as the complaint alleged the Section 8(a)(1) interrogation and threat of unspecified reprisals made in that conversation (JA 161-168). Cortez testified that Esparza promised raises for employees if they abandoned their support for the Union. As the Company admits (Br. 12), in response to that testimony, it "solicited two general denials from Mr. Esparza" regarding his promise of raises. (JA 139.) And the judge remarked that the hearing "certainly . . . had evidence about it." (JA 150.) Before the hearing closed, the General Counsel moved to add that allegation to conform the complaint to the evidence, giving the Company explicit notice with time to bolster its extant defense. (JA 149.)

[49] *Pergament United Sales, Inc.*, 920 F.2d at 135.

The Company's reliance (Br. 28-29) on *Conair Corp. v. NLRB*[50] and *NLRB v. Blake Construction Co.*[51] is misplaced because there was no notice at all of the additional allegations in either case. In both cases, the Board found violations never alleged in the complaint or litigated at the hearing, the General Counsel never sought to amend the complaint to allege the additional violations, and the employers had no notice of or meaningful opportunity to litigate those allegations.[52] Here, the General Counsel provided sufficient notice by moving to amend the complaint before the close of the hearing to encompass the alleged promise of wage increases. (JA 206; 60-64.) Thus, the amendment provided what this Court in *Conair* deemed necessary to satisfy due process: notice before the hearing closed.[53]

C. The Company Fully Litigated the Promise-of-Raises Allegation

The promise-of-raises allegation was fully and fairly litigated. (JA 206-207.) In *Tasty Baking Co. v. NLRB*, the complaint alleged that the employer's

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[50] 721 F.2d 1355 (D.C. Cir. 1983).

[51] 663 F.2d 272 (D.C. Cir. 1981).

[52] *See Conair Corp.*, 721 F.2d at 1371-72 (Board improperly found unalleged Section 8(a)(3) actual discharge where complaint only alleged Section 8(a)(1) threat of discharge); *Blake Constr. Co.*, 663 F.2d at 277, 279-80 (employer was unaware that hearing and order would encompass failure to apply union contract for all union employees, not just seven employees named in complaint).

[53] *Conair Corp.*, 721 F.2d at 1371-72.

threats occurred on different dates than the evidence showed; this Court found no denial of due process where the employer had the opportunity to cross-examine the General Counsel's witnesses and call rebuttal witnesses about circumstances surrounding alleged unlawful threats.[54] Likewise, here, the judge found: "[The Company] cross examined Maria Cortez as to her recollection of the conversation and presented Abel Esparza to contradict her account."[55] (JA 211 n.2; 65-69.) The judge relied on that conversation in determining that the General Counsel met his *Wright Line* burden with respect to Coria's and Maciel's layoffs, and found, as a *fact*, that Esparza impliedly promised raises for Maciel and Coria if they abandoned their Union support. (JA 206-207, 216 & n.19.) But the Company did not except to this factual finding, which was "adverse to [it] on an issue of law that *was* framed by the complaint." (JA 208 (emphasis in original).) Even a party that prevails before the judge must except to any adverse findings, in case the Board reverses the judge and that party seeks to challenge the ruling.[56] The Company,

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[54] 254 F.3d 114, 122 (D.C. Cir. 2001).

[55] *See Tricor Prod., Inc.*, 636 F.2d at 271 (allegation fully litigated where the only witnesses with knowledge of relevant facts testified); *see also George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1412 (9th Cir. 1985) ("[E]ven if the Company had not understood the issue at the hearing, it was 'fully litigated' in the sense that there was no more exculpatory evidence that could have been introduced.").

[56] *See NLRB v. R.J. Smith Constr. Co.*, 545 F.2d 187, 192 (D.C. Cir. 1976) ("The mere fact that the [c]ompany prevailed before the trial examiner" does not excuse it from having to except to adverse findings to preserve issue before Board); *see*

therefore, conceded that the coercive statement was made and the issue was fully litigated.

The Company intimates (Br. 35) that the judge's "prompt" and "firm" decision to reserve ruling on the issue rendered it incapable of presenting further evidence. However, the Company had the opportunity to defend against the promise-of-raises claim after the amendment was moved—for example, by attempting to recall Esparza or Maciel to rebut Cortez's testimony (JA208), or requesting a recess to consider potential additional evidence—but did not avail itself of that opportunity. Such a missed opportunity is not a denial of due process.

D. The Company Has Not Shown That It Was Prejudiced by the Complaint Amendment

The Company simply has not identified any prejudice it suffered from the amendment. In its answering brief to the Board (JA 6-8), the Company vaguely asserted that it would have solicited more testimony and did not identify any additional defenses it might have offered if the promise of raises were alleged originally. (JA 208.) Even now, it merely claims (Br. 31-32) it would have "explore[d]" the "topic" further with the witnesses. Lacking anything more definite, the Company seeks to completely eliminate its burden of showing

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also 29 C.F.R. § 102.46(e) (allowing prevailing party to file cross-exceptions to objectionable findings in judge's decision); 29 C.F.R. § 102.46(g) (any objection not raised in exceptions or cross-exceptions is waived).

prejudice: it claims (Br. 33-34) that it was not required to identify any additional evidence or defenses unless the record "uncontrovertibly" showed that it could not have prevailed, citing *Conair*'s discussion of that employer's possible evidence where the employer had *no* notice of an additional allegation before the hearing closed.[57] In any event, here, even the judge observed that "it is difficult to see what additional witness examination the [Company] might have conducted or what additional evidence [it] might have adduced" had it known of the allegation earlier. (JA 211 n.2.) Indeed, the Company cross-examined Cortez about the June 19 conversation and elicited Esparza's denial of the promise of raises (JA 140),[58] and the judge discredited Esparza's testimony where it differed from Cortez's account (JA 213), a determination the Company has not challenged. Those circumstances do not establish the requisite showing of prejudice.

Lastly, while the Company describes the promise-of-raises allegation as "time-barred" in its issue statement (Br. 1-2), it does not pursue that claim in its brief; thus, the Company has abandoned it.[59] In any event, the allegation was not

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[57] *Conair Corp.*, 721 F.2d at 1372.

[58] *See Tasty Baking Co.*, 254 F.3d at 123 (employer had opportunity to prepare for rebuttal of General Counsel's witness testimony and offered rebuttal testimony).

[59] *Bd. of Regents of the Univ. of Wash. v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (merely referring to argument in opening brief is insufficient to preserve it).

time-barred because it was closely related to the extant Section 8(a)(1) violations made in the same conversation.[60]

In sum, the Board did not deny the Company due process by granting the General Counsel's motion to amend the complaint.

[60] *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944-45 (D.C. Cir. 1999); *Redd-I*, 290 NLRB 1115, 1118 (1988).

CONCLUSION

Seeking better wages and working conditions, four sanitation employees tried to organize for the Union. In response, the Company made unlawful promises and threats to dissuade them, and then selected them for layoff admittedly based on their union activity. For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full and deny the Company's petition for review.

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NATIONAL LABOR RELATIONS BOARD
AUGUST 2012

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRUCE PACKING COMPANY, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1054, 12-1137
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	36-CA-10496
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL No. 296, AFL-CIO	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 7,919 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 2nd day of August, 2012

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LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL No. 296, AFL-CIO	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 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 2nd day of August, 2012

ADDENDUM OF STATUTES, RULES, AND REGULATIONS

Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Sec. 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 such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. [29 U.S.C. § 158]

(a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization
> . . . .

Sec. 10 [29 U.S.C. § 160]

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) 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 . . .

> . . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in

vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in such 2112 of title 28, United States Code. 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. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive. . . .

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

Relevant provisions of the Board's Rules and Regulations are as follows:

Sec. 102.46 [29 C.F.R. § 102.46]

(e) Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the administrative law judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (b) and (j) of this section.

(g) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

Sec. 102.48 [29 C.F.R. § 102.48]

(a) In the event no timely or proper exceptions are filed as herein provided, the findings, conclusions, and recommendations of the administrative law judge as contained in his decision shall, pursuant to section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

Relevant provisions of the Federal Rules of Appellate Procedure are as follows:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

. . . .

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies

. . . .