Nos. 12-1063, 11-1482

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), 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.

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
OHL	Ozburn-Hessey Logistics, LLC
Union	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Ozburn-Hessey Logistics, LLC ("OHL") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, the Board's Order against OHL, finding that it violated Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act").[1]

[1] 29 U.S.C. §§ 151, 158(a)(1) and (3).

The Board's Order issued on November 30, 2011, and is reported at 357 NLRB No. 125. (A. 389-442.)[2] The Board had subject matter jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the Act,[3] which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties under Section 10(e) and (f).[4]

The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act,[5] which provides that petitions for review and cross-applications for enforcement may be filed in this Court. OHL filed its petition for review on December 16, 2011, and the Board cross-applied for enforcement on January 30, 2012. Both filings were timely, as the Act places no time limitation on such filings.

STATEMENT OF ISSUES PRESENTED

I. Whether substantial evidence supports the Board's finding, based on the credited evidence, that OHL violated Section 8(a)(1) of the Act by its several

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[2] "A." References in this final brief are to the Deferred Appendix filed by OHL. "Br." references are to OHL'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(a).

[4] 29 U.S.C. § 160(e) and (f).

[5] *Id.*

acts of interrogating and threatening employees because of their union support and activities.

II. Whether substantial evidence supports the Board's finding, based on the credited evidence, that OHL violated Section 8(a)(3) and (1) of the Act by denying overtime to Glenora Rayford and discharging Glorina Kurtycz, immediately after coercively interrogating them, because of their union sympathies and activities.

RELEVANT STATUTORY PROVISIONS

Relevant provisions are contained in the attached Addendum.

STATEMENT OF THE CASE

Acting upon unfair-labor-practice charges filed by the United Steelworkers Union ("the Union") (A. 297-298), the Board's General Counsel issued a complaint against OHL alleging, as relevant here, violations of Section 8(a)(1) and (3) of the Act.[6] (A. 390-391.) After a five-day hearing, Administrative Law Judge West issued a decision on December 27, 2010. Specifically, the judge found that OHL violated Section 8(a)(1) by: (i) coercively interrogating employees about their and other employees' union activities and sympathies; (ii) threatening an

[6] 29 U.S.C. § 158(a)(1) and (3). The judge dismissed allegations that OHL unlawfully suspended an employee because she participated in a Board proceeding. Additionally, the judge sustained four objections to the conduct of the election, finding such conduct warranted setting aside the election. (A. 390, 429-441.) Because the Union subsequently withdrew its election petition, the Board declined to address the exceptions relating to the election objections. (A. 389 n.1.)

employee with unspecified reprisal; (iii) telling an employee that she could no longer work overtime in a certain department due to her union activities; and (iv) soliciting one employee to persuade another to abandon her support for the Union. The judge also found that OHL violated Section 8(a)(3) and (1) by refusing overtime to one employee and discharging another because of their union activities and sympathies. (A. 424-425, 441-442.) After considering the exceptions and briefs filed by OHL and the General Counsel, the Board issued a Decision and Order affirming, with slight modification, all but one of the judge's findings of Section 8(a)(3) and (1) violations.[7] (A. 389 & n.3.)

On August 18, 2010, in a separate but related action commenced before the issuance of the Board's Order, the Board's Regional Director filed for a preliminary injunction against OHL, under Section 10(j) of the Act,[8] in the Western District of Tennessee. The district court granted the injunction and ordered OHL to cease and desist from its unlawful activity—including coercive interrogations, threats of unspecified reprisals, and denial of overtime to employees because of their union support or activities—and to offer reinstatement to

[7] The Board dismissed a Section 8(a)(1) allegation that OHL unlawfully solicited one employee to persuade another employee to abandon her union support.

[8] 29 U.S.C. § 160(j).

terminated union activists.[9] The court found reasonable cause to believe OHL engaged in the unfair labor practices found by Judge West, as well as those found in another case[10] (A. 390), and that the requested relief was just and proper.[11] The Board's Order pretermitted further proceedings before the district court, since the court's Section 10(j) jurisdiction ended once the Board issued its final order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background and Company Operations

OHL provides transportation, warehousing, and logistics services for other employers at its Memphis, Tennessee facilities. It operates four warehouses in Memphis that serve several different employer accounts. The two warehouses located on Holmes Road service the Hewlett-Packard ("HP") and Water Pik accounts, and the facility on Global Drive houses the Remington Arms ("Remington") account. (A. 390-391; 309.)

The Memphis operations are overseen by Senior Vice President of Operations Randall Coleman, Regional Vice President Karen White, Area

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[9] *See Hooks ex rel. NLRB v. Ozburn-Hessey Logistics, LLC*, 775 F.Supp.2d 1029, 1053-54 (W.D. Tenn. 2011).

[10] *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011), 2011 WL 6147441 at *5, *pet. for review filed*, D.C. Cir. Nos. 11-1481, 12-1064.

[11] *Hooks ex rel. NLRB v. Ozburn-Hessey Logistics, LLC*, 775 F.Supp.2d at 1051-52.

Manager Phil Smith, and Human Resources Manager Evangelia ("Van") Young. Young reports directly to Human Resources Vice President Andrew Tidwell, who is responsible for approving manager recommendations of employee terminations. (A. 421-429; 161, 171, 241, 274-280, 299-306.)

Manager Ernest Lowery heads OHL's Operational Excellence Program, tracking the progress of OHL's various accounts. The HP account is overseen by Operations Supervisor William Pope and Operations Manager Vania Washington, who report to Area Manager Smith; HP employees work under Supervisors Jim Cousino and Jeremiah Walker. Water Pik employees report to Supervisors Willie Dye and Randy Phillips. Remington employees are directly supervised by Manager Roy Ewing. (A. 421-429; 39, 113-115, 199, 200-201, 215, 223, 231-232, 299-306.)

The Union began organizing at OHL in early May 2009.[12] In late August, three employees known to be union organizers were disciplined and discharged.[13] (A. 390; 39, 309, 322.) The interrogations, denial of overtime, and discharge at issue here occurred between early November and early March 2010. The representation election was scheduled for March 16, 2010. (A. 390.)

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

[13] *Ozburn-Hessey Logistics, LLC*, 357 NLRB No. 136 (2011), 2011 WL 6147441 at *1-2, *pet. for review filed*, D.C. Cir. Nos. 11-1481, 12-1064.

B. Human Resources Manager Young and Regional Vice President White Interrogate Employee Glenora Rayford Regarding Her Union Support and Her Daughter's Union Activities

Glenora Rayford was a day-shift employee in the Water Pik account. Her daughter, Nichole Bledsoe, worked in the HP department. In early November, Bledsoe had argued with Supervisor Sandy Pugh when Pugh was discussing an antiunion flyer, openly challenging Pugh's antiunion sentiments. (A. 391-392; 15-19, 34-36.)

On the afternoon of November 10, Rayford's supervisor said that Human Resources Manager Young wanted to speak to her and told her to report to Young's office. When Rayford arrived, Young asked, "What's up with Nichole?" (A. 106.) Rayford asked Young what she meant; Young replied that Regional Vice President Karen White told her that Bledsoe supported the Union. Rayford questioned how White obtained this information, and Young claimed that an employee approached White and told her about Bledsoe's union activities. Rayford responded that she would talk to Bledsoe for her. Young commented that she could not believe people would betray her "after all [she had] done for [Rayford] and [her] family," including once rehiring Bledsoe. (A. 107.) Then, Young asked Rayford, "Are you for it?" (*Id.*) Rayford said she was not, and reminded Young that Bledsoe had her own beliefs, but told Young that she would talk to her daughter. (A. 391-392, 422-423; 105-108.)

Rayford and Young left Young's office and walked down the hallway, toward Regional Vice President White's office. Rayford and Young stepped into her office and White asked Rayford, "Is everything okay with Nichole?" (A. 109.) Rayford replied that she already spoke with Young and would talk to Bledsoe. White pressed, asking if Bledsoe would listen to Rayford, and Rayford said yes, stating that Bledsoe is her daughter. Young confirmed that Rayford "could get through to" Bledsoe. (A. 391-392, 422-423; 108-109.)

Following this conversation, Rayford visited Bledsoe in the HP department, and told Bledsoe that Manager Young asked about her union support. Bledsoe responded that she supported the Union and did not care who knew about her views or activity. Rayford cautioned her to "be careful." (A. 391-392, 421-423; 18-19, 34-36, 109-110.)

C. Human Resources Manager Young Interrogates Employee Helen Herron About Employees' Union Activities

The next day, on November 11, Human Resources Manager Young approached Water Pik employee Helen Herron as she was exiting the warehouse for her lunch break. Young told Herron that she needed to speak to her and directed her into a nearby entranceway. Referring to Herron's niece, Glenora Rayford and Rayford's daughter, Young asked, "What's up with G and Nichole?" (A. 40, 61.) Herron asked Young what she meant. Young clarified, "What's up with G and Nichole with this Union?" (A. 40, 60.) Herron responded, "They are

both grown women. They make their own decision[s]. I don't have anything to do with that." Herron then walked outside to the parking lot. (A. 393, 421-422; 15-17, 20, 37-42, 60-61.)

Immediately after, Herron called Rayford on her cell phone, explained that she needed to meet with Rayford about Young, and warned: "Look this is a lady that's out to get us." (A. 42.) When the two women met, Herron recounted her conversation with Young and asked Rayford if she could get her a union authorization card. Rayford then called Bledsoe to ask about obtaining a card for Herron, but Bledsoe did not have any with her. Rayford assured Herron that she would give her one the next day. (A. 421-422; 21-22, 41-43, 111-113.)

Herron never openly engaged in any union activity or revealed her union views. (A. 40-41.)

D. Manager Ewing Interrogates Rayford About Her Union Sympathies, Informs Her That He No Longer Wants Her to Work Overtime in Remington, and Warns That There Will Be Repercussions if Anyone Finds Out About Their Conversation

Rayford began working overtime on the Remington account in May, after she contacted Remington Manager Ewing about available overtime opportunities and he approved her informal request. Rayford worked overtime at Remington a few days in July and August, one week in September, and the last two weeks of October. (A. 411-414, 423; 113-115, 233.)

On November 17, Rayford arrived at Remington at 5 a.m. for her overtime shift and spoke with another employee, Stephanie Adams, who regularly worked in Remington. Adams said that Human Resources Manager Young look "stressed out" because of the union campaign, and Rayford shared that she had offered Young a hug when Young was crying. (A. 118.) Adams stated that she did not support the Union; Rayford replied, "That's you." (*Id.*) Rayford left Remington at 7:45 a.m. and reported to her regular shift in Water Pik. (A. 412, 423; 117-119.)

Rayford left work around 2:15 p.m. to go to a doctor appointment and encountered Young in the OHL parking lot. Young asked Rayford why she was "[spreading] her business" at Remington. (A. 120.) Rayford denied it, adding that employee Adams must have told Young about their earlier conversation. Rayford offered to call Adams; Young replied, "Just leave it alone." (A. 412; 119-120.)

That afternoon, Remington Account Manager Ewing called Rayford and left a voicemail on her cell phone instructing her to call him. Rayford returned his call around 4:45 p.m. and Ewing told her not to report for overtime the next morning. (A. 412-413, 423.) Rayford asked why, and Ewing replied that he did not "want this Union shit down in [Remington]." (A. 121.) When she inquired further, Ewing told her, "They [are] trying to get a Union going on." Rayford responded, "Why would you come to me like this?" (*Id.*) Ewing asked, "Are you for the Union?" She said that she was not for the Union, and questioned why he was

"coming to [her] with this 'he said, she said.'" (*Id.*) Ewing accused her of talking to Remington employees about the Union; Rayford told him that Adams was the only employee with whom she had a conversation, and that Adams must have lied to Ewing. Ewing reiterated that he did not want Rayford working at Remington anymore, and said, "Glenora, this is something that I know. Respect my decision." (*Id.*) Then, he threatened Rayford that if anyone found out about their conversation, there would be "repercussion[s]" and she would not "like the outcome." (A. 122.) Finally, Ewing concluded the conversation, stating, "I don't want you at Remington. If I need you to work overtime I will give you a call." (*Id.*) The conversation lasted 27 minutes. (A. 356.) Rayford did not tell anyone at OHL about the phone call. (A. 412-413, 423; 116-122,125.)

After that day, Rayford never worked at Remington again or requested any overtime from Ewing. (A. 413, 423; 122-123.)

E. OHL's Inconsistently Enforced No-Solicitation Policy

OHL's handbook contains a no-solicitation policy that prohibits employees from soliciting or distributing items when they are not on break. Managers unevenly enforced the rule before and during the Union organizing campaign. (A. 395-396, 401, 429; 369.) Employees and supervisors routinely bought, sold, and distributed a variety of items during working time, including: DVDs; Avon products; 2008 Presidential campaign t-shirts; antiunion t-shirts; and food, such as

strawberry shortcake and homemade sandwiches. (A. 405-407, 421-424, 429, 441; 1-14, 23-31, 44-59, 126-148.)

After her husband lost his job in early 2009, employee Glorina Kurtycz began selling food at OHL. On two occasions in June and July, management informally asked Kurtycz to stop selling food during her nonwork hours, once in OHL's parking lot and another time outside of OHL property. On September 29, Area Manager Smith issued her a final written warning for selling food in the break room during lunch. Employees who receive final written warnings are subject to termination if they commit additional infractions. No other employee had ever been investigated, disciplined, or terminated for violating the solicitation policy, or terminated while on final warning status. (A. 398, 426 & n.20, 429; 80-83, 149, 190-191, 255, 258-259, 371-375.)

F. Manager Lowery Interrogates Employee Kurtycz About Her Union Views; Hours Later, OHL Managers Suspend Kurtycz for Allegedly Soliciting Employee Support for the Union; Managers Observe Her Handbilling for the Union; OHL Discharges Kurtycz the Next Day

Approximately two weeks before the election, on the morning of March 1, 2010, Manager Buddy Lowery approached HP employee Glorina Kurtycz, holding a copy of an NLRB Notice to Employees involving a settlement agreement between one of OHL's customers and the Union. (A. 395 n.4; 354.) Lowery said, "You are on my list." (A. 67.) Kurtycz asked what he meant. Lowery pointed to

the notice, and said, "If you select the United Steelworkers . . . it's not going to happen." (*Id.*) Lowery asked Kurtcyz what she thought about the Union. She responded, "The Union is good" and complained about the unpredictably long hours and excessive overtime, while Lowery took notes. (A. 394-395, 424; 68, 354.) It is undisputed (Br. 9) that, prior to this conversation, Kurtcyz was not an open union supporter. (A. 424; 95.)

A few hours later, Kurtcyz was called to the office of HP Operations Manager Washington for a private meeting with her and Supervisor Cousino. In that meeting, Washington informed Kurtycz that employees had reported that Kurtycz was handing out union authorization cards on the floor during working time and forcing employees to sign them. (A. 399-403, 426-429; 69-72.) Kurtycz denied the accusation, stating that "it never happened." Washington informed her that management would investigate and suspended her pending the outcome of the investigation. As Cousino escorted her back to her work area to collect her pen, Kurtycz asked him why Lowery had questioned her about the Union earlier that morning. Cousino replied that Lowery could do as he pleased because he was part of management. Before Kurtcyz left the facility, Cousino told Kurtycz to call Manager Washington the following day at 11 a.m. regarding the outcome of the investigation. Kurtycz clocked out at 2:45 p.m. (A. 397-398, 424; 64, 69-71, 78, 92-93.)

As Kurtycz exited the parking lot, she saw former HP employee and known Union organizer Jerry Smith, handing out pro-union flyers to employees entering and exiting the facility. Kurtycz asked Smith if she could help him and did so until 5 p.m. As they were handbilling, Area Manager Phil Smith drove past. Jerry Smith reminded employees about the upcoming election and told them to vote for the Union. Phil Smith remarked, "Yeah, let's vote." (A. 398-399, 428-429; 71-72, 101-103.)

That same afternoon, Washington obtained written statements from two employees who had complained that Kurtycz was allegedly harassing employees and asking for employees' contact information, and from another supervisor who claimed to have received complaints. (A. 426-429; 177, 377-379.)

The next day, Washington prepared her own statement about the investigation she and Supervisor Cousino had conducted about Kurtycz's conduct. (A. 380.) Washington never asked Kurtycz for a written statement responding to the accusations. Washington forwarded the four statements to Human Resources Manager Young. (A. 377-380.) Young attached those statements and Kurtcyz's final warning to an e-mail to her direct supervisor, Human Resources Vice President Andrew Tidwell, recommending that he approve Kurtycz's discharge. (A. 426-428; 194, 279-280, 281-283, 381-387.)

At 4 p.m. the same day, Manager Washington called Kurtycz and asked her to come into the office. Shortly after, Kurtycz met with Washington and Supervisor Cousino. Washington asked if Kurtycz recalled receiving a final written warning in September 2009 for selling food at work, which Kurtycz acknowledged. (A. 374-375.) Washington told Kurtycz she was being terminated and instructed her to surrender her badge. Cousino read aloud the termination report which stated that Kurtycz was discharged for violating OHL's no-solicitation policy. (A. 96-98, 376.) Kurtycz asked if she could review it or make a copy; Washington would not allow it. Kurtycz refused to sign the report. Kurtycz asked for copies of the witness statements, and again, Washington denied her request. At the end of the meeting, Kurtycz turned in her employee badge and Washington gave her a separation notice stating that she had been fired for violating the no-solicitation policy. (A. 424-429; 74-77, 96-98, 376, 377-380.)

On March 16, the Board conducted an election; the Union lost by a vote of 180-119. (A. 390.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On November 30, 2011, the Board (Chairman Pearce and Members Becker and Hayes), agreeing with the administrative law judge, found that OHL committed several violations of Section 8(a)(1) and (3) of the Act. Specifically, the Board found that OHL violated Section 8(a)(1) by interrogating employees

Herron, Rayford, and Kurtycz about their and other employees' union activities and sympathies, and threatening Rayford with unspecified reprisal if anyone found out about her conversation with Manager Ewing, during which he coercively interrogated her. The Board also found that OHL violated Section 8(a)(3) and (1) of the Act by denying overtime opportunities to Rayford and discharging Kurtycz because of their union support. (A. 389, 441-442.)

To remedy those violations, the Board's Order requires OHL 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, it requires OHL to offer Rayford overtime in the Remington department, to the extent it is available for employees assigned to other accounts; offer Kurtycz full reinstatement to her former job or, if it no longer exists, to a substantially equivalent position; expunge from its files any reference to Kurtycz's unlawful discharge, and notify her it has been done and will not be used against her in any way; and make Rayford and Kurtycz whole for any loss of earnings and other benefits suffered as a result of OHL's discrimination. Lastly, the Board ordered OHL to post and, if appropriate, electronically distribute remedial notices. (A. 389-390, 442.)

SUMMARY OF ARGUMENT

This case involves numerous unfair labor practices committed by OHL to stifle employee support for the Union during an ongoing organizing campaign.

As an initial matter, OHL's arguments largely consist of urging this Court to take the extraordinary step of disregarding the judge's credibility determinations. The judge's credibility determinations, which the Board adopted, were founded on his observations of the witnesses' demeanor, the vagueness or specificity of the testimony, as well as corroboration or inconsistencies in the evidence. As such, they are not "patently insupportable" and should be upheld by this Court.

Substantial evidence supports the Board's finding that OHL violated Section 8(a)(1) of the Act when several high-ranking officials and managers coercively interrogated and threatened employees regarding their and other employees' union views and activities. Under the totality of the circumstances, OHL supervisors' conduct reasonably tended to restrain those employees in exercising their Section 7 rights. OHL fails to refute those findings, as its arguments either rest on a discredited version of the facts or are unsupported by relevant legal precedent.

Substantial evidence also supports the Board's findings that, after coercively interrogating them, OHL denied overtime opportunities to Rayford and discriminatorily discharged Kurtycz, in violation of Section 8(a)(3) and (1). Based on the credited evidence, the General Counsel amply met his burden under *Wright*

Line, A Division of Wright Line, Inc.[14]: OHL knew of Rayford's and Kurtycz's union views and activities, it repeatedly demonstrated its hostility towards the Union (as evidenced by its several violations of Section 8(a)(1)), and such animus spurred OHL's decision to deny overtime to Rayford and to discharge Kurtycz. OHL has not proved that it would have taken the same adverse action against Rayford absent her protected activity or refuted the Board's finding that OHL's stated reason for Kurtycz's discharge was pretextual.

STANDARD OF REVIEW

This Court's review of Board decisions "is quite narrow."[15] The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole,[16] and the Court reviews the Board's application of the law to particular facts under the "substantial evidence" standard.[17] The Board's factual findings should not be disturbed, even if a reviewing court on *de novo* review would reach a different result.[18] Moreover, this Court gives great deference to the Board's factual

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[14] 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

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

[16] 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

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

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

findings regarding motive.[19] And this Court will defer to an administrative law judge's credibility determinations, as adopted by the Board, unless they are "hopelessly incredible," "self-contradictory," or "patently insupportable."[20]

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT OHL VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING AND THREATENING EMPLOYEES ABOUT THEIR UNION VIEWS AND ACTIVITIES

A. An Employer May Not Interfere With Employees' Right to Support a Union or Engage in Union Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[21] Section 8(a)(1) implements that right by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of

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[19] *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 [Board] may rely on both direct and circumstantial evidence . . . .").

[20] *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998) (citations omitted); *accord Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998).

[21] 29 U.S.C. § 157.

rights guaranteed in [S]ection 7."[22] It is well settled that an employer violates Section 8(a)(1) by coercively interrogating employees about their union support and activities[23] and threatening to penalize employees if they choose union representation.[24] Moreover, "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his [statutory] rights."[25] And an interrogation may be coercive when it occurs amidst the employer's hostility toward a union organizing campaign.[26]

The test for a Section 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct has a reasonable tendency to interfere with employee rights.[27] Factors that may be considered include: the background of the

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[22] 29 U.S.C. § 158(a)(1).

[23] *E.g.*, *Avecor, Inc.*, 931 F.2d 924, 931 (D.C. Cir. 1991); *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987).

[24] *Avecor, Inc.*, 931 F.2d at 931.

[25] *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997).

[26] *See, e.g., Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

[27] *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d at 931; *Rossmore House*, 269 NLRB 1176, 1178 and n.20 (1984), *aff'd sub nom., Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

employer's hostility to unionization; the nature of the information sought; the identity of the questioner; the place, timing, and method of the interrogation; the truthfulness of the reply; whether the employee is an open union supporter; and whether the questioner gave the employee assurances against reprisals.[28] This Court noted that "the[se] criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'"[29] Additionally, proof of actual coercion is not necessary to establish a violation of Section 8(a)(1).[30]

Here, the credited evidence shows that high-level managers and immediate supervisors coercively questioned employees about their and other employees' support for the Union. Accordingly, the Court should affirm the Board's findings that such conduct violated Section 8(a)(1) of the Act.

B. OHL Fails To Meet Its Extremely Heavy Burden in Seeking to Overturn the Board's Credibility Resolutions

The Board's findings in this case turn primarily on the judge's credibility resolutions—in particular, discrediting OHL's key witnesses and documentary

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[28] *See Perdue Farms, Inc.*, 144 F.3d at 835-36; *Midwest Reg. Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977).

[29] *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

[30] *Avecor, Inc.*, 931 F.2d at 931; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

evidence and crediting the testimony of the employees who were interrogated and threatened. OHL's attack on the Board's conclusions is founded primarily on its discredited versions of events. As this Court recognizes, the judge's credibility determinations will be upheld unless they are "patently insupportable."[31] In making his determinations here, the judge, with Board approval, properly considered his observation of witness demeanor, the vagueness or detail of the testimony, and the extent to which the evidence was corroborated or inconsistent.[32] (A. 391, 421-422, 424, 426-429, 431.) Based on these considerations, the judge expressly discredited Human Resources Manager Young and Regional Vice

[31] *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998); *see Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 426 (D.C. Cir. 1996) ("The mere fact that conflicting evidence exists is insufficient to render a credibility determination 'patently insupportable,' since such a conflict is present in every instance in which a credibility determination is required.").

[32] *See, e.g.*, *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1091-92 (D.C. Cir. 2012) (finding no basis for overturning credibility determinations, where judge credited one witness "based on a combination of testimonial demeanor and a lack of specificity and internal corroboration"); *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117, 1124 (D.C. Cir. 2012) (employer failed to show Board's credibility determinations were "patently unsupportable" where hearing officer discredited testimony that was inconsistent with credited facts or contradicted by credited witness testimony); *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 349 & n.2 (D.C. Cir. 2011) (finding no basis for overturning credibility findings where judge discredited one witness because he did not recall many details and had a vague recollection of the negotiations); *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1006 (D.C. Cir. 1998) (judge's credibility findings were based on demeanor and "apparent truthfulness" and thus, not hopelessly incredible) (internal quotation marks omitted).

President White with respect to the interrogations of employees Rayford and Herron. For example, he found that Young manifested a "total lack of credibility" because she gave vague testimony, made frequent uncorroborated statements and, most importantly, contradicted her testimony from a prior Board hearing when she untruthfully testified that she never distributed Obama t-shirts on working time. (A. 421-422; 262-273.) He noted that neither manager specifically denied the events that triggered Rayford's interrogation. (A. 421-423; 18-20, 40-43, 116-120.) In sharp contrast, the judge credited the employees' accounts of the interrogations, finding that their testimony was corroborated by other witnesses.[33] (A. 422; 18-20, 40-42, 105-110, 111-112.)

In its brief, OHL fails to offer any basis for overturning the judge's credibility findings, relying only on discredited evidence to support its challenges to the Board's conclusions. (Br. 34-37, 42-44.) The Board's findings are firmly rooted in credited evidence and, therefore, should be affirmed.

C. Human Resources Manager Young and Regional Vice President White Unlawfully Interrogated Rayford

Human Resources Manager Young and Regional Vice President White coercively interrogated employee Rayford, against the backdrop of OHL's existing hostility to the Union. (A. 422-423; 18-20, 40-41, 105-110, 307.)

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[33] *See also Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1138 (4th Cir. 1982) (employee's specific testimony more credible than supervisor's silence on issue).

Ample credited evidence supports the Board's finding that these interrogations reasonably tended to be coercive. First, Rayford was questioned by two high-ranking company officials about her and her daughter Bledsoe's union support and activities, and the interrogations took place in their respective offices.[34] (A. 422-423; 105-110.) After she complied with an order to report to Young's office, Young began questioning Rayford, stating that she heard Bledsoe supported the Union and asking Rayford about Bledsoe's union support. Young continued questioning her, reminding Rayford that Young had helped her and her family, and questioning Rayford about her own union views, bluntly asking "Are you for it?" (A. 105-108.) Minutes after that inquisition ended, White's interrogation began. Seeking confirmation that Bledsoe supported the Union (A. 423), White asked Rayford if "everything [was] okay" with Bledsoe and Rayford assured her that she had already spoken with Young and would talk to Bledsoe about her union support. (A. 105-110.) During these interrogations, neither Young nor White told Rayford that she would not be penalized for truthfully responding to their questions about her and Bledsoe's union sympathies.[35]

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[34] *See Timsco, Inc.*, 819 F.2d at 1178-79 (questioning by high-ranking official in his office was coercive).

[35] *See Midwest Reg'l Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977) (interrogation unlawful where employer failed to explain purpose of questions and did not offer assurances against reprisals).

Moreover, the coercive nature of the interrogations is graphically demonstrated by the fact that, after she left White's office, Rayford warned Bledsoe to be careful about openly supporting the Union. At the time of these interrogations, Rayford was not an open union supporter.[36] In these circumstances, the Board reasonably found that these interrogations tended to interfere with Rayford's Section 7 rights. (A. 389 n.3, 422-423.)

OHL's efforts (Br. 36-38) to contest these Board findings hinge on discredited testimony and are unsupported by the law. First, ignoring Rayford's credited testimony, OHL inexplicably posits (Br. 36) that Rayford voluntarily brought up her daughter's union support in the midst of OHL's antiunion campaign and somehow initiated the interrogation that followed. However, the judge specifically concluded that Young manifested a "total lack of credibility" (A. 422; 262-273), while Rayford's testimony was corroborated by other witnesses and subsequent events. (A. 421-422; 18-19, 40-43, 105-110, 116-120.) Thus, the credited record evidence does not support OHL's account of the events.

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[36] *See Perdue Farms, Inc., Cookin' Good Div. v. NLRB,* 144 F.3d 830, 835-36 (D.C. Cir. 1998) (employer coercively interrogated employees where employer did not know employees' union sympathies and gave no assurances against reprisal); *see also Vincent Indus. Plastics, Inc. v. NLRB,* 209 F.3d 727, 737 (D.C. Cir. 2000) (interrogation interfered with employee's right to "keep private his sentiments as to the Union").

Second, OHL inaccurately characterizes (Br. 37-38) White's questions as "concern for the welfare of [her] employees." Based on the credited evidence, the Board found that White interrogated Rayford to confirm Bledsoe's union activity. Indeed, White's testimony consisted of vague responses and general denials, and she "did not specifically deny" telling Young that Bledsoe supported the Union. (A. 422; 242-243.) In light of such unreliable testimony, the Board properly found White's interrogation unlawful[37] (A. 422-423) and, contrary to OHL's suggestion (Br. 37-38), that finding does not penalize employers for expressing genuine concern for their employees.

Third, OHL's claim (Br. 37-38) that this interrogation was lawful because White "never mentioned the union" misses the mark. As the Seventh Circuit stated: "When the questions asked, 'viewed and interpreted as the employee must have understood the questioning and its ramifications, could reasonably coerce or intimidate the employee with regard to [protected] activities,' a violation has been established."[38] Regardless of whether White explicitly mentioned the Union or merely alluded to Young's interrogation of Rayford just moments before, Rayford

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[37] *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 349 & n.2 (D.C. Cir. 2011) (judge discredited witness because he did not recall many details and had vague recollection of the negotiations); *Standard-Coosa-Thatcher Carpet Yarn Div., Inc.*, 691 F.2d at 1138 (employee's specific testimony more credible than supervisor's silence on issue).

[38] *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir. 1982).

reasonably understood that her daughter's union activity was the focus of White's inquiry. (A. 423; 105-110.) Thus, in placing unnecessary emphasis on whether White mentioned the Union and clinging to discredited testimony, OHL turns a blind eye to the circumstances surrounding the interrogation, OHL's hostility to the Union's organizing campaign, and the coercive nature of the inquiry.

Additionally, OHL's specious claim (Br. 36) that Rayford's credibility is somehow diminished because the Union did not file an unfair-labor-practice charge about Rayford's interrogation until after the election is wholly without merit. Though the Union did not file the unfair-labor-practice charge until after the election, there is no evidence about when Rayford informed the Union of OHL's misconduct. OHL's unsupported effort to undermine Rayford should be rejected.

D. Human Resources Manager Young Unlawfully Interrogated Herron

Like Young's and White's interrogations of Rayford, the Board found this interrogation similarly coercive (A. 389, 422). One day after interrogating Rayford, Human Resources Manager Young followed up by questioning employee Herron about her niece Rayford's and great-niece Bledsoe's union views. (A. 421; 40-43, 111-112.) As Herron was leaving the facility for her break, Young summoned her into a nearby entranceway and asked, "What's up with G and Nichole with this Union?" (A. 40, 61.) Without any assurances that she would not be punished for answering truthfully, Herron responded that she "had [nothing] to

do with that." (A. 40.) Immediately after she left Young, Herron called Rayford to warn her about Young: "Look this is a lady that's out to get us" and asked Rayford for a union authorization card, so she would "feel safer." (A. 41-42.) Thus, Young, a senior manager, questioned Herron, who was not an open union adherent, about Rayford's and Bledsoe's union support, and never gave Herron any assurances against reprisal.[39] (A. 421-422; 20, 40-43, 60, 111-113.) As such, the Board's finding that this interrogation was unlawful is supported by the credited record evidence.

In objecting to the Board's finding that Herron's interrogation was unlawful (Br. 38), OHL admits that the facts present a "credibility dispute." However, the judge explicitly stated (A. 421), "Herron is a credible witness. Young is not a credible witness." OHL contends (Br. 38-39) that the duration of this "happenstance 'encounter'" proves that any coercion was "at most *de minimis*" and therefore does not warrant a remedy, but offers no support for that claim. Indeed, the lawfulness of an interrogation is based on the totality of the circumstances, not merely one aspect of the interrogation.[40] And an interrogation need not be lengthy

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[39] *See supra* notes 27-29 and accompanying text.

[40] *See Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987) (Place, timing, and method of interrogation are merely "useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'").

to be unlawful.[41]

OHL also suggests (Br. 39) that Herron's interrogation could not be coercive because it "did not deter union activity," but "prompted it." Beyond the stunning claim that it was somehow aiding union activity, OHL disregards Herron's credited testimony that she sought a union card immediately after the interrogation because she wanted to "feel safer." (A. 41-42.) OHL also ignores that Section 8(a)(1) protects employees' Section 7 rights to engage in, or refrain from engaging, in union activity. Any conduct that interferes with the free exercise of that right is unlawful, whether it encourages union activity or discourages it. Here, Herron's reaction demonstrates that Young's questioning reasonably tended to (and, in fact, did) interfere with Herron's free exercise of her Section 7 rights.

[41] *See, e.g.*, *Midwest Reg'l Joint Bd.*, 564 F.2d at 443 (interrogation unlawful though employer only asked employees if they had been contacted by a union representative and signed union authorization cards); *see also Perdue Farms, Inc.*, 144 F.3d at 835 (finding violation where, during general staff meeting, company official asked employees single question of whether union organizers had visited employees at their homes).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT OHL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY COERCIVELY INTERROGATING, THREATENING, AND DENYING OVERTIME TO EMPLOYEE RAYFORD AND BY INTERROGATING AND DISCHARGING EMPLOYEE KURTYCZ

A. The Act Prohibits an Employer from Taking Adverse Employment Action Against its Employees Because of Their Union Views or Activities

Section 8(a)(3) of the Act bars "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."[42] A violation of Section 8(a)(3) constitutes a "derivative" violation of Section 8(a)(1),[43] 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."[44] Thus, an employer violates Section 8(a)(3) and (1) by taking adverse employment action against an employee because she engaged in union activities.

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[42] 29 U.S.C. § 158(a)(3).

[43] *S. Nuclear Operating Co.*, 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).

[44] 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").

In *NLRB v. Transportation Mgmt. Corp.*,[45] the Supreme Court approved the test for determining motivation in unlawful discrimination cases first articulated by the Board in *Wright Line, A Division of Wright Line, Inc.* ("*Wright Line*").[46] Under this test, if substantial evidence supports the Board's finding that an employee's union activity was a "motivating factor" in the adverse employment action, the Board's conclusion must be affirmed, unless the record as a whole should have compelled the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of the protected union activity.[47]

In assessing discriminatory motive, the Board "considers such factors as the employer's knowledge of the employee's union activities, the employer's hostility toward the union, and the timing of the employer's action."[48] It may also consider the employer's failure to fully investigate the asserted basis for an employee's

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[45] 462 U.S. 393, 397 (1983).

[46] 251 NLRB 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981).

[47] *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *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).

[48] *Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994).

discharge.[49] Further, evidence that the employer has violated of Section 8(a)(1) of the Act supports an inference of union animus.[50]

As it reviews the employer's reason for taking adverse action against an employee, the Board may draw reasonable inferences from the credited evidence and may rely on circumstantial as well as direct evidence.[51] Once the General Counsel has made a sufficient showing that the employee's union activity was a motivating factor in the employer's decision, the burden of persuasion then shifts to the employer to demonstrate that it would have taken the same action even absent the union activity.[52] 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

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[49] *See Dash v. NLRB*, 793 F.2d 1062, 1069 (9th Cir. 1986) (ignoring employee's version of incident establishes that employer's "interest was in finding a plausible pretext for the discharge, and not in ascertaining what actually occurred"); *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 663 (5th Cir. 1968) (discharge without giving employees opportunity to give their side of story demonstrates that employer "was looking for any infraction . . . that might ostensibly justify" punishment).

[50] *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996).

[51] *Power, Inc.*, 40 F.3d at 418.

[52] *Laro Maint. Corp.*, 56 F.3d at 228; *Microimage Display*, 924 F.2d at 252; *Manno Elec.*, 321 NLRB 278, 280 n.12.

activity."[53] The Board need not accept at face value the employer's explanation for the action if the evidence and the reasonable inferences drawn from it indicate that union animus motivated the decision.[54] However, if the employer's proffered reason for its actions is found to be pretextual, the inquiry ends.[55]

B. The Board's Findings Are Founded on Its Credibility Determinations, Which Should Be Upheld

The Board's findings that (1) Manager Ewing unlawfully interrogated Rayford about her union sympathies and denied her overtime and (2) OHL managers unlawfully interrogated and discharged Kurtycz, rest on its decision to credit Rayford and Kurtycz and discredit OHL's testimonial and documentary evidence. OHL's attack on those findings hinge mainly on Ewing's discredited version of his conversation with Rayford, Lowery's discredited account of his interrogation of Kurtycz, and OHL's fabricated investigation into Kurtycz's alleged violation of its no-solicitation policy. However, this Court will not

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[53] *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), *enforced*, 99 F.3d 1139 (6th Cir. 1996); *accord Laro Maint. Corp.*, 56 F.3d at 228.

[54] *Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 161 (1st Cir. 2005); *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981); *NLRB v. Buitoni Food Corp.*, 298 F.2d 169, 174 (3d Cir. 1962).

[55] *Waterbury Hotel Mgmt., LLC v. NLRB*, 314 F.3d 645, 653 (D.C. Cir. 2003).

overturn credibility determinations unless they are "hopelessly incredible."[56] Here, they are not; the judge properly examined the vagueness of OHL witnesses' testimony and inconsistencies in the testimonial and documentary evidence that OHL presented. As the judge acknowledged (A. 428), "Normally one can expect some minor inconsistencies in the testimony and evidence of multiple witnesses" regarding a series of events, but here, the "contradictions are numerous and they involve material issues of fact." Therefore, the Court should affirm the Board's credibility resolutions, which underpin the Board's findings of unfair labor practices, and disregard OHL's claim (Br. 44) that it "should prevail whether or not [the Board's] credibility determinations are resolved in its favor."

C. Manager Ewing Unlawfully Interrogated Rayford About Her Union Views, Threatened That There Would Be "Repercussions" If Others Found Out About Their Conversation, and Denied Rayford Overtime Because of Her Union Sympathies

Based on the credited evidence, the Board reasonably found that during Manager Ewing unlawfully interrogated Rayford regarding her union sympathies, threatened her with unspecified reprisal, and denied overtime opportunities to her

[56] *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998) (citations omitted); *accord Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998).

because of her union views, which reasonably tended to be coercive under the circumstances.[57] (A. 389, 423-425, 441-442.)

1. Manager Ewing Coercively Interrogated and Threatened Rayford in Violation of Section 8(a)(1) of the Act

The Board found, based on credited record evidence, that Rayford was subjected to further unlawful conduct, this time by her supervisor at Remington where she worked overtime. Within a week of Young's and White's interrogations, during Rayford's overtime shift at Remington, Rayford and employee Adams briefly discussed the Union campaign at OHL, and Rayford expressed her support for the Union. (A. 412, 423; 117-119; 357-367.) Only hours after that exchange, Manager Ewing instructed Rayford to call him and, when she did, the Board found that Ewing unlawfully interrogated her, threatened her with reprisal and denied her overtime because of her union sympathies. Specifically, during the 27-minute conversation, Ewing explicitly told her not to report for overtime the next morning because he did not "want this Union shit down in [Remington]." He accused her of talking to Remington employees about the Union, asked if she supported the Union, and then warned her that if anyone found out about their conversation, there would be "some repercussions" and she

[57] *See supra* notes 27-29 and accompanying text; *Avecor, Inc.*, 931 F.2d 924, 931 (D.C. Cir. 1991) (interrogation about employees' union views and threat to punish employees for engaging in protected activity violates Section 8(a)(1) of the Act).

would not "like the outcome." Before this conversation ended, Ewing reiterated: "I don't want you at Remington. If I need you to work overtime I will give you a call." (A. 412-413, 423; 120-122, 125, 355 p.2.)

The totality of the circumstances amply supports the Board's findings. As the Board found (A. 389, 423), Ewing was Rayford's immediate supervisor at Remington, responsible for deciding whether she could work overtime. And this conversation occurred only one week after two other OHL managers interrogated Rayford about her union support. Moreover, far from giving Rayford assurances against reprisal, immediately after interrogating her, Ewing threatened that there would be repercussions if she told anyone about their conversation, further underscoring the coerciveness of the interrogation.[58]

OHL's sole attack (Br. 39-40) on the Board's finding consists of a disagreement with the judge's credibility resolution between Rayford and Ewing. (A. 422-423.) The judge determined (A. 425) that Manager Ewing had "no credibility" because "he lied under oath about a material fact"—namely, whether he met with employees individually about the Union campaign. As a result, the judge credited Rayford's account of the conversation and found Ewing's version to be a "total fabrication." (A. 424-425.) Without a shred of support, OHL intimates (Br. 39) that Rayford should not have been credited because of her "delay" in

[58] *See, e.g.*, *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985).

raising her allegations to the Union; however, as shown,[59] this unfounded assertion does not hold water. OHL also contests (Br. 40) the judge's decision to discredit Ewing (A. 423-424); it claims that the Board was under a "misperception" about Ewing, who did not "meet with employees 'individually'" but was only going to "meet with individual employees" and "filter their concerns." However, Ewing's testimony that he did not "meet with employees individually" was rebutted by Shipp's credited testimony that Ewing spoke with him privately about his union views (A. 294-295) and by Ewing's e-mail to Regional Vice President White (A. 388), in which he listed how some employees felt about the Union and promised that he would "personally continue with meet with [the named] individuals daily." Thus, despite OHL's struggle to find favorable credited evidence on which to hang its hat, such irreconcilable conflicts defeat its efforts. (A. 430-431.)

2. Manager Ewing Unlawfully Denied Overtime to Rayford Because of Her Union Sympathies, Violating Section 8(a)(3) and (1)

The General Counsel met his initial *Wright Line* burden as to Rayford's denial of overtime, and OHL has not rebutted that showing. The credited evidence shows, and OHL does not contest, that Manager Ewing had knowledge of Rayford's pro-union sentiments, as illustrated by his unlawful interrogation of

[59] *See supra* at 27.

Rayford.[60] (A. 423; 116-122.) It is clear that, upon learning of Rayford's union views, Ewing sought to prevent Rayford from interacting with Remington employees—by denying Rayford overtime in that department and saying he would call her if any overtime opportunities arose—because he did not "want this union shit [at Remington]." (A. 116-122.) Moreover, as the Board found (A. 389, 441-442) and as shown, OHL committed numerous Section 8(a)(1) violations, including Ewing's interrogation and threat during that same conversation with Rayford, which further illustrate OHL's union animus.[61]

OHL erroneously claims it did not violate the Act because there was no "adverse employment action" (Br. 32-34) and because Rayford was treated "identically to other employees" who requested overtime (Br. 35). These assertions fly in the face of the credited evidence.

Rayford had previously requested and been approved for overtime. However, after learning of her pro-union sentiments, Ewing stripped her of any opportunity for overtime by telling her that she should not report for overtime the next day, that he did not want her working in the Remington account because he did not want "this union shit" at Remington, and that he would contact her if she

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[60] *See supra* at 35-36.

[61] *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423-24 (D.C. Cir. 1996) (contemporaneous Section 8(a)(1) violations support inference of animus).

was needed for future overtime work. Thus, "Rayford did not continue to seek overtime . . . because Ewing made it clear to her that such an endeavor would be futile." (A. 424.) Under these circumstances, OHL clearly denied overtime opportunities to Rayford. And OHL's suggestion (Br. 35) that Rayford should have followed the pattern of other employees and requested more overtime ignores this credited evidence. Therefore, contrary to OHL's claim, Rayford was not treated "exactly the same" as other employees who requested and worked overtime in Remington.

D. Manager Lowery Unlawfully Interrogated Kurtycz About Her Union Sympathies and OHL Discharged Kurtycz Because of Her Union Support, Not Her Asserted Violation of Its No-Solicitation Policy

The Board reasonably found, based on the credited evidence, that Lowery coercively interrogated Kurtycz about her union views and, after becoming aware of her pro-union sentiments, OHL discharged Kurtycz, fabricating the reason for her termination. (A. 389, 429, 441-442.)

1. Manager Lowery Coercively Interrogated Kurtycz, in Violation of Section 8(a)(1) of the Act

Operational Excellence Program Manager Lowery coercively interrogated Kurtycz about her union sympathies. (A. 424; 66-68.) As with the other interrogations, Kurtycz was questioned by a senior manager about her union sympathies and she was not an open union supporter before Lowery's

interrogation. Operational Excellence Manager Lowery approached Kurtycz carrying a copy of an NLRB Notice to Employees (A. 354), and said, "You are on my list." He pointed to the notice where it read "If you select the United Steelworkers Union . . ." and threatened that union representation was "not going to happen." (A. 67.) He then asked about Kurtycz's union sentiments and Kurtycz informed him that she thought the "Union was good." (A. 68.) Lowery even admitted that he approached employees during work time because he had a list of "people assigned to [him] to talk to [about the Union campaign]." (A. 424; 208-209.) Additionally, while Kurtycz complained about her unpredictable hours and excessive overtime, Lowery took notes, suggesting that he would report back to someone about her union views. Indeed, as the Board found (A. 429), this conversation sparked the accusations and investigation that led to Kurtycz's discharge the next day.[62] Therefore, under these circumstances, Lowery's interrogation, combined with his "declaration of the futility of selecting the [Union]," reasonably tended to be coercive under the circumstances.[63] (A. 424.)

OHL contests the Board's finding by challenging the judge's credibility resolutions between Lowery and Kurtycz. The judge properly discredited Lowery's "equivocal" and vague testimony because of his inability to recollect

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[62] *See infra* at 42-50.

[63] *See supra* notes 27-29 and accompanying text.

important aspects of Kurtycz's interrogation and credited Kurtycz's "unequivocal" account.[64] (A. 424.) For example, Lowery frequently hypothesized about what likely happened during his interrogation of Kurtycz, instead of recalling what actually happened. (A. 207-213.) In sharp contrast, Kurtycz gave detailed testimony about Lowery's coercive interrogation of her. (A. 66-68.)

In light of this determination, OHL's speculation (Br. 41) that Kurtycz "obviously has the stronger motive to fabricate [the interrogation]" and that Lowery "has no motive to lie" should be rejected. Moreover, OHL relies purely on discredited testimony in maintaining (Br. 41) that Lowery did not interrogate her since he was instructed not to ask employees' about their personal opinion of the Union. It also inaccurately claims (Br. 41) that Kurtycz never reported the interrogation to another manager; in fact, Kurtycz asked Supervisor Cousino why Manager Lowery had questioned her about her union views. (A. 69-71, 78.) Lastly, OHL's contention (Br. 42) that the violation was "at most" *de minimis* utterly ignores the context of this interrogation, which was part of a series of coercive interrogations by OHL managers to diminish employee support for the Union shortly before the election and triggered Kurtycz's discharge.

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[64] *See, e.g.*, *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 349 & n.2 (D.C. Cir. 2011) (noting that judge reasonably discredited one witness because he only vaguely remembered circumstances surrounding negotiations).

2. OHL Discriminatorily Discharged Kurtycz Because of Her Union Sympathies and Activities

i. The General Counsel proved Kurtycz's termination was unlawfully motivated

It is undisputed (Br. 9) that prior to March 1, Kurtycz was not an open union supporter. However, on March 1, OHL learned of Kurtycz's union support and discharged her the following day. Specifically, on March 1, in response to Manger Lowery's unlawful interrogation, Kurtycz admitted her union sympathy. Then, after Manager Washington suspended her pending investigation, Kurtycz distributed pro-union flyers with Jerry Smith, a known union activist and former employee. (A. 426-429; 66-72, 78.) And Manager Phil Smith observed her handbilling with Smith after she left the facility. OHL in no meaningful way contests that Kurtycz engaged in union activities or that it knew about her union support when it made the decision to discharge her.

As shown,[65] OHL violated Section 8(a)(1) in numerous ways, which is strong evidence of OHL's animus towards the Union and the employees engaged in union activity.[66] (A. 389, 441-442.) As the Board noted (A. 424-425), OHL's hostility to the union was "spread throughout this record."

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[65] *See supra* at 23-29, 34-37, 39-41.

[66] *See Parsippany Hotel Mgmt. Co.*, 99 F.3d at 423-24.

In addition, the suspect timing between managers' knowledge of Kurtycz's union activities and Kurtycz's discharge further supports the Board's conclusions that the discharge was unlawfully motivated, despite OHL's argument that there is no "link" between Lowery's knowledge and Kurtcyz's discharge (Br. 28-30).[67] Indeed, just hours after Lowery learned that Kurtycz supported the Union, Manager Washington met with Kurtycz about claims that Kurtycz solicited Union cards during work time and, despite her denials, suspended her while OHL "investigated" the matter; that afternoon, Manager Smith witnessed her handbilling with a union activist. The following day, in what appears to be a "stunningly obvious" coincidence of timing, Washington met with Kurtycz, asked if she remembered receiving a final warning for selling food six months earlier, and promptly terminated her.[68] Therefore, OHL "took advantage of the fact that Kurtycz had previously received a final warning" and terminated her for violating its no-solicitation policy. (A. 426-429; 160, 255, 256-259.) Substantial evidence thus supports the Board's conclusion that Kurtcyz' union activity was a motivating factor in OHL's decision to terminate her. Accordingly, the burden shifted to OHL

[67] *See Power, Inc.*, 40 F.3d at 418; *see also Phelps Dodge Min. Co. v. NLRB*, 22 F.3d 1493, 1502 (10th Cir. 1994) (timing alone may suggest that union animus motivated employer's conduct); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) ("An inference of [union] animus is proper when the timing of the employer's actions is 'stunningly obvious.'") (citation omitted).

[68] *See American Geri-Care, Inc.*, 697 F.2d at 60.

to prove that it would have terminated Kurtycz even absent her union activity. It has not done so.

ii. OHL has not shown that it would have discharged Kurtycz absent her union activity

The Board reasonably found (A. 428-429) that OHL did not meet its *Wright Line* rebuttal burden because the stated reason for Kurtycz's discharge—that she allegedly violated its no-solicitation policy by asking employees to support the Union— was pretextual.[69]

As discussed,[70] OHL managers had not enforced its no-solicitation policy prior to Kurtycz's discharge. Indeed, even Human Resources Manager Young distributed Obama t-shirts on working time. (A. 421; 270-273.) Moreover, no other employee who violated a company policy while on final warning status had ever been disciplined, let alone discharged.[71] The evidence showed that another employee, Eason, received three warnings between January and March 2009 and was on final warning status when he violated a policy prohibiting the use of cell

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[69] *See Southwire Co.*, 820 F.2d 453, 460 (D.C. Cir. 1987) (where record had evidence of employer's animus, employee was discharged one week after openly supporting union, and no other employee was discharged for similar violation, substantial evidence supported Board's finding of pretext).

[70] *See supra* at 11-12.

[71] *See Southwire Co.*, 820 F.2d at 460 (fact that no other employee was discharged for similar violation supported Board's finding of pretext).

phones during work time; yet, OHL excused the infraction and did not discipline him. (A. 426 & n.20; 257-261, 370-373.) Kurtycz, on the other hand, was also on final warning status when she allegedly violated OHL's no-solicitation policy, but OHL chose to discharge her.

Contrary to OHL's depiction of its "investigation" of Kurtycz's alleged solicitation, the credited evidence shows that it undertook a flawed investigation into the accusations against Kurtycz before discharging her, further bolstering the Board's finding of pretext.[72] (A. 426-429.) For example, Manager Washington's statement indicates that employee Jearl Moore said Kurtycz asked for employees' phone numbers and addresses, but Moore's statement "does not even mention this." (A. 426-427; 377, 380.) Similarly, Moore's statement—that she saw Kurtycz approach *other* employees about voting for the Union—conflicts with the

[72] *See Dash v. NLRB*, 793 F.2d 1062, 1069 (9th Cir. 1986) (employer's determination to ignore employee's version of incident establishes that employer's "interest was in finding a plausible pretext for the discharge, and not in ascertaining what actually occurred"); *Am. Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980) (discharge decision "swiftly" made after employer's "cursory investigation of the incident," which employer made "without attempting to allow [the employee] to explain the context of his impropriety"); *U.S. Rubber Co. v.* NLRB, 384 F.2d 660, 663 (5th Cir. 1968) (summary discharge without giving employees opportunity to explain or give their version of incidents supports conclusion that employer "was looking for any infraction . . . that might ostensibly justify" punishment); *Bantek West, Inc.*, 344 NLRB 886, 895 (2005) (employer's "failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain are clear indicia of discriminatory intent.").

testimony of employee Lashunda Hill, who testified that Kurtycz approached her *and Moore*. Manager Washington's own statement "goes to great lengths to indicate what she and Cousino told Kurtycz . . . but indicates nothing regarding what Kurtycz told them about her guilt or innocence." (A. 427-428, 380.) Moreover, Washington unquestioningly believed Moore's complaint that Kurtycz was asking for employees' contact information and forcing them to sign Union cards (A. 398-403; 177, 377). Washington sent the statements to Human Resources Manager Young, who simply forwarded them, with Kurtycz's final warning, to Human Resources Vice President Tidwell, recommending Kurtycz's discharge. (A. 398-403, 426-427; 179-185, 377-380.) And Young's cover e-mail only discusses Kurtycz's prior warnings for selling food at OHL, and does not mention the accusations which laid the foundation for Kurtycz's discharge.

Despite receiving conflicting statements accusing Kurtycz of misconduct, Tidwell never inquired into the actual basis for Young's recommendation or sought Kurtycz's side of the story. Instead, he unhesitatingly approved her termination. (A. 426-429; 278-280, 281-283, 285-286.) In light of the numerous inconsistencies in OHL's evidence, the judge concluded that OHL "relied on a fabrication" to justify Kurtycz's discriminatory discharge.[73] (A. 428-429.)

[73] *See also Wayneview Care Ctr. v. NLRB*, 664 F3d 341, 349 & n.2 (D.C. Cir. 2011) (judge reasonably credited witnesses based on frequent contradictory

OHL mistakenly asserts (Br. 29) that there can be no violation of the Act because Tidwell was unaware of Lowery's interrogation of Kurtycz. The judge found that "OHL, through Lowery, knew [Kurtycz supported the Union]" and the evidence illustrates a nexus between Lowery's discovery of Kurtycz's views and her "unjustified termination hours later." (A. 429, emphasis added.) OHL's efforts to challenge that nexus are belied by Tidwell's own admission: "I rely on my local HR professional staff to conduct the investigation and make the recommendation." (A. 427; 285.) Thus, the Board's finding recognizes that several managers and supervisors involved in Kurtycz's discharge were unlawfully motivated, even before Tidwell's approval, when "OHL took advantage" of her final warning. Notably, Managers Washington, Young, and Lowery all denied any involvement in the decision to discharge Kurtycz, but the judge discredited them. (A. 422, 428-429; 185, 205, 254.) Therefore, in approving Kurtycz's discharge, Tidwell looked to managers' reports for a recommendation, illustrating that he was not the sole decisionmaker. (A. 426-427; 279-280, 281-283, 285-286.)

Even accepting that Tidwell was the ultimate decisionmaker, Tidwell did not need to be aware of Kurtycz's union support for the Board to find the discharge unlawful, since he relied on an antiunion-motivated investigation in approving Kurtycz's termination. (A. 426-427; 279-280, 281-283, 285-286.) The Board,

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statements, inability to recall specific details, and inconsistencies between testimonial and documentary evidence).

with circuit court approval, has held that an employer can be liable under the Act, where a supervisor's knowledge of employees' union activity and unlawful motivation leads to the employer's discharge of those employees, even thought the deciding manager did not have knowledge of the union animus or knowledge of that union activity.[74] If such direct knowledge were required, "companies [would] 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."[75]

Moreover, OHL places undue emphasis (Br. 29-30) on the Board's rejection of the judge's reasoning that Kurtycz would not have been seeking authorization

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[74] *See, e.g.*, *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 311-13 (D.C. 1989) (upholding Board's finding that employer unlawfully discharged employees because of their union activity, where supervisor's knowledge of activity was imputed to the 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); *Boston Mut. Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (supervisors showed union animus and decisionmaker fired union steward in 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).

[75] *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 815 (3d Cir. 1986).

cards only two weeks before the scheduled election (A. 389n.3). However, the judge's (and Board's) finding of pretext does not rest on that reasoning, but on the numerous contradictions in OHL's evidence presented on this matter, Lowery's interrogation of Kurtycz, and OHL's fabricated investigation of her supposed misconduct. (A. 389 n.3; 428-429.) In a similar vein, OHL's defense (Br. 30) that Kurtycz's termination was not pretextual because it was unaware of any evidentiary inconsistencies at the time it discharged her misses the point: If Human Resources Vice President Tidwell had closely reviewed the employee and manager statements, which comprised the "investigation," he would have discovered that they were conflicting and inconsistent, and did not include a statement from Kurtycz. (A. 426-429; 377-380.) For example, Tidwell would have recognized that Manager Washington's statement includes details that Moore's statement omits, and that Supervisor Pope's statement includes employee Tiraney Crawford in the group of employees whom Kurtycz approached, while Crawford portrays herself as a mere observer. He also would have noticed, as the judge did (A. 428), that the beginning of Crawford's statement is missing. (A. 428; 377-378, 380.) But Tidwell failed to examine the statements.

Furthermore, OHL's attempt (Br. 31) to undermine the Board's finding of animus by highlighting that it did not discharge other union activists is unhelpful, since it is well settled "that a discriminatory motive, otherwise established, is not

disproved by an employer's proof that it did not weed out all union adherents."[76] Considering this myriad of unsubstantiated arguments, OHL failed to refute the Board's finding that Kurtycz's discharge was based entirely on pretext.

Finally, in its issue statement (Br. 4), OHL suggests that the Board exceeded its authority in ordering OHL to electronically distribute copies of the remedial notice to OHL employees, but it does not pursue that claim in its brief. Consistent with the Federal Rules of Appellate Procedure, this Court has made clear that when a party fails to sufficiently raise an issue in its opening brief, that issue is waived.[77] The Court has repeatedly refused to consider passing references to a vague and unsupported narrative, and has consistently ruled that an opening brief "must contain" citations to the authorities and record that support the petitioner's arguments.[78] Thus, OHL has waived any argument on the Board's electronic posting of its remedial notice.

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[76] *Clark & Wilkins Indus., Inc.*, 887 F.2d at 316 n.19 (internal quotation marks omitted).

[77] *See* Fed. R. App. P. 28(a)(9)(A) (party must present "contentions and the reasons for them" in opening brief); D.C. Cir. R. 28(a) (parties' briefs must contain "items required by FRAP 28"); *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).

[78] *See Dunkin' Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (citing cases).

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD
AUGUST 2012

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-1063 & 11-1482
	)	
v.	)	Board Case No.
	)	26-CA-23675
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 11,441 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 10th day of August 2012

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OZBURN-HESSEY LOGISTICS, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
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v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case No.
	)	26-CA-23675
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all 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 10th 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.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is

engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

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

. . . .