

**Nos. 12-70111 & 12-70517**

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

**W.D. MANOR MECHANICAL CONTRACTORS, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD**

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**JULIE B. BROIDO**  
*Supervisory Attorney*

**MILAKSHMI V. RAJAPAKSE**  
*Attorney*

**National Labor Relations Board**  
**1099 14th Street, N.W.**  
**Washington, D.C. 20570**  
**(202) 273-2996**  
**(202) 273-1778**

**LAFE E. SOLOMON**  
*Acting General Counsel*

**CELESTE J. MATTINA**  
*Deputy General Counsel*

**JOHN H. FERGUSON**  
*Associate General Counsel*

**LINDA DREEBEN**  
*Deputy Associate General Counsel*

*National Labor Relations Board*

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## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of jurisdiction .....	1
Statement of the issues presented .....	3
Statement of the case.....	3
Statement of facts.....	6
I. The Board’s findings of facts .....	6
A. Background; the Company’s business and organizational structure.....	6
B. The union begins a campaign to organize the Company’s sheet-metal workers in the shop and in the field; initially, the Company permits non-work-related discussions and solicitations during the work day .....	7
C. Union Organizer Montroy speaks to employee Jones near the MIM jobsite; shortly thereafter, Company Foreman Hartranft questions Jones, and warns Jones and others of dire consequences for those who spoke to Montroy or sought union representation .....	9
D. Leadman Carrillo tells employees that he knows Montroy visited the the shop, that anyone who signed an authorization card would be gone, and that the Company would close before it went union.....	10
E. Carrillo repeatedly asks employee Weimann, a union supporter, whether he is having “another union meeting” with co-workers in the shop; amidst these ongoing questions, Carrillo discharges Weimann, purportedly for poor performance .....	12

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
F. Members of the Union apply for work with the Company; a company official questions two of them about their union affiliation, and another official suggests that police should be summoned if union members appear in a group to apply for work; the Company makes no job offers to the union members .....	14
G. Shop Leadman Carrillo introduces a series of restrictions on shop employees’ break locations, in response to union activity in the in the publicly accessible areas adjoining the shop; the Union nevertheless gains support in the shop.....	18
H. Employee Jones discusses the Union with co-workers at the MIM jobsite; MIM Superintendant Longley reads a letter from the Plumbers’ Union, intended for company plumbers, to MIM sheet-metal workers; the letter warns against union activity while “on the clock”.....	20
I. The Union files a petition with the Board, seeking to represent the Company’s sheet-metal workers; days later, the Company terminates shop employees Brimie, Chavez, Duffy, Nielsen, and Retzlaff .....	21
J. Field employee Jones is transferred to the BIMC jobsite, where he discusses the Union with co-workers; Superintendent Bowser informs Jones that he is not allowed to solicit for or talk about the Union except on breaktime and after hours; Bowser disciplines Jones for violating these rules.....	22
II. The Board’s conclusions and order .....	23
Summary of argument.....	25
Standard of review .....	29

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
Argument.....	30
I. The Board is entitled to summary enforcement of its numerous uncontested findings that the company violated Section 8(a)(1) and (3) of the Act .....	30
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Weimann, and discharging employees Brimie, Chavez, Duffy, and Nielsen, because of their union activities .....	35
A. Applicable principles .....	35
B. The Board reasonably found that the company unlawfully disciplined and discharged Weinmann in January 2009 .....	37
1. The Company discharged Weimann because of his union activities ..	38
2. Substantial evidence supports the Board’s finding that Shop Leadman Carrillo is a supervisor under the Act .....	42
C. The Board reasonably found that the Company unlawfully Discharged Brimie, Chavz, Duffy, and Nielsen .....	46
1. The Company’s ample knowledge of its employees’ union activities, the timing of the discharges, and its many uncontested unfair labor practices, establish its unlawful motive.....	47
2. The Company failed to meet its burden of demonstrating that it would have discharged Brimie, Chavez, Duffy, and Nielsen in the absence of their union activity. ....	50

**TABLE OF CONTENTS**

<b>Headings – Cont’d</b>	<b>Page(s)</b>
III. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire union-affiliated applicants Jameson, Latham, Lebron, Osteros, and Rico .....	54
A. The Act prohibits an employer from failing or refusing to hire applicants because of their union affiliation or activity .....	54
B. The Board reasonably found that the Company unlawful refused to hire Jameson, Latham, Lebron, Osteros, and Rico .....	57
Conclusion .....	63
Statement of related cases .....	64

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Abbey's Transp. Servs., Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988).....	57
<i>Abilene Sheet Metal, Inc. v. NLRB</i> , 619 F.2d 332 (5th Cir. 1980) .....	45
<i>American Federation of Labor v. NLRB</i> , 308 U.S. 401 (1940).....	5
<i>Atlantic Veal &amp; Lamb, Inc.</i> , 342 NLRB 418 (2004), <i>enforced</i> , 156 Fed. App'x 330 (D.C. Cir. 2005).....	49
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964).....	5
<i>Children's Farm Home</i> , 324 NLRB 61 (1997) .....	44
<i>FES, a Division of Thermo Power</i> , 331 NLRB 9 (2000), <i>enforced</i> , 301 F.3d 83 (3d Cir. 2002).....	56-58
<i>Frankl v. HTH Corp.</i> , 650 F.3d 1334 (9th Cir. 2012) .....	55
<i>Frankl v. HTH Corp.</i> , 693 F.3d 1051 (9th Cir. 2012) .....	30, 41
<i>Healthcare Employees Union, Local 399 v. NLRB</i> , 463 F.3d 909 (9th Cir. 2006) .....	36, 37, 50
<i>Knoxville Distrib. Co.</i> , 298 NLRB 688 (1990), <i>enforced mem.</i> , 919 F.2d 141 (6th Cir. 1990) .....	39

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>L'Eggs Prods., Inc. v. NLRB</i> , 619 F.2d 1337 (9th Cir. 1980) .....	48
<i>Lippincott Indus., Inc. v. NLRB</i> , 661 F.2d 112 (9th Cir. 1981) .....	50, 57
<i>Martech MDI</i> , 331 NLRB 487 (2000) .....	48
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 n.4 (1983).....	35
<i>MJ Metal Prods., Inc. v. NLRB</i> , 267 F.3d 1059 (10th Cir. 2001) .....	36
<i>Mountaineer Park, Inc.</i> , 343 NLRB 1473 (2004) .....	44
<i>NLRB v. Advanced Stretchforming Int'l, Inc.</i> , 233 F.3d 1176 (9th Cir. 2000) .....	33
<i>NLRB v. Brooks Cameras, Inc.</i> , 691 F.2d 912 (9th Cir. 1982) .....	37, 54
<i>NLRB v. Clark Manor Nursing Home</i> , 671 F.2d 657 (1st Cir. 1982).....	34
<i>NLRB v. Gen. Fabrications Corp.</i> , 222 F.3d 218 (6th Cir. 2000) .....	34
<i>NLRB v. Howard Elec. Co.</i> , 873 F.2d 1287 (9th Cir. 1989) .....	35, 36
<i>NLRB v. Kentucky River Cmty. Care, Inc.</i> , 532 U.S. 706 (2001).....	43

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Legacy Health Sys.</i> , 662 F.3d 1124 (9th Cir. 2011) .....	30, 33
<i>NLRB v. Nevis Indus., Inc.</i> , 647 F.2d 905 (9th Cir. 1981) .....	29
<i>NLRB v. Res-Care, Inc.</i> , 705 F.2d 1461 (7th Cir. 1983) .....	44
<i>NLRB v. Rockline Indus., Inc.</i> , 412 F.3d 962 (8th Cir. 2005) .....	40
<i>NLRB v. Studio Transp. Drivers Local 399</i> , 525 F.3d 898 (9th Cir. 2008) .....	29
<i>NLRB v. Talsol Corp.</i> , 155 F.3d 785 (6th Cir. 1998) .....	34
<i>NLRB v. Town &amp; Country Elec., Inc.</i> , 516 U.S. 85 (1995).....	54
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	35, 36
<i>NLRB v. Warren L. Rose Castings, Inc.</i> , 587 F.2d 1005 (9th Cir. 1978) .....	35-38, 49-50
<i>NLRB v. Yeshiva University</i> , 444 U.S. 672 n.17 (1980).....	43-44
<i>Oakwood Healthcare, Inc.</i> , 348 NLRB 686 (2006) .....	43
<i>Phelps Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	54-55

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Plaza Auto Ctr., Inc. v. NLRB</i> , 664 F.3d 286 (9th Cir. 2011) .....	32
<i>Progressive Elec., Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006) .....	57
<i>Retlaw Broad. Co. v. NLRB</i> , 53 F.3d 1002 n.1 (9th Cir. 1995) .....	33
<i>Searle Auto Glass, Inc. v. NLRB</i> , 762 F.2d 769 (9th Cir. 1985) .....	36, 42
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966) .....	36, 49-50
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001) .....	37
<i>Toering Elec. Co.</i> , 351 NLRB 225 (2007) .....	55, 56, 58, 60
<i>Torrington Extend-A-Care Emp. Ass'n v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994).....	34
<i>U.S. Marine Corp. v. NLRB</i> , 944 F.2d 1305 (7th Cir. 1991) .....	34
<i>U.S. v. L.A. Tucker Truck Lines</i> , 344 U.S. 33 (1952).....	30
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	29
<i>Vincent Indus. Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000) .....	36

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>W.F. Bolin Co. v. NLRB</i> , 70 F.3d 863 (6th Cir. 1995) .....	40
<i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	30, 43
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	35, 38, 47-49, 56
 <b>Statutes:</b>	
<b>Page(s)</b>	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 1 ((29 U.S.C. §§ 151).....	2
Section 2(11) (29 U.S.C. 152(11)).....	38, 42, 44, 45
Section 7 (29 U.S.C. § 157) .....	35
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	<i>passim</i>
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	<i>passim</i>
Section 8(a)(4) (29 U.S.C. §§ 158(a)(4)).....	3, 5, 24
Section 10(a) (29 U.S.C. § 160(a)) .....	2
Section 10(e) (29 U.S.C. § 160(e)) .....	2, 26, 29, 30, 41
Section 10(f) (29 U.S.C. § 160(f)).....	2
 <b>Rules:</b>	
<b>Page(s)</b>	
Fed. R. App. Proc. 28(a)(9)(A) .....	32-33
 <b>Regulations:</b>	
<b>Page(s)</b>	
29 C.F.R. § 102.46(b)(2).....	30
29 C.F.R. § 102.46(g) .....	30

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on a petition filed by W.D. Manor Mechanical Contractors, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the Company. The Board’s Decision and Order issued on December 7,

2011, and is reported at 357 NLRB No. 128. (D&O1-29.)<sup>1</sup> In its decision, the Board found (D&O1-2,14-24) that the Company engaged in a spate of unfair labor practices in response to the efforts of the Sheet Metal Workers' International Association, Local No. 359, AFL-CIO, CLC ("the Union") to organize the Company's sheet-metal workers.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), and its Order is final with respect to all parties. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which allows an aggrieved party to obtain review of a Board order in this Circuit, and allows the Board to cross-apply for enforcement.

The Company filed its petition for review on January 11, 2012. The Board filed its cross-application for enforcement on February 21, 2012. Both of these filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

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<sup>1</sup> Record references are to the Board's Decision and Order ("D&O"), which is included in Volume I of the Company's excerpts of record at tab A, and to the supplemental excerpts of record ("SER") filed by the Board. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that the Company violated Section 8(a)(1) and (3) of the Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Nathaniel Weimann, and discharging employees Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen, because of their union activities.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire Lance Jameson, Donald Latham, Mahelio Rico, James Osteros, and Fernando Lebron because of their union affiliation.

## **STATEMENT OF THE CASE**

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company committed numerous violations of Section 8(a)(1), (3) and (4) of the Act (29 U.S.C. §§ 158(a)(1), (3), and (4)), in response to a union organizing drive directed at the Company's sheet-metal workers. (SER9-13,20-33.) Around the time that the complaint issued, the Union filed objections to a representation election that was held among the sheet-metal

workers. (SER15.) The complaint and the election objections were subsequently set for consolidated consideration by an administrative law judge. (SER34-36.)

Following a hearing, the judge issued a decision finding merit in some of the unfair-labor-practice complaint allegations, and dismissing others. (D&O7-24.)

Noting that the election objections generally tracked the complaint, the judge further determined that the unfair labor practices constituted objectionable conduct warranting a re-run election among the sheet-metal employees. (D&O7,24-26.)

The Acting General Counsel thereafter filed timely exceptions, and the Company filed cross-exceptions. (SER1-8.)

The Board adopted a number of the judge's findings, in the absence of exceptions, that the Company repeatedly violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)), including by discharging employee Jarrod Retzlaff for supporting the Union. (D&O1n.1.) The Board also affirmed the judge's findings that the Company further violated the same provisions of the Act by: discharging employee Nathaniel Weimann because of his union activities; subsequently discharging four more employees (Paul Brimie, Pedro Chavez, Charles Duffy, and Terrance Nielsen) because of their union activities; and refusing to hire five sheet-metal workers because of their union affiliation. (D&O1-2.) In addition, the Board affirmed, with a modified rationale, the judge's finding that the Company violated Section 8(a)(1) of the Act by promulgating a

rule against union solicitation in late March 2009, and violated Section 8(a)(3) and (1) of the Act by later taking adverse action against employee Robert Jones pursuant to the unlawfully promulgated rule. (D&O1n.1.)

The Board, however, reversed the judge's finding of one Section 8(a)(1) violation, and found it unnecessary to pass on several other violation findings. (D&O1-2&nn.1,9.) In particular, the Board majority (Members Becker and Hayes, Chairman Pearce dissenting) found it unnecessary to pass on the judge's findings that the Company violated Section 8(a)(4) of the Act (29 U.S.C. 158(a)(4)) by discharging Brimie, Chavez, Duffy, and Nielsen, and that the Company violated Section 8(a)(3) and (1) of the Act by outsourcing some of its sheet-metal fabrication work after March 16, 2009.<sup>2</sup> (D&O1n.9.)

The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

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<sup>2</sup> Finally, in view of the Company's numerous unfair labor practices during the period before the representation election, the Board directed that its Regional Director for Region 28 conduct a second election among the sheet-metal employees. (D&O5.) That ongoing election proceeding has not yet resulted in a final order that would be subject to judicial review. *See American Federation of Labor v. NLRB*, 308 U.S. 401, 409-11 (1940) (representation proceedings excluded from appellate review afforded by Section 10 of the Act (29 U.S.C. § 160)); *accord Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964).

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACTS

#### A. Background; the Company's Business and Organizational Structure

The Company is a heating, air-conditioning, and plumbing business in Phoenix, Arizona. (D&O7;SER37-40,144-47.) It fabricates air ducts and other sheet-metal components for heating and air-conditioning systems at a fabrication facility (“the shop”) adjoining its offices in Phoenix. (D&O7;SER37-40,143-47.) It also installs such components at various customer (“field”) sites in the area. (D&O7-8;SER37-40,144-54.) The Company employs sheet-metal workers for both purposes. (D&O7-8;SER 147,152,160.)

At the time of the events at issue, the Company had fabrication orders for several large-scale projects, including the Mayo Hospital, General Dynamics Corporation, the Musical Instrument Museum (“MIM”), and the Banner Ironwood Medical Center (“BIMC”). (D&O13;SER438-61,464-65,468-77.) The Company also had installation work at those field sites—particularly at MIM and BIMC. (D&O8;SER154,158-59,175-78,441-50.)

The Company's sheet-metal operations, in the shop and in the field, are under the general direction of Executive Vice President Don Petty and Sheet-Metal

Superintendent Shawn Bowser.<sup>3</sup> (D&O7;SER144,150-51.) However, Foreman Trevor Davies oversees the day-to-day functioning of the shop, with assistance from Leadman Joshua Carrillo.<sup>4</sup> (D&O7,9;SER151-52,433-34.) And the Company's job superintendants oversee day-to-day operations at the various field locations, with assistance from several project managers and foremen. (D&O7-8;SER152-55.) During the relevant time period, Mike Longley was the job superintendent at the MIM jobsite, and Scott Hartranft and Tom Turner were foremen there; likewise, Brian Van Kuren was the job superintendent at the BIMC jobsite, and Harry Dempsey was a foreman there. (D&O7-8;SER154-57,162-63,251.)

**B. The Union Begins a Campaign To Organize the Company's Sheet-Metal Workers in the Shop and in the Field; Initially, the Company Permits Non-Work-Related Discussions and Solicitations During the Work Day**

In early 2008, the Union began a campaign to organize the Company's sheet-metal workers in the shop and in the field. (D&O8;SER201-02.) During the initial phase of this campaign, Union Organizer Pat Montroy contacted the employees, arranged a meeting with them, and also met with Company President

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<sup>3</sup> Company President Brian DeWitt runs the plumbing side of the business and is not involved in the Company's sheet-metal operations. (D&O7;SER205.)

<sup>4</sup> Experienced sheet-metal worker Dennis Kupiec also serves as a leadman in the shop, but has less responsibility than Carrillo. (D&O9;SER331,435-36.)

Brian DeWitt. (D&O8;SER201-05.) In the latter meeting, Montroy told DeWitt that the Union was interested in representing the Company's sheet-metal workers. (D&O8;SER204-05.) DeWitt responded that Montroy would have to take this matter up with Executive Vice President Petty, who was in overall charge of the Company's sheet-metal employees. (D&O8;SER205.)

Montroy accordingly contacted Petty, asking to discuss a possible collective-bargaining agreement covering the sheet-metal employees, but Petty did not respond. (D&O8;SER205-06.) The Union therefore decided, in February 2008, to suspend its campaign to represent the Company's sheet-metal employees. (D&O8;SER206-07.)

In November of that year, however, the Union resumed its campaign, following an inquiry from a company employee about union representation. (D&O8;SER207.) As part of the resumed campaign, Montroy met with Shop Leadman Carrillo and gave him packets of information about the Union to pass on to the shop employees. (D&O8;SER210-12.) Montroy also directly contacted the Company's field employees, calling and meeting with them during their breaks from work and after work, and soliciting their signatures on union authorization cards. (D&O8;SER207-09.)

At the time, the Company permitted a certain amount of talking and solicitation, unrelated to work, during the work day. (D&O9;SER268-74,276-79.)

Thus, employees were allowed to talk while working, so long as their conversations were not excessive. (D&O9;SER165,294.) In regard to solicitation, various employees were allowed to solicit for a “paycheck poker” pool on paydays, during working time, at the BIMC jobsite; Foreman Turner was allowed to solicit support for a charity motorcycle run by posting flyers in an employee work area at the MIM jobsite; and MIM Job Superintendant Longley was allowed to solicit donations for a food drive during employee safety meetings. (D&O9;SER268-71.) The Company further allowed employees to place stickers for various organizations on gang boxes in their work areas, including stickers for the union representing the Company’s plumbers. (D&O9;SER272-74,276-79,341.)

**C. Union Organizer Montroy Speaks to Employee Jones Near the MIM Jobsite; Shortly Thereafter, Company Foreman Hartranft Questions Jones, and Warns Jones and Others of Dire Consequences for Those Who Spoke to Montroy or Sought Union Representation**

On December 8, Montroy met with Field Employee Robert Jones while Jones was on a break from work at the MIM jobsite. (D&O8;SER245-46.) During that meeting, just off the jobsite, Jones signed a union authorization card. (*Id.*)

The following day, Company Foreman Scott Hartranft came to Jones’s car while Jones was eating lunch and asked whether he had seen or spoken to any union representatives. (D&O8;SER246-48.) Jones replied that he had not. (D&O8;SER248.)

A day later, Hartranft told a group of employees that if Montroy appeared on the MIM jobsite, they were not to speak to him and were to notify Hartranft immediately. (D&O8;SER249-50.) Hartranft particularly emphasized that the employees were not allowed to speak to Montroy about the Union on “company time,” and stated that those caught doing so would probably be fired. (*Id.*)

Along the same lines, during a morning meeting at the MIM jobsite on December 15, Hartranft told employees that they were only allowed to speak to Montroy on their unpaid lunch break, not on other breaks, because other breaks represented “company time.” (D&O8;SER252-53.) Hartranft added that, according to Company Sheet Metal Superintendent Shawn Bowser, the Company would close its doors if the employees went union. (D&O8;SER253.)

**D. Leadman Carrillo Tells Employees that He Knows Montroy Visited the Shop, that Anyone Who Signed an Authorization Card Would Be Gone, and that the Company Would Close Before It Went Union**

Meanwhile, Montroy paid a visit to the fabrication shop. (D&O8,9;SER212-13,316-17.) As he attempted to speak to the shop employees about the Union, however, Leadman Carrillo noticed his presence and told him that he was not allowed to be there. (D&O8;SER213.) Montroy therefore left, but later that day he returned to the company parking lot, where he spoke to employees for a few minutes while they were taking a break from work. (D&O8;SER213-15,317-19.)

Two days later, Carrillo told the shop employees that he knew Montroy had visited them. (D&O9;SER319-21.) Addressing the purpose of Montroy's visit, Carrillo said the employees should not expect to go union and that the Company would never go union. (*Id.*) Indeed, Carrillo projected that the Company would close its doors before it went union, and then all of the employees would be out of work. (*Id.*) Carrillo accordingly advised that those who wanted a union job should "pack [their] shit right now and go down to the hall because it was never going to happen." (D&O9;SER319-21,360.) Carrillo added that he knew there were union authorization cards circulating in the shop and that anyone caught signing a card would be gone. (D&O9;SER319-21.)

Shortly after Carrillo made these statements, Shop Employee Paul Brimie approached Carrillo and asked why the Company would never go union. (D&O10;SER322-23.) Carrillo suggested it was because of an argument between the Company's owners and the Union, and reiterated that the Company would close before it went union. (*Id.*)

Carrillo repeated the latter point in subsequent meetings with all of the shop employees in December, underscoring that the Company would never be a union shop. (D&O10;SER286-87.) In those meetings, Carrillo also invited employees who were interested in unionizing to leave the shop. (*Id.*)

**E. Carrillo Repeatedly Asks Employee Weimann, a Union Supporter, Whether He Is Having “Another Union Meeting” with Co-Workers in the Shop; Amidst These Ongoing Questions, Carrillo Discharges Weimann, Purportedly for Poor Performance**

Beginning around this time, Shop Employee Brimie noticed that Carrillo was watching employee conversations in the shop area. (D&O10;SER324-25.) Carrillo’s observations particularly focused on Shop Employee Nathan Weimann—a new employee who had worn a union t-shirt and had discussed his past union membership during his job interview with Carrillo. (D&O10;SER349-55,358.) Weimann occasionally spoke to others in the shop, including Leadman Kupiec and Shop Foreman Davies’s son Jeremy, about the Union and other matters in the shop area. (D&O12;SER318-19,355-57.) After one such conversation, Carrillo approached Weimann and asked whether he was having another union meeting. (D&O12;SER358-59.) Carrillo thereafter posed the same question to Weimann every time he saw Weimann speaking to another employee in the shop. (*Id.*)

On January 12, 2009, Weimann came under Carrillo’s criticism for his work with Employee Jessie Wilson on a large sheet-metal fitting consisting of several interlocking parts. (D&O12;SER361-67.) Carrillo at first yelled at Weimann and Wilson for not assembling the fitting fast enough. (*Id.*) Later, when they completed the fitting, Carrillo became irate that the fitting was the wrong size.

(*Id.*) Although Leadman Kupiec told Carrillo that the fault lay with the work of a third employee, who had made the parts of the fitting in the wrong size, this explanation did not defuse Carrillo's anger. (*Id.*) Nor did Kupiec's assurances that the fitting could be fixed. (*Id.*) Carrillo called a meeting of the shop employees, called them incompetent, and told Weimann and Wilson in particular to "pack [their] shit and get out." (D&O12;SER288,361-67.)

Weimann gathered his things, but decided to speak to Carrillo one more time before leaving as instructed. (D&O12;SER367-69.) In the conversation that ensued, Weimann asked Carrillo why he was being dismissed. (*Id.*) Carrillo said Weimann could not complete the work correctly. (*Id.*) Weimann countered that "shit happens." (*Id.*) To this, Carrillo responded, "Oh, shit happens . . . . If that's your attitude I don't need people in here like you stirring up trouble." (*Id.*) When Weimann expressed confusion over the latter statement, Carrillo said, "You know exactly what I'm talking about. All the shit you been in here talking." (*Id.*) Although Weimann insisted that he had simply made a mistake in regard to the fitting, Carrillo maintained that he did not "need people like your kind in here stirring up trouble." (*Id.*) Carrillo therefore instructed Weimann, once again, to pack his things and leave the shop immediately. (*Id.*) After Weimann left, Carrillo prepared a written warning memorializing Weimann's error in assembling the

fitting, and executed papers formally terminating his employment for unsatisfactory work performance. (D&O12;SER81-82.)

**F. Members of the Union Apply for Work With the Company; a Company Official Questions Two of Them About Their Union Affiliation, and Another Official Suggests that Police Should Be Summoned If Union Members Appear in a Group To Apply for Work; the Company Makes No Job Offers to the Union Members**

Later in January 2009, the Union learned that the Company was hiring sheet-metal workers. (D&O10;SER216,243,371-72.) Montroy accordingly gathered a group of members, who were out of sheet-metal work at the time, to apply for the advertised job opportunities. (D&O10;SER241,374-75,384-85,421-22,426-29,432.) The group—consisting of Union Business Agents Donald Latham and Marco Molina, Organizer Mahelio Rico, and Members Lance Jameson, James Osteros, and Fernando Lebron—met Montroy at the union hall on the morning of January 20. (D&O10;SER241-42,372-73,383,388,401-04,415-16,426-29.) They organized a carpool to the Company's facility. (D&O10;SER410-12,417.)

Latham and Jameson traveled in one car and arrived first at the Company's offices. (D&O10;SER375,390.) They wore no clothing items that would indicate their union affiliation. (D&O10;SER373,389.) When they reached the clear glass door of the main office, Latham pressed a buzzer to gain entry. (D&O10;SER375,378,390.) Company Receptionist Ruth Patterson responded via speaker and asked how she could help. (D&O10;SER375,397.) Latham replied that he

was there to fill out an application. (D&O10;SER375.) Patterson unlocked the door, admitted Latham and Jameson to the office, and gave them application forms to fill out. (D&O10;SER375-76,390,397.)

Minutes later, while Latham and Jameson were inside the office filling out applications, Montroy arrived with the remaining members of the group from the Union. (D&O10;SER376,390-92.) They each wore prominent union insignia on multiple items of clothing. (D&O10;SER217-231,391,404-05,417,429-30.) Like Latham and Jameson, they walked up to the clear glass door of the office and pressed the buzzer. (D&O10;SER232,418.) When Patterson answered, Montroy said that he and the others were there to fill out applications for sheet-metal jobs. (D&O10;SER233.) Patterson told him the Company was not hiring. (D&O10;SER233,391,418.)

Not satisfied with this representation, Montroy noted that he could see two people filling out applications in the office and repeated that he and his group just wanted to do the same. (D&O10-11;SER233-34.) Patterson still would not admit them. (*Id.*) Montroy then asked whether Patterson was denying them applications. (D&O11;SER235.) Patterson made no response. (*Id.*) As Montroy continued to request applications, Patterson used the Company's internal loudspeaker system to request help. (D&O11;SER180-81,235-36,377,392-93.) Meanwhile, hearing no response from Patterson for a period of time, Montroy decided to leave. (D&O11;

SER 236.) As he and the others began to walk away, about 10 company officials, including President DeWitt and Sheet-Metal Superintendant Bowser, appeared in the office to assist Patterson. (D&O11;SER236,377,398.)

DeWitt went outside and asked the departing union members whether he could help them. (D&O11;SER237,378-79,419-20.) Montroy replied that they wanted to apply for work and that Patterson had denied them applications.

(D&O11;SER237.) DeWitt immediately went back into the office and returned with application forms for the group. (D&O11;SER237-38,419-20.) Osteros, LeBron, and Rico each proceeded to fill out a form. (D&O11;SER239,406,420, 431-32.)

On returning to the office, DeWitt told Patterson—in the presence of Latham and Jameson, who were still completing their forms—that “[i]f this happens again you can just call 9-1-1, and tell them that you feel threatened.” (D&O11;SER381.) DeWitt said the police would then “come and take the guys away for a couple of hours. Take them to jail.” (*Id.*)

Bowser thereafter approached Latham and asked for his name. (D&O11;SER381-82.) Once Latham provided it, Bowser briefly left the office. (D&O11;SER382.) When he returned, he said to Latham, “Hey, you’re with the Union, right?” (*Id.*) Latham responded that he was. (*Id.*) Bowser similarly

approached Jameson and asked if he was “part of [the Union].”

(D&O11;SER395.) Jameson said he was not. (D&O11;SER395.)

Latham, Jameson, Osteros, Lebron and Rico eventually submitted applications to the Company on January 20. (D&O10,22-23;SER85-104,184-191,239, 382,394,406-07,420,431-32.) Their applications indicated recent sheet-metal employment. (D&O10-11;SER85-104,413.) They also had considerable prior sheet-metal experience, as Jameson noted when he told Bowser that he had done sheet-metal installation work in schools, hospitals, and office buildings.<sup>5</sup> (D&O11;SER400,505-06.) Latham and Lebron, for their part, noted on their forms that they possessed particular kinds of sheet-metal expertise about which the Company specifically inquired. (SER87,103.) Notwithstanding these qualifications, none of the union applicants received a call from the Company or a job offer. (D&O11;SER396,408-09,422,432.) The Company, however, was hiring at the time—contrary to Patterson’s representation to Montroy. (D&O11;SER105-131,179,190-98,423-24,.) Indeed, the Company hired nearly 30 sheet-metal workers between January 20 and the end of March. (D&O11;SER132-33,139-42.)

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<sup>5</sup> Indeed, Latham had been a sheet-metal worker for approximately 23 years; Jameson had been a sheet-metal worker for approximately 11 years; and Lebron, Osteros, and Rico had each done sheet-metal work for approximately 7 years. (SER370,386-87,401,414,425.)

**G. Shop Leadman Carrillo Introduces a Series of Restrictions on Shop Employees' Break Locations, In Response to Union Activity in the Publicly Accessible Areas Adjoining the Shop; the Union Nevertheless Gains Support in the Shop**

Soon after the union members submitted their job applications, Carrillo announced a series of restrictions on the areas in which shop employees could take their breaks. (D&O10;SER143,298-300,304-310.) First, on January 21, Carrillo told employees that they could no longer take breaks outside a shop door that opened onto the parking lot used by visitors. (D&O10;SER326.) A few days later, after employees who were on break just inside that door observed a demonstration by union agents outside, Carrillo told employees that they could no longer take breaks near the door leading to the public parking lot. (D&O10;SER330-34,344-45.) Around the same time, Carrillo also announced that the employees could not go into the main office area anymore and would have to exit the shop by using the door to the public parking lot—a door that Carrillo would have to unlock. (D&O10;SER298-300,326-29.) The Company subsequently formalized these changes at a security meeting, during which it revealed its plans to create an employee break area inside the shop, and to monitor activities around the door leading to the public parking lot. (*Id.*)

Notwithstanding these restrictions, which necessarily limited the shop employees' access to union representatives in the parking lot, the employees—including Jarrod Retzlaff, Paul Brimie, and Charles Duffy—continued to organize

and discuss the union amongst themselves, in the shop. (D&O12-13;SER284-85.)  
Brimie, further, displayed union stickers on his toolbox. (D&O12;SER302.) By  
March, Retzlaff, Brimie, and Duffy, and two more shop employees—Pedro  
Chavez and Terrance Nielsen—had all signed union authorization cards. (D&O12-  
13;SER293.)

Given the openness of the employees' union activities, and the increasingly  
closed nature of the shop, Carrillo and other company officials eventually came to  
know that certain employees in the shop were union supporters.

(D&O12;SER289-92,324.) Specifically, Carrillo learned about Retzlaff's union  
activity from employee Gregory Louis, even before the Union informed the  
Company by letter, in February, that Retzlaff was on the Union's organizing  
committee. (D&O12;SER289-90,437.)

Company officials, moreover, were in a position to witness employee union  
activity that sometimes took place just outside the shop. (D&O12-13;SER336-42.)  
For example, Company President DeWitt on one occasion passed close to Brimie's  
truck, which bore a visible union sticker, while Brimie and Duffy were in the truck,  
and Union Organizer Montroy was parked nearby. (*Id.*)

**H. Employee Jones Discusses the Union with Co-Workers at the MIM Jobsite; MIM Superintendent Longley Reads a Letter From the Plumbers' Union, Intended for Company Plumbers, to MIM Sheet-Metal Workers; the Letter Warns Against Union Activity While "On the Clock"**

As the union organizing campaign proceeded in January and February, field employee Jones discussed the Union with fellow employees at the MIM jobsite.

(D&O8;SER244-45,253.) Jones also carpooled to and from work with Supervisor Tom Turner, and told Turner that he supported the Union. (D&O8;SER251-52.)

On March 6, MIM Superintendent Longley met with the sheet-metal employees at the MIM jobsite and read them a letter from Plumbers Local 469, the union that represented the Company's plumbers. (D&O8;SER254,275.) The letter, addressed to the plumbers, stated that employees should "be advised" that "if, while on the clock, you . . . engage in efforts to support the organizing effort you will be subject to discipline, up to and including discharge." (D&O8;SER79-80,256.) After reading the letter, Longley reinforced its message in his own words, telling the gathered sheet-metal workers that if a plumber attempted to talk to them about the Union, they should report the incident to Longley or Foreman Hartranft, and that the Company would take disciplinary action against those who discussed the Union on company time. (D&O8-9;SER254-57.)

**I. The Union Files a Petition With the Board, Seeking To Represent the Company's Sheet-Metal Workers; Days Later, the Company Terminates Shop Employees Brimie, Chavez, Duffy, Nielsen, and Retzlaff**

By early March, the Union had collected a sufficient number of union authorization cards from the Company's sheet-metal employees to support a petition to represent those employees. (D&O7;SER69-78.) The Union accordingly filed its petition with the Board on March 11. (D&O7;SER69-78,240.)

On March 16, Superintendent Bowser and Leadman Carrillo approached shop employees Brimie, Chavez, Duffy, Nielsen, and Retzlaff as they were talking and cleaning up at the end of their work day. (SER292,303,342-43,346-47,348.) Bowser told the five employees that they were being terminated as part of a reduction in force within the shop, and then handed them their final paychecks. (D&O13;SER292,303,342-43346-47,348.) The Company also executed written termination notices giving the same reason. (D&O13;SER134-38.)

At the time of the terminations, the Company had outstanding orders for fabrication work on several projects, including the MIM and BIMC projects. (D&O13;SER450,460,464-65,468-477.) It had, moreover, installation work available at those field sites and others, and it had some history of transferring shop employees to the field to perform installation work. (D&O13;SER161,176,502-

03.) Notwithstanding this history, the Company did not offer any of the terminated shop employees work in the field.

**J. Field Employee Jones Is Transferred to the BIMC Jobsite, Where He Discusses the Union With Co-Workers; Superintendent Bowser Informs Jones That He Is Not Allowed To Solicit For or Talk About the Union Except on Breaktime and After Hours; Bowser Disciplines Jones for Violating these Rules**

On March 19, three days after discharging the shop employees, the Company transferred field employee Jones from the MIM jobsite to the BIMC jobsite. (D&O9;SER257-58.) Clad in his union t-shirt, Jones began talking to his new co-workers about the Union, and distributing union stickers to them. (D&O9;SER164,259-63,267.) He engaged in the latter activities both while working and during break time. (*Id.*)

On March 27, BIMC Foreman Dempsey observed Jones talking to fellow employees about the Union and immediately informed Superintendent Bowser. (D&O9;SER165-69.) Bowser and BIMC Superintendent Van Kuren arrived shortly thereafter in Jones's work area. (D&O9;SER263-64.) Bowser approached Jones and told him that he was not allowed to solicit for or talk about the Union on company time, but could only engage in such conduct on his breaks and after hours. (D&O9;SER165-69,263-64.)

Nevertheless, after Bowser left, Jones returned to work and once again talked about the Union with a co-worker while working. (D&O9;SER169-74.)

Later in the day, Dempsey saw Jones giving another employee a union t-shirt. (*Id.*) Dempsey reported the incident to Bowser, who gave Jones a written warning for engaging in union solicitation. (D&O9;SER169-74,199-200,265-66.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On the foregoing facts, the Board (Chairman Pearce and Members Becker and Hayes) found that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) in numerous respects. (D&O1-5.) First, in the absence of exceptions, the Board adopted the administrative law judge's findings that the Company violated Section 8(a)(1) of the Act by creating the impression that employee union activities were under surveillance, threatening employees with discharge or other unspecified reprisals for supporting the Union, threatening to close the Company if employees supported the Union, inviting union supporters to quit, telling employees that it is futile to support the Union, directing employees to call the police if union supporters attempted to apply for jobs with the Company, and interrogating employees about their union activities or the activities of fellow employees. (D&O1n.1.) The Board further adopted, in the absence of exceptions, the judge's findings that the Company violated Section 8(a)(3) and (1) of the Act by restricting employee break times and relocating break areas, and by discharging employee Jarrod Retzlaff for his union activities. (*Id.*)

Addressing the unfair labor practices that were raised on exceptions, the Board found that the Company violated Section 8(a)(1) of the Act by promulgating and maintaining a discriminatory rule prohibiting union solicitation during working time, and violated Section 8(a)(3) and (1) of the Act by disciplining employee Jones pursuant to that discriminatory rule. (*Id.*) The Board found that the Company also violated the same Section of the Act by: disciplining and discharging employee Weimann for his union activity; discharging employees Brimie, Chavez, Duffy, and Nielsen because of their union activities; and refusing to hire applicants Jameson, Latham, Rico, Osteros, and Lebron because of their union affiliation.<sup>6</sup> (D&O1-2,22-23.)

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 statutory rights.

(D&O3-4.) Affirmatively, the Board's Order requires the Company to: rescind its overly broad and discriminatory no-solicitation and no-discussion rules, and notify employees in writing that this has been done; offer employees Weimann, Retzlaff,

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<sup>6</sup> Given the finding that the discharges of Brimie, Chavez, Duffy, and Nielsen violated Section 8(a)(3) and (1) of the Act, the Board majority (Members Becker and Hayes, Chairman Pearce dissenting) found it unnecessary to pass on the judge's additional finding that those discharges violated Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)). (D&O2n.9.) The Board majority further found it unnecessary to pass on the judge's finding that the Company unlawfully outsourced some of the shop's fabrication work. (*Id.*)

Brimie, Chavez, Duffy, and Nielsen full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make the aforementioned employees whole for lost earnings and other benefits; remove from the Company's files any reference to the unlawful discharges of the aforementioned employees, and to the unlawful discipline of employee Jones, and notify all of the named employees that this has been done and that the unlawful actions will not be used against them in any way; offer applicants Jameson, Latham, Rico, Osteros, and Lebron instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions; make the aforementioned applicants whole for lost earnings and other benefits; remove from the Company's files any reference to the unlawful refusals to hire the aforementioned applicants, and notify them that this has been done and that the unlawful refusals to hire will not be used against them in any way; and post a remedial notice.<sup>7</sup> (D&O4-5.)

### **SUMMARY OF ARGUMENT**

In this case, the Company responded to its employees' union organizing campaign with an onslaught of unlawful statements and actions, most of which are

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<sup>7</sup> In addition to ordering the above relief, the Board directed a second election among the Company's sheet-metal workers. As this election-related directive was expressly severed and remanded to the Board's Regional Director for Region 28, and is not a judicially reviewable final order, it is not before the Court. *See* n.2 above.

uncontested. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), and settled law interpreting that provision, the Board is entitled to summary enforcement of the portions of its Order involving the numerous unfair-labor-practice findings that the Company did not contest before the Board. Those uncontested findings include determinations that the Company unlawfully: created the impression that employee union activity was under surveillance; threatened employees that union activity would result in discharge, company closure, or other adverse consequences, and that organizing efforts would be futile; interrogated employees about their union activities or affiliation; altered employee break locations to impede interactions between employees and union representatives; and discharged shop employee Retzlaff because of his union activity.

The Board is likewise entitled to summary enforcement of the portions of its Order that the Company has not challenged in its opening brief to this Court. Thus, the Court should summarily enforce the Board's findings that the Company: promulgated overly broad and discriminatory work rules against union activity; threatened employees who violated those rules with discipline and discharge; carried out that threat by disciplining employee Jones; and instructed employees to report if the union organizer appeared on a jobsite, or if anyone talked about the Union at work.

Against this backdrop of uncontested violations, the Board reasonably found that the Company further violated Section 8(a)(3) and (1) of the Act by disciplining and discharging shop employee Weimann, subsequently discharging four more shop employees (Brimie, Chavez, Duffy, and Nielsen) and refusing to hire union applicants Jameson, Latham, Lebron, Osteros, and Rico, because they supported or were members of the Union. Substantial evidence supports these findings.

To begin, ample evidence supports the Board's finding that the Company disciplined and discharged Weimann based on its transparent hostility towards his union-related discussions with other employees in the shop. Although the Company argues that it took action against Weimann for poor performance, and that he quit, the credited testimony and documentary evidence fails to support these claims. And the Board reasonably rejected the Company's alternative argument that it cannot be held responsible for the unlawful motives of Shop Leadman Carrillo, who spearheaded the actions against Weimann, as he purportedly did not have supervisory authority. Indeed, substantial evidence supports the Board's finding that Carrillo had authority to effectively recommend the hiring and discipline of shop employees, and such authority is sufficient to confer supervisory status under the Act.

Moreover, substantial evidence supports the Board's finding that the Company subsequently discharged four other union supporters in the shop, on the

pretext that it had insufficient work for them. Given the Company's clear knowledge of the shop employees' union activities, the numerous uncontested unfair labor practices—including the simultaneous discharge of a fifth shop employee, Retzlaff—and the timing of the discharges, just 4 days after the Company received notice of the Union's petition to represent the employees, the Board found ample circumstantial evidence that the Company's discharge of the four employees in question was unlawfully motivated. Faced with this powerful evidence, the Company asserted that it would have discharged the shop employees absent their union activity because it lacked appropriate work for them, either in the shop or in the field. The Board, however, reasonably found that the record did not support the Company's assertion, and that the purported "reduction in force" was a pretext to mask its unlawful desire to get rid of the union supporters.

Finally, substantial evidence supports the Board's finding that the Company unlawfully refused to hire the five union-affiliated job applicants. In so finding, the Board relied on the largely uncontested findings of the administrative law judge that these applicants were genuinely interested in working for the Company and qualified for the available jobs; that the Company was hiring at the time; and the Company's refusal to hire them was driven by anti-union animus. As the Company failed to file exceptions to most of these findings—preserving only its challenge to the genuineness of Rico's application—the Court lacks jurisdiction to

consider the Company's belated challenge to them. Moreover, as to the Company's lone viable challenge, the Board properly found that Rico's failure to truthfully complete his application did not negate his genuine interest in employment. The Board further properly rejected the Company's unsubstantiated claims that it would not have hired the applicants in question, even in the absence of any unlawful motive, because it had a sufficient list of qualified applicants, and because the union applicants required wages that exceeded the Company's budget.

### **STANDARD OF REVIEW**

This Court applies a deferential standard in reviewing the Board's decisions. Specifically, "[t]he Board's order will be upheld on appeal if it correctly applied the law and its factual findings are supported by substantial evidence." *NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898, 901 (9th Cir. 2008); *see also* 29 U.S.C. 160(e). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court accordingly may not "displace the Board's choice between two fairly conflicting views of the facts, even though the court would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488; *accord NLRB v. Nevis Indus., Inc.*, 647 F.2d 905, 908 (9th Cir. 1981). Moreover, the Court will accept an administrative law judge's credibility determinations that are adopted by the Board "unless they

are inherently incredible or patently unreasonable.” *Frankl v. HTH Corp.*, 693 F.3d 1051, 1063 (9th Cir. 2012).

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT

Section 10(e) of the Act (29 U.S.C. § 160(e)) provides that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” Accordingly, a party that fails to take specific exception to an administrative law judge’s findings is jurisdictionally barred from obtaining appellate review of those findings. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011). *See also* 29 C.F.R. § 102.46(b)(2) (“Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.”); 29 C.F.R. § 102.46(g) (“No matter not included in exceptions or cross-exceptions may thereafter be urged . . . in any further proceeding.”).<sup>8</sup>

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<sup>8</sup> *See U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (holding that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice).

Here, the Company failed to file exceptions to a number of the judge's unfair-labor-practice findings. Specifically, the Company did not except to the judge's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- creating the impression of surveillance – telling shop employees that it was aware a union agent had been to the shop, and asking shop employee Weimann whether he was having another union meeting;
- threatening discharge and other unspecified reprisals – telling employees that anyone caught signing a union authorization card would be gone;
- threatening facility closure – telling employees that the Company would close its doors before it went union or became a union shop;
- inviting union supporters to quit – indicating that those who supported the Union should “pack their shit and go down to the hall,” or should otherwise leave;
- threatening futility – stating that those who wanted a union should leave because it was never going to happen, or the Company would never go union;
- threatening union-affiliated applicants – stating, in the presence of union applicants, that Company Receptionist Patterson should seek

police assistance if a group from the Union attempted to apply for work, and suggesting that the police would put the group in jail; and

- interrogating employees about their union activities – asking employee Jones if he had seen or spoken to any union representatives, and asking union applicants Latham and Jameson if they were with the Union.

(See SER6-8.) The Company also did not except to the judge’s findings that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by:

- relocating employee break areas in order to impede employee interactions with union representatives; and
- discharging shop employee Retzlaff because of his union activity.

(See SER6-8.) In the absence of exceptions, the Board adopted the judge’s above Section 8(a)(1) and (3) findings against the Company. The Board is accordingly entitled to summary enforcement of the portions of its Order corresponding to the uncontested Section 8(a)(1) and (3) findings listed above. *See Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 295-96 (9th Cir. 2011) (employer failure to challenge unfair-labor-practice finding before the Board means that finding “must be taken as established” and the Board is entitled to summary enforcement).

Additionally, under Rule 28 of the Federal Rules of Appellate Procedure, issues that are not raised in a party’s opening brief are deemed waived. Fed. R.

App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief); *see also Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (passing reference to an issue, without discussion and supporting legal authority, constitutes a waiver). This Court has accordingly held that where a party fails to sufficiently challenge an unfair-labor-practice finding in its opening brief, any argument over that issue is abandoned, and the Board is entitled to summary enforcement of the corresponding aspects of its order. *NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000); *accord Legacy Health Sys.*, 662 F.3d at 1126.

Here, the Company's opening brief does not challenge the Board's findings that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by promulgating overly broad rules against union solicitation and union-related discussion on company time or "on the clock"; promulgating an overly broad rule limiting union-related discussion to lunch breaks; directing employees to report if Union Organizer Montroy appeared on a company jobsite, or if anyone spoke about the Union at work; threatening that those who spoke to union agents or discussed the Union on company time would probably be discharged, or would face other unspecified discipline; and promulgating a discriminatory rule against union solicitation at the BIMC jobsite, where other forms of solicitation were permitted. The Company also has not challenged, in its opening brief, the Board's finding that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by

disciplining employee Jones pursuant to the discriminatory rule against union solicitation at the BIMC jobsite. Accordingly, the Board is entitled to summary enforcement of the aspects of its Order corresponding to these Section 8(a)(3) and (1) findings, as to which the Company has waived any challenge. *See* cases cited above p. 33.

Moreover, the Company's numerous uncontested violations detailed above do not disappear simply because they are not preserved for appellate review; rather, they remain in the case, "lending their aroma to the context in which the remaining issues are considered." *See NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (quoting *NLRB v. Talsol Corp.*, 155 F.3d 785, 793 (6th Cir. 1998)); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc). Thus, the discharges and refusals-to-hire discussed below must be considered "against the backdrop of [numerous] acknowledged violations." *Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCIPLINING AND DISCHARGING EMPLOYEE WEIMANN, AND DISCHARGING EMPLOYEES BRIMIE, CHAVEZ, DUFFY, AND NIELSEN, BECAUSE OF THEIR UNION ACTIVITIES**

**A. Applicable Principles**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .” It is well settled that an employer violates this provision by taking adverse employment actions against employees for engaging in protected union activity.<sup>9</sup> *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *accord NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1290-91 (9th Cir. 1989); *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978).

To determine whether an adverse employment action violates Section 8(a)(3) of the Act (29 U.S.C. 158(a)(3)), the Board examines the employer’s motive, using the test articulated in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme

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<sup>9</sup> Section 7 of the Act (29 U.S.C. § 157) protects, among other things, employees’ right to “form, join, or assist labor organizations . . . .” A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1), 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 [S]ection 7” of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 397-98, 400-03. Under that test, if substantial evidence supports the Board's finding that the employee's protected union activity was a factor motivating the employer's decision, the Board's conclusion that the action was unlawful must be affirmed, unless the employer demonstrates, by a preponderance of the evidence, that it would have taken the same action even in the absence of its unlawful motive. *See Howard Elec.*, 873 F.2d at 1290; *Searle Auto Glass, Inc. v. NLRB*, 762 F.2d 769, 773 (9th Cir. 1985).

The Board may properly rely on circumstantial evidence to infer unlawful motivation. *See Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006); *NLRB v. Warren Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978). *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving."). Evidence that supports a finding of unlawful motivation includes the employer's hostility toward the employees' union activities, as reflected by other unfair labor practices;<sup>10</sup> the employer's knowledge that the employees against whom it acted were involved in

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<sup>10</sup> *MJ Metal Prods., Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001); *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000).

union activity;<sup>11</sup> the timing of the adverse action;<sup>12</sup> and the employer's departure from established policies and practices.<sup>13</sup>

Applying these principles, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by disciplining and discharging shop employee Weimann, and by subsequently discharging four more shop employees, because of their union activities. As shown below, substantial evidence supports those findings.

**B. The Board Reasonably Found that the Company Unlawfully Disciplined and Discharged Weimann in January 2009**

On January 12, 2009, amidst the spate of unlawful conduct described above pp. 30-34, the Company, acting through Shop Leadman Carrillo, disciplined and discharged employee Nathan Weimann—a former union member and known union supporter who worked in the Company's shop. At the time, the Company cited Weimann's unsatisfactory work performance as the basis for its actions against him. (SER81-82.) In addition, before the Board the Company asserted, as it does

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<sup>11</sup> *Healthcare Employees Union, Local 399*, 463 F.3d at 919; *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001).

<sup>12</sup> *NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915-16, 918 (9th Cir.1982); *Warren L. Rose Castings*, 587 F.2d at 1008.

<sup>13</sup> *Brooks Cameras*, 691 F.2d at 916.

before the Court (Br.23-24), that Weimann quit, and was not discharged.<sup>14</sup> As explained below, the Board reasonably rejected both proffered explanations and found (D&O21) that the Company unlawfully disciplined and discharged Weimann because it perceived him as a union agitator. The Board also reasonably found (D&O9,16-17) the Company liable for the adverse actions because they were instigated by Shop Leadman Carrillo, a supervisor under Section 2(11) of the Act (29 U.S.C. § 152(11)). As shown below, substantial evidence also supports that finding.

**1. The Company discharged Weimann because of his union activities**

Applying the *Wright Line* test for determining motivation, the Board found (D&O21) that Weimann engaged in union activities and that the Company knew about them. Indeed, Weimann openly discussed the Union with other employees in the work area of the shop, on occasion doing so in the presence of Leadman Kupiec and Shop Foreman Davies' son, Jeremy. *See Warren L. Rose Castings*, 587 F.2d at 1007-08 (inferring employer knowledge where pro-union employee talked about union in presence of another employee, and that employee was later seen speaking to a foreman and pointing to pro-union employee). Moreover,

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<sup>14</sup> On review, the Company does not separately defend its decision to discipline Weimann before discharging him. Accordingly, pp. 38-42 focus on his unlawful termination.

Leadman Carrillo, who executed Weimann's written discipline on behalf of the Company and signed Weimann's termination notice, repeatedly asked Weimann whether he was "having another union meeting" when Weimann spoke to fellow employees in the shop area. (SER358-59.) Carrillo's questions serve as an acknowledgment that he was well aware of Weimann's union activities.

As the Board further found (D&O21), Carrillo made his hostility toward Weimann's union activities plain, not only by the repeated coercive questioning described above, but also by his comments to Weimann on the day of the discipline and discharge at issue. On that day, Carrillo instructed Weimann to "pack [his] shit and get out," and further told him that he "didn't need people in here like you stirring up trouble." When Weimann inquired what Carrillo meant by "stirring up trouble," Carrillo told him, "You know exactly what I'm talking about. All the shit you been in here talking." Carrillo then reiterated that Weimann had to get out "right now," because Carrillo did not "need people like your kind in here stirring up trouble."

Consistent with its precedent, the Board reasonably viewed (D&O21) Carrillo's comments about "stirring up trouble" and "the shit [Weimann was] . . . talking" as thinly veiled references to Weimann's union-related discussions with co-workers in the shop. *See, e.g., Knoxville Distrib. Co.*, 298 NLRB 688, 688 (1990) (employer use of term "troublemakers" on pro-union employees referred to

their union activity and reflected animus), *enforced mem.*, 919 F.2d 141 (6th Cir. 1990). As Carrillo, thus, all but told Weimann that he was being terminated for his union activity, ample evidence supports the Board's finding (*id.*) that the Company was unlawfully motivated when it disciplined and discharged Weimann.

Turning to the Company's defenses, the administrative law judge reasonably found (D&O21) that the Company's disparately harsh treatment of Weimann undermined any assertion that it properly disciplined and discharged him for poor performance. After all, although employee Wilson committed the same error as Weimann, and Carrillo told both men to pack up and get out, the Company later permitted Wilson to keep his job, while standing behind Carrillo's decision to discipline and terminate Weimann. And as the judge further found (*id.*), the Company's disparate treatment of Weimann not only undercut a claim of poor performance, it also provided further evidence of unlawful motive. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995) (discriminatory motive may be inferred based on "disparate treatment of certain employees compared to others with similar work records or offenses"); *accord NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 968-70 (8th Cir. 2005) (finding employee suspension and discharge unlawfully motivated, based in part on evidence of disparate treatment). The Company failed to file an exception to these findings. (SER6-8.) Accordingly, the Board adopted the findings in the absence of any challenge, and the Court lacks

jurisdiction to consider the challenge that the Company (Br.23) belatedly attempts to raise here. *See* 29 U.S.C. § 160(e) and authorities cited above p. 30.

Moreover, the Board reasonably rejected (D&O21) the Company's argument, which it renews here (Br.23-24), that Weimann voluntarily quit. As the Board found (D&O21), Carrillo's above-quoted statements to Weimann "left no doubt that Weimann did not quit but was fired." Moreover, as the Board further found (*id.*), the termination notice issued to Weimann made no mention of his quitting. (SER82.) Rather, it explained his termination by reference to various performance failures, noting only in passing that Weimann had "walked out" of the shop after refusing to sign a written discipline detailing one of his performance failures. (*Id.*)

Notwithstanding this evidence, the Company insists in its opening brief (Br.23-24&n.6) that the Board should have relied on *other* evidence—specifically, the discredited testimony of employee Gregory Louis, and the self-serving testimony of Carrillo and Shop Foreman Davies—to reach a finding that Weimann voluntarily quit. This argument is baseless. With regard to Louis, the Company provides no explanation as to why his vague, discredited testimony should displace the detailed, credited testimony of Weimann as to the events in question. *See Frankl v. HTH Corp.*, 693 F.3d 1051, 1063 (9th Cir. 2012) (Board credibility determinations not overturned unless "inherently incredible or patently

unreasonable”). Similarly, the Company fails to explain why Carrillo and Davies—the shop managers who signed Weimann’s termination notice—should be considered more persuasive or credible than Weimann, particularly where, as here, their testimony is inconsistent with the termination rationale set forth in the written notice they prepared at the time of Weimann’s discharge. *See Searle Auto Glass, Inc. v. NLRB*, 762 F.2d 769, 774 (9th Cir. 1985) (holding that Board “need not treat self-serving declarations of an employer as conclusive,” even where unrebutted). The Company, thus, has not approached the showing necessary to overturn the Board’s credibility determinations, or to otherwise give credence to witness testimony that directly contradicts the credited evidence that Weimann was fired, and did not quit, on January 12, 2009.

**2. Substantial evidence supports the Board’s finding that Shop Leadman Carrillo is a supervisor under the Act**

Likewise meritless is the Company’s alternative argument (Br.20-23) that it cannot be held responsible for the unlawfully motivated actions against Weimann, because they were instigated by Shop Leadman Carrillo. Contrary to the Company, substantial evidence supports the Board’s finding that Carrillo is a statutory supervisor.<sup>15</sup> Under Section 2(11) of the Act (29 U.S.C. 152(11)), any

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<sup>15</sup> Although the Company further asserts (Br.20) that it cannot be held responsible for the litany of unlawful statements that Carrillo made over the course of the union organizing campaign, the Company failed to file specific exceptions to the

individual who has the authority to hire or discipline employees in the interest of the employer, or to effectively recommend such action, is a supervisor, so long as their exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment. *See NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001); *accord Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Here, as the Board found (D&O9,16-17), the record shows that Carrillo interviewed and hired several employees between August and December 2008, and also issued written disciplines to several employees between December 2008 and January 2009. (SER280-83,295-97,311-12,314-15,349-50.) Indeed, Carrillo's signature alone appears on Weimann's January 12, 2009 written warning. (SER81.)

The Company nevertheless maintains (Br.22) that Carrillo lacked the authority to make hiring or disciplinary decisions independent of Shop Foreman Davies. But, as a matter of law, the lack of such authority does not exclude Carrillo from supervisory status. *See NLRB v. Yeshiva University*, 444 U.S. 672,

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administrative law judge's findings that those statements were unlawful. (*See* SER6-8.) The Board accordingly adopted (D&O1n.1) those findings in the absence of exceptions, and the Company never moved for reconsideration of the Board's decision. As the Company, thus, failed to preserve any challenge to the specific Section 8(a)(1) violations in which Carrillo was involved, it cannot be heard to complain about those findings here. *See* authorities cited above p. 30 and *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (finding that a party's failure to present a question to the Board, including by motion for reconsideration, "prevents consideration of the question by the courts").

684 n.17 (1980) (fact that employer “holds a rarely exercised veto power” does not diminish “effective power” of others in the organization; recognizing this, Section 2(11) makes the relevant consideration “effective recommendation or control rather than final authority”); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983) (in light of statutory language, “effectively to recommend such action,” it is not important that putative supervisor lacks “formal or final authority to hire, fire, lay off . . . or discipline”); *accord Mountaineer Park, Inc.*, 343 NLRB 1473, 1476 (2004). Because Section 2(11) of the Act (29 U.S.C. § 152(11)) expressly includes in the definition of “supervisor” those who effectively recommend hiring or discipline, the operative question is whether the recommended action is effective—that is, “taken without independent investigation by superiors.” *Children’s Farm Home*, 324 NLRB 61, 61 (1997).

Here, the evidence shows and the Board found (D&O9,16-17) that Carrillo made independent disciplinary and hiring decisions when Davies was out of the office, and at all other times made hiring and disciplinary recommendations that Davies invariably followed. The Company does not dispute (Br.22) that Davies “did rely heavily on Carrillo’s input,” but suggests (Br.22) that Carrillo’s recommendations were still subject to independent “review” by Davies. The Company, however, provides no specifics with regard to the nature of this purported review. In particular, the Company points to no evidence that Davies

independently investigated Carrillo's specific hiring choices in 2008, either before or after Carrillo extended job offers to the applicants involved. Nor does the Company provide details as to how Davies may have independently investigated the written disciplines in evidence that were signed by Carrillo. And the Company cites no instance in which Davies departed from Carrillo's recommendation. Instead, the Company merely refers (*id.*) to the fact that Davies's signature or initials appear on some of the disciplines that Carrillo prepared. In these circumstances, the Company has failed to counter the substantial evidence supporting the Board's finding that Carrillo's recommendations were "effective" for purposes of Section 2(11) of the Act (29 U.S.C. §152(11))—that is, usually followed without independent investigation. *See Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 344-45 (5th Cir. 1980) (substantial evidence supported Board finding that foreman had supervisory authority to assign, even though higher-level official also participated in assignment process, and did not always follow foreman's recommendations). The Board's finding that Carrillo is a statutory supervisor accordingly stands.

In sum, the Board reasonably found that the Company's actions were unlawfully motivated, and reasonably rejected the defenses that the Company advanced to excuse its conduct. The Board also reasonably found that Shop Leadman Carrillo, who instigated the unlawful actions, was a supervisor under the

Act, and therefore his conduct is properly attributed to the Company. Substantial evidence accordingly supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining and discharging Weimann.

**C. The Board Reasonably Found that the Company Unlawfully Discharged Brimie, Chavez, Duffy, and Nielsen**

It is undisputed that, just four days after receiving notice of the Union's petition to represent the sheet-metal workers, the Company announced a purported reduction in its shop workforce. This action, taken at a crucial time in the organizing campaign, conveniently rid the Company of five union supporters: Retzlaff, Brimie, Chavez, Duffy, and Nielsen.

Nevertheless, before the Board, the Company maintained that these terminations were lawfully motivated, with one notable exception. The Company did not except to the judge's finding that it discharged Retzlaff—a member of the union organizing committee and the most prominent union supporter among the five terminated employees—in retaliation for his union activity. (SER6-8.) The Board accordingly adopted the administrative law judge's finding that the Company discharged Retzlaff because he was a union activist, and appropriately took that unlawful discharge into account in assessing the Company's motivation for simultaneously discharging Brimie, Chavez, Duffy, and Nielsen. For the reasons explained below, the Board reasonably found (D&O2,23-24), pursuant to

*Wright Line*, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging these four employees, just as it violated the Act as to Retzlaff.<sup>16</sup>

**1. The Company’s ample knowledge of its employees’ union activities, the timing of the discharges, and its many uncontested unfair labor practices, establish its unlawful motive**

By March 16, 2009, when the Company discharged Retzlaff, Brimie, Chavez, Duffy, and Nielsen, it was well aware that its shop was a site of intense union activity. Indeed, this awareness—coupled with transparent hostility to the Union and its supporters—prompted Shop Leadman Carrillo to give a series of unlawful speeches to shop employees, threatening them against engaging in union activity. It also prompted the Company to unlawfully restrict employee break areas, in a blatant effort to impede employee interactions with union representatives outside the shop during their breaks.

As the Board found (D&O23), the Company’s unlawful conduct within the shop particularly included Carrillo’s statement to employees “that . . . he knew there were cards that had been floating around, and that anybody caught signing the card would be gone . . . .” Given this professed knowledge, and the associated

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<sup>16</sup> Although the Company attempts (Br.18-19) to argue the lawfulness of Retzlaff’s termination before this Court, that attempt fails. As discussed above p. 30, the Court is jurisdictionally barred from considering challenges to the Board’s findings that were not presented to the Board.

threat, it was hardly coincidental that the Company focused its purported reduction in force on Retzlaff, Brimie, Chavez, Duffy, and Nielsen, all of whom had signed union authorization cards. *See L'EGGS Prods., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980) (instruction to find out who was discussing union, and to get rid of them, was “an outright confession of unlawful discrimination” that “eliminated any question concerning . . . other causes suggested as the basis for the discharge”).

The Company, moreover, had ample basis to suspect that at least three of the employees targeted by the reduction in force were involved in union activity beyond signing an authorization card. *See Martech MDI*, 331 NLRB 487, 488 (2000) (noting that precedent applying *Wright Line* does not require a showing “that the employer had specific knowledge of an employee’s union interest and activities, where other circumstances support an inference that the employer had suspicions or probable information on the identity of union supporters”), *enforced*, F. App’x 14 (D.C. Cir. 2001). In addition to Retzlaff, whose union activity is described above, the evidence shows that Brimie conspicuously displayed union insignia on his toolbox in the shop, and on his truck that was often parked just outside the shop. And on at least one occasion, Company President DeWitt was present as Brimie and Duffy took a break in Brimie’s truck, with Union Organizer Montroy seated nearby.

Given all these circumstances, the Board found (D&O2) the evidence “more than sufficient to demonstrate that the [Company] knew or at least suspected that each of the discharged employees was involved with the Union, and that this involvement was a motivating factor in the [Company’s] decision to discharge them.” See *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 419 (2004) (finding that General Counsel’s initial burden under *Wright Line* “may be satisfied by evidence of surrounding circumstances, including contemporaneous 8(a)(1) violations, the timing of the alleged discriminatory action, and the pretextual nature of the reasons advanced by the [employer] for the action taken”), *enforced mem.*, 156 Fed. App’x 330 (D.C. Cir. 2005).

The Company challenges (Br.18-19) this finding of unlawful motivation, maintaining that the Board improperly proceeded based on inferences, “without a single piece of evidence that W.D. Manor was actually motivated by anti-Union animus.” In so arguing, the Company misunderstands the law that applies to Board assessments of motivation.

As this Court has long recognized, “where, as here, motive is the central issue, the fact finder must often rely heavily on circumstantial evidence and inferences.” *NLRB v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1008 (9th Cir. 1978). Indeed, “[o]nly rarely will there be probative direct evidence of the employer’s motivation.” *Id*; accord *Shattuck-Denn Mining Corp. v. NLRB*, 362

F.2d 466 (9th Cir. 1966). It is accordingly “a well-established rule” in cases turning on motivation that “the Board is free to draw inferences from all the circumstances.” *Warren L. Rose Castings*, 587 F.2d at 1008. Indeed, this Court has specifically held that “circumstantial evidence is sufficient to establish anti-union motive.” *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 919 (9th Cir. 2006).

In light of these well-settled principles, it was entirely proper for the Board to rely on circumstantial evidence that included the suspect timing of the discharges and the Company’s extensive unfair labor practices. *See Lippincott Indus., Inc. v. NLRB*, 661 F.2d 112, 116 (9th Cir. 1981) (holding that “the determination of motive is particularly within the purview of the NLRB”).

**2. The Company failed to meet its burden of demonstrating that it would have discharged Brimie, Chavez, Duffy, and Nielsen in the absence of their union activity**

Given the Company’s ample knowledge of its employees’ union activities, its animus, as demonstrated by its many uncontested violations, and the timing of the discharges—only 4 days after receiving notice of the Union’s representation petition—it was incumbent upon the Company to show that it would have discharged the four employees at issue, even in the absence of their union activity. As the Board found (D&O2), however, far from carrying this burden, the Company’s patently pretextual reasons for the purported reduction in force only

underscore the Board's finding that the Company discharged the shop employees in order to rid itself of union supporters.

Specifically, the record does not support the Company's suggestion (Br.18-19) that it implemented a reduction in force in the shop because it lacked sufficient orders for fabrication work to occupy the discharged shop employees. On the contrary, the record shows that the Company had ongoing fabrication demands for two large projects—at Mayo Hospital and General Dynamics Corporation—in March 2009, and for the MIM and BIMC jobs through at least April 2009. (SER450,460,464-65,473-77.) The amount of work to be done for those projects, in fact, so exceeded the capacity of the shop that the Company outsourced some of that work to Omni Duct Systems ("Omni"), both before and after the March 16 discharges. (SER466-67,482-84.)

Although the Company claimed that the outsourced fabrication work could not have been performed by the shop employees, because of scheduling constraints, the Company failed to provide any coherent explanation to support that claim. (SER289,492.) Company Vice President Petty, thus, asserted that the Company engaged Omni because of its short turnaround time for producing sheet-metal products, but he also admitted that Omni required the same 2-week period as the shop to complete fabrication work. (D&O13;SER484-92.) Petty further

admitted that Omni required additional lead time—which the shop did not require—to prepare a price quote for the work. (D&O13; SER484-92,503-04.)

Contrary to the Company (Br.16-18), the Board’s finding that it failed to prove its lack-of-work defense did not impugn its “business judgment” to subcontract some of the shop’s fabrication work to Omni. The Company seems to forget that the Board expressly declined (D&O2n.9) to pass on the administrative law judge’s finding that the Company’s subcontracting arrangement with Omni was unlawfully motivated. The Board, therefore, did not “misinterpret[ the subcontracting arrangement] as being fueled by anti-Union animus,” as the Company claims (Br.16,18), nor did it “infer [that the Company’s] decision to use Omni was nefarious and improperly motivated.” At most, the subcontracting arrangement bears on the Company’s assertion that it would have discharged the shop employees even absent its unlawful motive, because they could not perform any of the fabrication work subcontracted to Omni. As explained above, however, the Company failed to show that scheduling constraints or project timetables precluded use of the shop for at least some of that fabrication work.

The Company similarly failed to provide any coherent explanation as to why Brimie, Chavez, Duffy, and Nielsen were terminated rather than simply transferred to the field, where the Company had an abundance of installation work. The Company asserted that it did not take this approach because it had no practice of

transferring shop employees to the field, but as the Board noted (D&O24), this assertion “is contrary to the evidence that in February 2009 Carrillo sent Brimie to work in the field as a sheet metal worker.” (SER334-35.) Likewise, the Company’s suggestion that the shop employees were unqualified to perform field installation work is unsupported, and the Board so found (D&O13,24), given the evidence that “Brimie, Chavez, and Duffy all had field experience installing sheet metal,” and given that the Company employs both experienced and inexperienced sheet-metal workers in the field. (SER161,182-83,296,301,334-35.)

Although the Company additionally claimed that it could not accommodate the terminated shop employees in the field, because it had subcontracted for temporary workers to fulfill its field staffing needs, the Board reasonably found (D&O24) that claim, too, at odds with the record. The evidence establishes that the Company entered into one subcontracting arrangement just three days before it terminated the shop employees, and entered into another nearly a week *after* the terminations. (SER41-44.) As the Board found (D&O24), these facts “render[] suspect” the Company’s contentions that its hands were tied by its contracts for temporary labor in the field, and that it did not know its shop employees would be available for field work at the time of those arrangements.

Given the Company’s failure to sustain its burden of demonstrating it would have discharged the shop employees absent their union activity, the Board

reasonably found (D&O2) that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. 158(a)(3) and (1)) by discharging Brimie, Chavez, Duffy, and Nielsen. *See NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915-18 (9th Cir. 1982) (finding that discharges of 7 warehouse employees violated Section 8(a)(3) and (1), where company failed to make out defense that it reduced staff for economic reasons).

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE UNION-AFFILIATED APPLICANTS JAMESON, LATHAM, LEBRON, OSTEROS, AND RICO**

**A. The Act Prohibits an Employer from Failing or Refusing To Hire Applicants Because of their Union Affiliation or Activity**

It is well established that Section 8(a)(3)’s protection of employees against “discrimination in regard to hire” encompasses applicants for employment. *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87-88 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941). Indeed, the protection extends even to “salts,”—that is, paid or unpaid union organizers who apply for work with a nonunion employer in furtherance of a campaign to organize the employees. *See Town & Country*, 516 U.S. at 96-97. The Act is interpreted to protect union-affiliated applicants, because “[d]iscrimination against union labor in the hiring of [employees] is a dam to self-organization at the source of supply,” which

“inevitably operates against the whole idea of the legitimacy of organization.”

*Phelps Dodge*, 313 U.S. at 185. Accordingly, “[r]efusing to hire new employees because of their prior union involvement is as much an unfair labor practice as is firing current employees for that reason.” *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2012).

To establish an unlawfully motivated refusal to hire, the General Counsel must show, as a preliminary matter, that the applicant was “entitled to protection as a [statutory] employee, i.e., an applicant genuinely interested in seeking to establish an employment relationship with the employer.” *Toering Elec. Co.*, 351 NLRB 225, 233 (2007). The necessary showing of genuine interest, moreover, “embraces two components: (1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer.” *Id.*

Nevertheless, in the absence of contrary evidence, the Board will not presume that an application for employment is anything other than what it purports to be. *Id.* Thus, once the General Counsel shows that there was an application, that showing will suffice to establish genuine interest, unless the employer contests the genuineness of the application. *Id.* Where the employer makes such a challenge, the General Counsel must rebut that challenge and establish the applicant’s genuine interest in gaining employment with the employer. *Id.* An

employer may put the genuineness of an application in issue by, for example, producing evidence that the applicant engaged in disruptive, insulting, or antagonistic behavior during the application process. *Id.* In addition, the Board has held that an incomplete application “may, depending on the circumstances, indicate that the applicant does not genuinely seek to establish an employment relationship with the employer.” *Id.*

Once the General Counsel has made the requisite showing that the applicant was genuinely interested in the job, and thus entitled to statutory protection, the General Counsel must further show that (1) the employer was hiring, or had concrete plans to hire, when it refused to hire the applicant at issue; (2) the applicant had experience or training relevant to the employer’s announced or generally known requirements of the positions for which he applied, or that the employer had not uniformly adhered to such criteria, or that the criteria were pretextual or had been been pretextually applied; and (3) union animus contributed to the decision not to hire the applicants. *FES, a Division of Thermo Power*, 331 NLRB 9, 12, 15 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002); *see also Toering Elec.*, 351 NLRB at 234 (holding that proof of applicant’s genuine job interest is part of General Counsel’s initial case under *FES*).

As under *Wright Line*, an inference of unlawful motivation may be based on the employer’s expressions of hostility to employee rights, disparate treatment of

discriminatees compared to others, the presence of other unfair labor practices, the timing of the adverse action, and the fallacious nature of the employer's explanation. *See Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 550 (D.C. Cir. 2006); *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988).

Once the General Counsel has met his initial burden of proving an unlawfully motivated refusal to hire pursuant to the above standards, the burden shifts to the employer to show that it would not have hired the applicants, even in the absence of their union affiliation. *FES*, 331 NLRB at 12, 15. Because the question to be resolved under this burden-shifting analysis is ultimately one of motivation, the Court's review of the Board's findings is especially deferential. *See Lippincott Indus.*, 661 F.2d at 116.

**B. The Board Reasonably Found that the Company Unlawfully Refused To Hire Jameson, Latham, Lebron, Osteros, and Rico**

Substantial evidence supports the Board's finding (D&O23) that the Company unlawfully refused to hire union applicants Jameson, Latham, Lebron, Osteros, and Rico, who applied for work with the Company in January 2009. As shown below, the Board's finding rests, in large part, on findings of the administrative law judge to which the Company did not except. Indeed, the Company only filed an exception to the judge's finding that Rico was genuinely interested in employment with the Company. (SER6-8.) However, as further

shown below, this lone challenge to the General Counsel's initial case under *Toering* and *FES* is meritless. And because the Company's defenses to the General Counsel's initial case also fail, the Board reasonably found that the refusals to hire violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

In January 2009, as the Company was involved in various unlawful attempts to stymie union activity among its sheet-metal employees, union members Jameson, Latham, Lebron, Osteros, and Rico traveled to the Company's facility and filed applications for sheet-metal work. Lebron, Osteros, and Rico arrived in the company of Union Organizer Montroy—whose visits to the shop and the field had already prompted the Company to issue coercive prohibitions on employee union activity at work. Jameson and Latham arrived separately, but revealed their union affiliation upon coercive questioning from a company official. At the time of these events, the Company was advertising for sheet-metal workers and was unquestionably hiring. Nevertheless, it did not contact or hire any of the named union applicants after their applications were filed. On this evidence, the Board reasonably found (D&O22-23) that the Company unlawfully refused to hire the applicants because of their union affiliation.

In so finding, the Board adopted (D&O22-23) the unchallenged determinations of the administrative law judge that: Jameson, Latham, Lebron,

and Osteros were genuinely interested in working for the Company; the Company was hiring at the time of the applications; and all of the union applicants were qualified for the sheet-metal positions for which the Company was hiring. (SER6-8.) The Board further adopted (D&O23) the judge's finding, to which there were no specific exceptions, that "the record is replete with [the Company's] antiunion animus both before and after" the application effort here. (SER6-8.)

As the Company failed to file specific exceptions to these findings of the administrative law judge—which collectively establish that the Acting General Counsel satisfied his initial burden of proving unlawful motivation, at least as to the refusals to hire Jameson, Latham, Lebron, and Osteros—the Court lacks jurisdiction to consider any challenge to those findings here. *See* authorities cited above p. 30. Accordingly, to the extent that the Company is now arguing (Br.24-25) that Jameson, Latham, Lebron, and Osteros were not genuinely interested in employment with the Company, the Court lacks jurisdiction to consider the argument. Similarly, the Company's argument (Br.24-25) that none of the union applicants were qualified for its sheet-metal positions is also not before the Court.

Instead, the only finding that the Company preserved for review by this Court is the Board's conclusion that Rico was entitled to statutory protection as an applicant genuinely interested in employment with the Company. As the Board found (D&O23), however, the evidence is more than sufficient to establish Rico's

genuine interest. Rico filed an application, he did not engage in any behavior inconsistent with an honest desire to work for the Company, and he testified that if hired, he would actually work for the Company. (D&O23-24;SER407-08.)

Although the Company suggests (Br.25) that Rico, nevertheless, betrayed a lack of genuine interest in working for the Company by making up some of the information on his application, the Board properly rejected this argument as pretextual. As the Board found (D&O23), the Company “accepted applications from and hired sheet metal employees after January 20, 2009, who failed to complete their applications” at all, much less complete them truthfully. (SER116-19.) In these circumstances, Rico’s failure to truthfully complete all aspects of his application did not reflect a lack of interest in working for the Company, any more than the similar failures of other applicants, whom the Company considered and hired. *See Toering Elec.*, 351 NLRB at 233 (whether failure to complete application reflects lack of genuine interest depends on circumstances). Nor did Rico’s conduct disqualify him from employment with the Company.

In any event, the administrative law judge’s broader findings with regard to the initial showing of unlawful motivation are based on record evidence that the Company has not countered, either before the Board or in its brief to this Court. Specifically, the record includes testimony from all of the applicants that they genuinely wanted to work for the Company and would do so if hired. Moreover,

the record includes documentary and testimonial evidence establishing that the Company was hiring and that the applicants were experienced sheet-metal workers who could perform the tasks required in the positions for which the Company was hiring. Finally, the Company's numerous unfair labor practices, on and around the date of the applications, amply establish its hostility toward the Union and support the inference that the Company refused to hire the applicants at issue because of their union affiliation.

Turning to the Company's affirmative defenses, the Board reasonably rejected (D&O23) the Company's argument that it did not contact, or extend job offers to, the union applicants because it already had a sufficient list of qualified applicants on file. The Company continued to accept applications after January 20, 2009, and it hired based on those later applications, undercutting its claim that it only hired from a list that was already set as of January 20. (SER105-131,190-98.) Moreover, as the Board noted (D&O23), the Company failed to show that the applicants on its purported list were more qualified than the union applicants and entitled to preference on that basis.

Likewise, the Company failed to provide evidence to support its alternative claim (D&O23) that the union applicants at issue were over-qualified and therefore would have caused a labor-cost overrun. As the Board noted (D&O23), the Company failed "to offer any evidence as to how its labor costs were allocated nor

did it explain why none of the five [union applicants] was offered a wage within the [Company's] budget.” Thus, the Company failed to establish that it would have refused to hire the union applicants, notwithstanding any anti-union animus, because of legitimate labor-cost concerns.

In sum, the Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire union applicants Jameson, Latham, Lebron, Osteros, and Rico. Although the Company challenges this finding—which is, in turn, based on the mostly uncontested findings of the administrative law judge—its cursory presentation (Br.24-26) does not undermine the substantial evidence supporting the Board's finding that the Company unlawfully refused to hire the applicants at issue.

**CONCLUSION**

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

/s/ Julie B. Broido  
JULIE B. BROIDO  
*Supervisory Attorney*

/s/ Milakshmi V. Rajapakse  
MILAKSHMI V. RAJAPAKSE  
*Attorney*

National Labor Relations Board  
1099 14th Street N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1778

LAFE E. SOLOMON  
*Acting General Counsel*

CELESTE J. MATTINA  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
*Deputy Associate General Counsel*

National Labor Relations Board

December 2012

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**STATEMENT OF RELATED CASES**

Board counsel is unaware of any case that may be deemed related to this one pursuant to Circuit Rule 28-2.6.

## **ADDENDUM**

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

**Section 1.[§151.]** The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce.

The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

## **DEFINITIONS**

### **Sec. 2. [§152.] When used in this Act [subchapter]--**

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(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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**Sec. 7. [§ 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) [section 158(a)(3) of this title].

**Sec. 8. [§ 158.]** (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

\*\*\*

(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: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

**Sec. 10. [§ 160.]** (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

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

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

## **Relevant Rules and Regulations:**

### **Federal Rule of Appellate Procedure 28(a)(9)(A)**

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

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(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.

### **The Board's Rules and Regulations**

**Section 102.46 [29 C.F.R. § 102.46]** *Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments*

\*\*\*

(b)(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

\*\*\*

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

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

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W.D. MANOR MECHANICAL )  
CONTRACTORS, INC. )

Petitioner/Cross-Respondent )

Nos. 12-70111  
12-70517

v. )

NATIONAL LABOR RELATIONS BOARD )

Respondent/Cross-Petitioner )

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32, the Board certifies that its brief contains 13,512 words of proportionally-spaced, 14-point type in Times New Roman font, and the word processing system used was Microsoft Word 2007.

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, D.C.  
this 11th day of December 2012

**UNITED STATES COURT OF APPEALS  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further 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 address of counsel listed below:

John J. Egbert  
Keith Overholt  
Kami M. Hoskins  
JENNINGS, STROUSS & SALMON, P.L.C.  
One East Washington Street, Suite 1900  
Phoenix, AZ 85004

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1099 14th Street, NW

Washington, DC 20570

(202) 273-2960

Dated at Washington, D.C.  
this 11th day of December 2012