

No. 12-15124

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

AMBASSADOR SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

STUART F. DELERY
Principal Deputy Assistant Attorney General

LAFE E. SOLOMON
Acting General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

CELESTE J. MATTINA
Deputy General Counsel

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

ROBERT J. ENGLEHART
Supervisory Attorney

GREGOIRE SAUTER
Attorney

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4052

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-1714

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMBASSADOR SERVICES, INC.,)	
)	
Petitioner/Cross-Respondent	)	No. 12-15124
)	
v.	)	Board Case Nos.
	)	12-CA-026758
NATIONAL LABOR RELATIONS BOARD,	)	12-CA-026759
	)	12-CA-026832
Respondent/Cross-Petitioner)	
)	

**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case and were omitted by Ambassador Services, Inc., in its brief:

1. Brinkman, Beth S., Deputy Assistant U.S. Attorney General
2. Cohen, David, Regional Attorney for Region 12 of the Board
3. Damle, Sarang V., Attorney, U.S. Department of Justice
4. Delery, Stuart F., Principal Deputy Assistant U.S. Attorney General
5. Ferguson, John H., Associate General Counsel for the Board
6. Freeman, Mark R., Attorney, U.S. Department of Justice
7. Garver, Donald, Co-Owner of Ambassador Services, Inc.

Case No. 12-15124
Ambassador Services, Inc. v. NLRB
C-2 of 2

8. Hubert, Brian, Co-Owner of Ambassador Services, Inc.
9. International Longshoremen's Association, Locals 1922 and 1359, AFL-CIO, Charging Party
10. Letter, Douglas N, Attorney, U.S. Department of Justice
11. Mattina, Celeste J., Deputy General Counsel for the Board
12. May, Randall, Co-Owner of Ambassador Services, Inc.
13. McIntosh, Scott R., Attorney, U.S. Department of Justice
14. Patterson, Melissa N., Attorney, U.S. Department of Justice
15. Schultz, Benjamin M., Attorney, U.S. Department of Justice
16. Solomon, Lafe E., Acting General Counsel for the Board
17. Waldman, Joshua P., Attorney, U.S. Department of Justice

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001
(202) 273-1714

Dated at Washington, D.C.
this 21st day of February 2012

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to established facts and, therefore, that argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	2
Statement of the case.....	3
I. Board proceedings and disposition.....	3
II. Statement of the facts	4
A. The Company and its operations.....	4
B. The Company’s unfair labor practices and unlawful withdrawal of recognition from the Union.....	6
III. The Board’s conclusions and order	9
IV. Standard of review	11
Summary of argument.....	13
Argument.....	15
I. The Board is entitled to summary enforcement of the uncontested portions its order	15
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act	16
A. Supervisor May acted unlawfully when he interrogated Martin about his union sympathies.....	17
1. May’s interrogation of Martin was unlawfully coercive	17

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
2. May's interrogation of Martin was unlawful because the Company has not carried its burden of showing Martin was a supervisor	19
a. Martin does not possess or exercise the authority to assign employees	21
b. Martin does not responsibly direct other employees	23
c. Martin does not possess or exercise the authority to discipline other employees.....	26
d. Martin does not effectively recommend supervisory actions....	29
B. Supervisor May unlawfully solicited Martin to sign the decertification petition	30
C. Supervisor May acted unlawfully in telling Brian Postmus that May assisted in preparing the decertification petition.....	31
D. The Company violated the Act by maintaining a rule against walking off the job	34
III. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.....	37
A. The Company failed to prove the Union's actual loss of majority support.....	39
B. In any event, the Company's unfair labor practices tainted the decertification petition	42
IV. The Board possessed a quorum at the time it acted.....	45
Conclusion	47

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allentown Mack Sales & Serv., Inc. v. NLRB</i> , 522 U.S. 359, 118 S. Ct. 818 (1998)	12
<i>Amason, Inc.</i> , 269 NLRB 750 (1984), <i>enforced mem.</i> , 758 F.2d 648 (4th Cir. 1985)	43
<i>Assoc. Rubber Co. v. NLRB</i> , 296 F.3d 1055 (11th Cir. 2002)	13
<i>Bayside Enters., Inc. v. NLRB</i> , 429 U.S. 298, 97 S. Ct. 576 (1977)	11
<i>Beverly Health & Rehab. Servs., Inc. v. NLRB</i> , 297 F.3d 468 (6th Cir. 2002)	36
<i>Bickerstaff Clay Prods. Co. v. NLRB</i> , 871 F.2d 980 (11th Cir. 1989)	38
<i>Bonner v. City of Prichard</i> , 661 F.2d 1206 (11th Cir. 1981)	12
<i>Brockton Hosp.</i> , 333 NLRB 1367 (2001), <i>enforced in relevant part</i> , 294 F.3d 100 (D.C. Cir. 2002)	36
<i>Capri Sun, Inc.</i> , 330 NLRB 1124 (2000)	27
<i>Children’s Farm Home</i> , 324 NLRB 61 (1997)	29
<i>Cintas Corp. v. NLRB</i> , 482 F.3d 463 (D.C. Cir. 2007)	36
<i>Croft Metals, Inc.</i> , 348 NLRB 717 (2006)	22, 25

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Colgate-Palmolive Co.</i> , 323 NLRB 515 n.1 (1997).....	36
<i>Computer Sci. Corp. v. NLRB</i> , 677 F.2d 804 (11th Cir. 1982).....	38
<i>E. States Optical Co.</i> , 275 NLRB 371 (1985).....	43
<i>Eastman Broad. Co.</i> , 188 NLRB 80 (1971).....	42
<i>Elec. Mach. Co. v. NLRB</i> , 653 F.2d 958 (5th Cir. Aug. 1981).....	38
<i>Evans v. Stephens</i> , 387 F.3d 1220 (11th Cir. 2004), <i>cert. denied</i> , 544 U.S. 942, 125 S. Ct. 1640 (2005)	14, 45, 46, 47
<i>Exxel/Atmos, Inc. v. NLRB</i> , 147 F.3d 972 (D.C. Cir. 1998).....	31
<i>Facchina Constr. Co.</i> , 343 NLRB 886 (2004), <i>enforced per curiam</i> , 180 F. App'x 178 (D.C. Cir. 2006)	17
<i>First Healthcare Corp.</i> , 323 NLRB 1171 (1997).....	29
<i>Fla. Steel Corp. v. NLRB</i> , 529 F.2d 1225 (5th Cir. 1976).....	34
<i>Flying Food Grp. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006).....	39, 42
<i>Flying Foods Grp. Inc.</i> , 345 NLRB 101 (2005).....	39, 40, 41, 42

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Franklin Home Health Agency</i> , 337 NLRB 826 (2002).....	28
<i>Frenchtown Acquisition Co. v. NLRB</i> , 683 F.3d 298 (6th Cir. 2012).....	28
<i>Grandview Health Care Ctr.</i> , 332 NLRB 347 (2000).....	36
<i>Hearst Corp.</i> , 281 NLRB 764 (1986).....	43
<i>Holly Farms Corp. v. NLRB</i> , 517 U.S. 392, 116 S. Ct. 1396 (1996)	11
<i>Hotel & Rest. Emps. Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985).....	17
<i>Int’l Bhd. of Boilermakers v. NLRB</i> , 127 F.3d 1300 (11th Cir. 1997).....	32
<i>IRIS U.S.A., Inc.</i> , 336 NLRB 1013 (2001).....	36
<i>JHP & Assocs., LLC</i> , 338 NLRB 1059 (2003).....	19
<i>Jurys Boston Hotel</i> , 356 NLRB No. 114, 2011 WL 1127474 (Mar. 28, 2011).....	35, 36
<i>Labor Ready, Inc.</i> , 331 NLRB 1656 (2000).....	35
<i>Lakeland Health Care Assocs., LLC v. NLRB</i> , 696 F.3d 1332 (11th Cir. 2012), <i>pet. for reh’g en banc filed</i> , Nos. 11-12000 & 11-12638 (Dec. 6, 2012).....	20, 24, 25

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Laredo Coca Cola Bottling Co.</i> , 241 NLRB 167 (1979).....	19
<i>Levitz Furniture Co.</i> , 333 NLRB 717 (2001).....	38, 39
<i>Little v. T-Mobile USA, Inc.</i> , 691 F.3d 1302 (11th Cir. 2012).....	45
<i>Lutheran Heritage Vill.-Livonia</i> , 343 NLRB 646 (2004)	34
<i>Mead Corp. v. NLRB</i> , 697 F.2d 1013 (11th Cir. 1983).....	12
<i>Merchants Truck Line v. NLRB</i> , 577 F.2d 1011 (5th Cir. 1978).....	12
<i>Mickey's Linen & Towel Supply, Inc.</i> , 349 NLRB 790 (2007).....	31
<i>Monotech of Miss. v. NLRB</i> , 876 F.2d 514 (5th Cir. 1989).....	30
<i>N.Y. Univ. Med. Ctr.</i> , 324 NLRB 887 (1997), <i>enforced in relevant part</i> , 156 F.3d 405 (2d Cir. 1998).....	20
<i>NLRB v. Bell Aerospace Co.</i> , 416 U.S. 267, 94 S. Ct. 1757 (1974)	24
<i>NLRB v. Birmingham Publ'g Co.</i> , 262 F.2d 2 (5th Cir. 1958).....	30
<i>NLRB v. Burns International Security Services, Inc.</i> , 406 U.S. 272, 92 S. Ct. 1571 (1972)	38

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775, 110 S. Ct. 1542 (1990)	11
<i>NLRB v. Dole Fresh Vegetables, Inc.</i> , 334 F.3d 478 (6th Cir. 2003)	20, 30, 33
<i>NLRB v. Escambia River Elec. Co-op., Inc.</i> , 733 F.2d 830 (11th Cir. 1984)	16
<i>NLRB v. Goya Foods of Fla.</i> , 525 F.3d 1117 (11th Cir. 2008)	15, 16, 41
<i>NLRB v. Hilliard Dev. Corp.</i> , 187 F.3d 133 (1st Cir. 1999)	29
<i>NLRB v. IDAB, Inc.</i> , 770 F.2d 991 (11th Cir. 1985)	13
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251, 95 S. Ct. 959 (1975)	11
<i>NLRB v. Ky. River Cmty. Care, Inc.</i> , 532 U.S. 706, 121 S. Ct. 1861 (2001)	20
<i>NLRB v. Laredo Coca Cola Bottling Co.</i> , 613 F.2d 1338 (5th Cir. 1980)	19
<i>NLRB v. Pope Maint. Corp.</i> , 573 F.2d 898 (5th Cir. 1978)	30
<i>NLRB v. R.T. Blankenship & Assocs., Inc.</i> , 210 F.3d 375 (7th Cir. 2000)	31
<i>NLRB v. Saint Vincent's Hosp.</i> , 729 F.2d 730 (11th Cir. 1984)	15

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. St. Clair Die Casting, L.L.C.</i> , 423 F.3d 843 (8th Cir. 2005).....	28
<i>NLRB v. United Union of Roofers Local No. 81</i> , 915 F.2d 508 (9th Cir. 1990).....	43
<i>Noel Canning v. NLRB</i> , 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).....	14, 45, 46
<i>Oakwood Healthcare</i> , 348 NLRB 686 (2006).....	21, 22, 23, 24, 25
<i>Pacific Grove Convalescent Hosp.</i> , 350 NLRB 518 (2007).....	44
<i>Phelps Cmty. Med. Ctr.</i> , 295 NLRB 486 (1989).....	27
<i>Poly-Am., Inc. v. NLRB</i> , 260 F.3d 465 (5th Cir. 2001).....	15
<i>Quantum Electric</i> , 341 NLRB 1270 (2004).....	36
<i>Republic Aviation Corp. v. NLRB</i> , 324 U.S. 793, 65 S. Ct. 982 (1945).....	15
<i>Rossmore House</i> , 269 NLRB 1176 (1984).....	17, 18
<i>Ryder Truck Rental, Inc.</i> , 326 NLRB 1386 (1998).....	27
<i>2 Sisters Food Grp.</i> , 357 NLRB No. 168, 2011 WL 7052272 (Dec. 29, 2011).....	35

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>SFO Good-Nite Inn, LLC</i> , 357 NLRB No. 16, 2011 WL 2883217 (July 19, 2011), <i>enforced</i> 700 F.3d 1 (D.C. Cir. 2012)	43, 44
<i>Stanford Hosp. & Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003).....	35, 36
<i>TCB Sys., Inc. v. NLRB</i> , 448 F. App'x 993 (11th Cir. 2011).....	12
<i>TRW, Inc. v. NLRB</i> , 654 F.2d 307 (5th Cir. Unit A Aug. 1981)	18
<i>TT&W Farm Prods., Inc.</i> , 358 NLRB No. 125, 2012 WL 3993537 (Sept. 1, 2012)	35
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474, 71 S. Ct. 456 (1951)	12
<i>Utils. Serv. Corp. v. NLRB</i> , 35 F.3d 621 (1st Cir. 1994)	26
<i>V&S ProGalv, Inc. v. NLRB</i> , 168 F.3d 270 (6th Cir. 1999).....	43
<i>W&M Props. of Conn., Inc. v. NLRB</i> , 514 F.3d 1341 (D.C. Cir. 2008).....	17
<i>Wayneview Care Ctr. v. NLRB</i> , 664 F.3d 341 (D.C. Cir. 2011).....	31
<i>Webco Indus.</i> , 334 NLRB 608 (2001).....	29
<i>Williamette Indus., Inc.</i> , 336 NLRB 743 (2001).....	30

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Wire Prods. Mfg., Co.</i> , 326 NLRB 625 (1998).....	31
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645, 102 S. Ct. 2071 (1982)	15, 41
Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 3 (29 U.S.C. § 152(3))	19
Section 2(11) (29 U.S.C. § 152(11)).....	20, 23, 29, 30
Section 7 (29 U.S.C. § 157)	16, 34, 35, 36, 37, 38
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	2, 3, 4, 10, 15, 16, 17, 30, 31, 32, 35, 37, 38
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 10, 37, 38
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 151 160(e))	2, 12, 15, 41, 45
Section 10(f) (29 U.S.C. § 151 160(f)).....	2
United States Constitution	Page(s)
U.S. Const. Art. I, § 2, cl. 3.....	47
Legislative Materials	Page(s)
S. Rep. No. 80-105 at 4 (1947)).....	24
Executive Materials	Page(s)
Presidential Statement, 2004 WL 319038 (Feb. 20, 2004).....	46

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

No. 12-15124

AMBASSADOR SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition for review of Ambassador Services, Inc. (“the Company”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Decision and Order issued by the Board on September 14, 2012, and reported at 358 NLRB No. 130. (R-III-12,

Board Decision and Order [hereinafter D&O].)¹ The Board's Decision and Order is final with respect to all parties under Section 10(e) and (f) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. §§ 151 et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the Act, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). The Company's petition for review and the Board's application for enforcement are timely, as the Act places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the Act, as the unfair labor practices occurred in Florida. *Id.* § 160(e), (f).

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order.
2. Whether substantial evidence in the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by: telling an employee that supervisor Donald May helped prepare an antiunion petition; interrogating an employee about his union sympathies; soliciting an

¹ In this brief, D&O references are to the Board's findings. "R" references are to the certified agency record, which is divided into Volumes I (Transcript), II (Exhibits) and III (Pleadings). "Tr." references are to the hearing transcript (Volume I). "GC Ex." and "R. Ex." references are to the exhibits of the General Counsel and Respondent, respectively (Volume II). "Br." refers to the Company's opening brief.

employee to sign the petition; and maintaining a work rule prohibiting “walking off the job” without permission.

3. Whether substantial evidence in the record as a whole supports the Board findings that the Company failed to recognize and bargain with, and unlawfully withdrew recognition from, the Union representing the Company’s employees, in violation of Section 8(a)(5) and (1) of the Act, because the Company was unable to authenticate that the decertification petition was signed by a majority of the bargaining unit’s employees and, in any event, because the petition was tainted by two of the Company’s unfair labor practices.

STATEMENT OF THE CASE

I. BOARD PROCEEDINGS AND DISPOSITION

This case originated when the International Longshoremen’s Association, Locals 1922 and 1359, AFL-CIO (“the Union”), filed unfair labor practice charges against the Company. (D&O 4 & n.1.) The Board’s Acting General Counsel investigated these charges and issued a consolidated complaint alleging that the Company violated Section 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. § 158(a)(1) and 158(a)(5). (D&O 4.) An administrative law judge held a hearing on the matter and found that the Company committed four separate violations of Section 8(a)(1) of the Act by engaging in coercive conduct and violated Section 8(a)(1) and (a)(5)

by refusing to recognize and bargain with the Union by relying on an invalid decertification petition. (D&O 4-11.) The Company filed exceptions to some of the judge's findings and the Acting General Counsel filed cross-exceptions to others. On review, the Board affirmed the violations found by the judge and found that the Company committed two additional violations of Section 8(a)(1) of the Act. (D&O 1-3.) The Company petitioned this Court to review the Board's Order, and the Board cross-applied for enforcement.

II. STATEMENT OF THE FACTS

A. The Company and its Operations

The Company provides stevedoring services to cargo and cruise ship operators in Port Canaveral, Florida. (D&O 4; Tr. 335-36.) In March 2010, the Company entered into a contract to service passenger liners run by Disney Cruise Lines ("Disney") at Port Canaveral. (D&O 4; R. Ex. 14; Tr. 27-28, 340-41.) The Company's contract had them replace Disney's prior stevedoring contractor, Florida Transportation Services, Inc. ("FTS"). (D&O 4; Tr. 29.) The Company hired a majority of FTS's former employees, unaware that they were represented by the Union. (D&O 4, 5; R. Ex. 13; Tr. 29-30, 342.) The Union had been certified as the collective-bargaining representative of FTS's employees in 2002, and survived three decertification attempts in the ensuing years. (D&O 4; GC Exs.

2-5.) Despite this, FTS and the Union had never signed a collective-bargaining agreement. (D&O 4; Tr. 125.)

Stevedoring consists mainly of loading and unloading various cargo and commodities onto and off of ships docked in port. (D&O 4-5; Tr. 28, 344.) The work is performed by longshoremen or porters, as they are more commonly known. (*Id.*) The Company's porters only work on "ship days," *i.e.*, days when a cruise ship is in port. (D&O 4-5; Tr. 31-33.) The work starts at 6 a.m., when the ship arrives, and continues until the vessel sails at 5 p.m. (D&O 4-5; Tr. 355, 362.) During this 11-hour window, the porters must unload tons of garbage left by 2750 passengers and 1300 crew members, remove the suitcases of departing guests and return them to their rightful owners, greet new arrivals, screen their luggage by x-ray, deliver it to the appropriate cabins, and load provisions for the next voyage. (D&O 5; Tr. 28-29, 48, 71-72, 83-84, 344, 346-48, 350, 355-65.)

In May 2010, when the events of this case unfolded, the Company employed 37 porters to service Disney's ships, including porter supervisor J. D. Martin and dock supervisor Christopher Justice.² (D&O 5, 11; R. Ex. 13; Tr. 342.) The porters are divided into teams of about eight employees, each of which has a team leader or "header." (D&O 5; Tr. 81.) Each team is responsible for completing a

² The Board found that Martin and Justice are employees of the Company, not supervisors as defined by the Act. The Company disputes this ruling, but only as to Martin. The facts relevant to the determination of Martin's status are summarized in pages 19-30, *infra*.

specific task to prepare the ship for departure. (D&O 5; Tr. 83-84, 135-36.)

Assignments rotate between teams from one ship day to the next. (*Id.*) The entire operation is overseen by vessel supervisor Donald May.³ (D&O 4; Tr. 27.) May's responsibilities include scheduling assignment rotations between teams and assigning new hires to a particular team. (D&O 5; Tr. 135-36.)

The Company maintains an Employee Safety & Environmental Handbook that applies to all employees. (D&O 7; GC Ex. 9.) During the relevant period, the handbook prohibited the “[u]nauthorized solicitation and/or distribution of literature, services or products” and provided that violations of this no-solicitation rule would result in issuance of a final disciplinary warning. (D&O 7; GC Ex. 9 at 13.) The handbook also prohibited “[w]alking off the job and/or leaving the premises during working hours without permission” and specified that violations of this rule were punishable by issuance of a final disciplinary warning or, in certain circumstances, by discharge. (D&O 1, 7; GC Ex. 9 at 14.)

B. The Company's Unfair Labor Practices and Unlawful Withdrawal of Recognition from the Union

The events relevant to this case occurred in May 2010. On May 19, the Union requested by letter that the Company recognize and bargain with it as the exclusive bargaining representative of the Company's longshoremen. (D&O 5;

³ Donald May is the son of Randall May, who owns the Company together with two other individuals. (D&O 4; Tr. 27-28.)

GC Ex. 6; Tr. 34-35.) Later that day, Supervisor May mentioned this letter during a conversation with J. D. Martin, a former FTS employee now working for the Company, and asked him “where [he] stood.” (D&O 1, 7; Tr. 52, 54-55.) Martin replied that he attended all the union meetings and wished to remain informed in the event that there was a vote, and that his vote would not be influenced by a spokesperson for the Company or the Union. (D&O 1, 7; Tr. 55.)

At various times during the week after the Company received the recognition letter, Donald Bartlett, a union sympathizer and one of the few FTS employees whom the Company had not rehired (R. Ex. 13; Tr. 291-92), distributed copies of the letter to employees arriving for work in the early mornings (D&O 5). Martin noticed Bartlett on the morning of May 20, distributing leaflets in a parking lot some distance from the terminal. (D&O 5; Tr. 35-36.) Others observed Bartlett similarly leafleting on May 22 or 23 (Tr. 199), and on May 27 (Tr. 164-67, 174, 185).

Following receipt of the Union’s letter, porter Eric Swanson informed Supervisor May that he intended to circulate a petition to decertify the Union. (D&O 9; Tr. 39, 200.) May told Swanson that this was “a great idea” and to “go for it.” (D&O 10; Tr. 39-40.) Swanson began to circulate his petition on May 27. (D&O 9; GC Ex. 7; Tr. 195.) When other employees asked if Supervisor May

knew what he was doing, Swanson replied that May was aware of his activities. (D&O 9; Tr. 210.)

On the morning of May 27, porter Brian Postmus saw Bartlett distributing copies of the Union's recognition letter in the parking lot. (D&O 7; Tr. 164-65.) Shortly after lunch, Postmus was approached by Swanson, who requested that he sign the decertification petition; Postmus declined. (D&O 7; Tr. 165-66, 196.) That afternoon, Postmus rhetorically asked Supervisor May if "it was a coincidence" that the petition had appeared on the same day Bartlett was distributing copies of the Union's letter. (D&O 7; Tr. 166-67.) May replied that there was "no coincidence" and that he and Swanson "had been working on [the petition] for a couple of weeks." (D&O 7; Tr. 167.) At the end of the work day, during an informal meeting with employees, May told them that a petition to decertify the Union was being circulated, which they were free to sign. (D&O 9, 10; Tr. 307-08, 396-97.) Also on the same day, May approached Martin and asked if he wished to sign the petition; Martin declined. (D&O 8; Tr. 58-59.)

On May 30, Swanson gave the petition to Supervisor May with 23 signatures on it. (D&O 10; Tr. 40-42, 207-08.) May took the petition and signed it. (D&O 10; GC Ex. 7 at 3; Tr. 40-41.) The same day, May approached Martin again and, pulling the petition out from his backpack, presented it to Martin and asked again if he wished to sign it. (D&O 8; Tr. 60-61.) This time, feeling "a little

pressured,” Martin relented and signed the document. (D&O 8; GC Ex. 7 at 3; Tr. 61, 86-87.) Another employee, Chester Dampier, also signed the petition after May. (D&O 10, 11; GC Ex. 7 at 3; Tr. 332.) A few days later, May returned the petition to Swanson, who mailed it to the Board. (Tr. 41-42; 208.)

The petition garnered a total of 26 signatures, including May’s and Martin’s, out of 37 bargaining-unit employees. (D&O 11; GC Ex. 7.) On June 2, 2010, the Company declined to recognize the Union, citing the petition as the basis for its refusal. (D&O 5; GC Ex. 8.)

On July 30, after the Union filed its charges in this case, Supervisor May held a group meeting in which he informed employees that the Company had rescinded its no-solicitation rule. (D&O 8; Tr. 46-48.) Later, May approached porter Dan Schmidt, who had missed the meeting, and told him there would not be “any more soliciting” or leafleting on company property, even of union-related materials. (D&O 8-9; Tr. 157-58.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On September 13, 2011, Administrative Law Judge George Carson II issued a recommended order finding that the Company violated the Act in several respects. (D&O 4-13.) Specifically, the judge found that the Company’s rule prohibiting all solicitation without prior authorization, as well as the Company’s informing employees that they could not solicit or distribute literature on the

property at which they were working, violated Section 8(a)(1) of the Act. (*Id.* at 7, 8-9, 11-12.) The judge determined further that Supervisor May violated Section 8(a)(1) by telling employees that he assisted in the circulation of a decertification petition and by soliciting employees to sign the decertification petition. (*Id.* at 7-8, 11-12.) The judge also found that the Company violated Section 8(a)(5) of the Act by refusing to recognize and bargain with, and withdrawing recognition from, the Union by relying on a decertification petition that did not contain the verified signatures of a majority of the bargaining-unit employees and, in any event, was tainted by the Company's misconduct. (*Id.* at 10-11.)

After carefully reviewing the record and considering the parties' exceptions to the recommended order, the Board (Members Hayes, Griffin and Block) affirmed the violations found by the judge and found that the Company had committed two additional violations of Section 8(a)(1) of the Act. (D&O 1-2.) First, the Board held (Member Hayes, dissenting (*id.* at 1 n.3)) that supervisor May violated Section 8(a)(1) of the Act by unlawfully interrogating Martin about his union sympathies. (*Id.* at 1.) Second, the Board found that the work rule prohibiting walking off the job without permission violated Section 8(a)(1) of the Act because it could be reasonably construed to prohibit such protected concerted activity as a strike, given the common use of the term "walkout" as a synonym for a strike. (*Id.* at 1-2.)

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 their exercise of their statutory rights. (D&O 2.) The Order affirmatively requires the Company to rescind its rule prohibiting unauthorized walk-offs during work hours, to recognize and bargain with the Union on request and to post a remedial notice. (*Id.* at 2-3.)

IV. STANDARD OF REVIEW

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 S. Ct. 1542, 1549 (1990). Thus, when the Board engages in the “difficult and delicate responsibility of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267, 95 S. Ct. 959, 969 (1975) (internal quotation marks omitted). Courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ . . . even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399, 116 S. Ct. 1396, 1401 (1996) (internal citation omitted) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304, 97 S. Ct. 576, 580-81 (1977)).

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 464-65 (1951). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377, 118 S. Ct. 818, 828 (1998). Under this test, a reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo.” *Universal Camera*, 340 U.S. at 488, 71 S. Ct. at 465. As this Court has observed, “[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence.” *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1014 n.3 (5th Cir. 1978).⁴

The fact that the Board’s final determinations may differ from those of the administrative judge “in no way changes” this Court’s deferential review of the Board’s conclusions. *Merchants Truck Line, Inc.*, 577 F.2d at 1014. Furthermore, it is not this Court’s role “to re-weigh the evidence or make credibility choices.” *Mead Corp. v. NLRB*, 697 F.2d 1013, 1022 (11th Cir. 1983); *TCB Sys., Inc. v. NLRB*, 448 F. App’x 993, 997 (11th Cir. 2011). Rather, if the evidence is

⁴ Decisions of the former Fifth Circuit issued prior to October 1, 1981, are binding precedent for this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

conflicting, this Court is “bound by [the Board’s credibility] determinations unless they are ‘inherently unreasonable or self-contradictory.’” *Assoc. Rubber Co. v. NLRB*, 296 F.3d 1055, 1060 (11th Cir. 2002) (quoting *NLRB v. IDAB, Inc.*, 770 F.2d 991, 996 (11th Cir. 1985)).

SUMMARY OF THE ARGUMENT

This is a straightforward case. As a successor employer, the Company was legally obligated to bargain with the incumbent Union. Instead, the Company withdrew recognition and refused to bargain, based on a decertification petition allegedly signed by a majority of employees. When the Union challenged the withdrawal of recognition, the Company was required to show, by authenticating their signatures, that a majority of bargaining-unit employees had signed the petition. However, the Company failed to do so. There is no legal support for the Company’s claim that it was not required to authenticate the signatures. The petition was also tainted by two unfair labor practices committed by Supervisor May. This is a separate and independent basis for the Board’s finding that the Company withdrawal of recognition was unlawful.

The Board found a total of six unfair labor practices, four of which are contested by the Company. Substantial evidence supports the finding that Supervisor May violated the Act by soliciting Martin to sign the decertification petition, and by telling Postmus that he assisted in preparing the petition for two

weeks before it began to circulate. These unfair labor practices fatally tainted the petition. In addition, substantial evidence supports the finding that the Company violated the Act by maintaining an overbroad rule against walking off the job, and when Supervisor May interrogated Martin about his stance on union-related matters. The Company does not contest the Board's remaining findings, i.e., that the Company maintained an overly broad no-solicitation rule and that May unlawfully told an employee that solicitation and distribution were prohibited on company property. The Board is entitled to summary enforcement of these uncontested portions of its Order.

Finally, Ambassador invokes the D.C. Circuit's recent decision in *Noel Canning v. NLRB*, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), to argue that two Board members had been invalidly appointed under the Constitution's Recess Appointments Clause, depriving the Board of a quorum. That argument is squarely foreclosed by this Court's *en banc* decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), which conclusively held that Presidents may make recess appointments during intrasession recesses, and may fill vacancies that first arose before the recess in which the President acts.

ARGUMENT

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

Before the Board, the Company did not contest the administrative law judge's findings that it violated Section 8(a)(1) by maintaining an unlawfully broad no-solicitation rule⁵ and by informing an employee that solicitation and distribution were prohibited on company property.⁶ (D&O 1 n.1.) Section 10(e) of the Act states 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.” 29 U.S.C. § 160(e). Courts have consistently read the statutory language to mean that a litigant's failure to raise an objection to the Board precludes appellate courts from subsequently asserting jurisdiction over that issue. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665, 102 S. Ct. 2071, 2083 (1982); *NLRB v. Goya Foods of Fla.*, 525 F.3d 1117, 1122 n.2 (11th Cir. 2008). Accordingly, the Board

⁵ Under section 8(a)(1) of the Act, it is “not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8, 65 S. Ct. 982, 987 n.8 (1945) (quotation marks and citation omitted); *see also NLRB v. Saint Vincent's Hosp.*, 729 F.2d 730, 732 (11th Cir. 1984) (holding that a no-solicitation rule violates the Act even if it is never enforced, due to its “potential inhibitory effect”).

⁶ *See Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 480 (5th Cir. 2001) (“Absent special circumstances, time outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint, even though the employee is on company property.” (citation omitted)).

is entitled to summary enforcement of these uncontested portions of its Order.

NLRB v. Escambia River Elec. Co-op., Inc., 733 F.2d 830, 831 (11th Cir. 1984).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for employers to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7.” *Id.* § 158(a)(1).

The Board found that the Company violated Section 8(a)(1) of the Act when Supervisor May interrogated Martin about his union sympathies, solicited Martin’s support to decertify the Union, and told Brian Postmus that he helped Eric Swanson prepare the decertification petition. (D&O 1 & n.1, 7-8.) The Board also determined that the Company’s rule against walking off the work site without permission violated Section 8(a)(1) of the Act. (*Id.* at 1-2.) Each finding is supported by substantial evidence in the record viewed as a whole.

A. Supervisor May Acted Unlawfully When He Interrogated Martin About His Union Sympathies

1. May's Interrogation of Martin Was Unlawfully Coercive

On the day the Company received the Union's recognition letter, Supervisor May approached Martin and, referring to the letter, asked Martin "where [he] stood" on union-related matters. Martin replied that he attended union meetings and wished to remain informed in case of a vote, and added that his vote would not be influenced by representatives of the Company or the Union. The Board found that May's interrogation of Martin violated Section 8(a)(1) of the Act. (D&O 1).

"[T]he basic test for evaluating whether interrogations violate the Act [is] whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enforced sub nom. Hotel & Rest. Emps. Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *see also W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2008). The coercive tendency of an interrogation is measured objectively, by assessing "all the surrounding circumstances in which the statement is made as the conduct occurs." *Facchina Constr. Co.*, 343 NLRB 886, 894 (2004) (citations omitted), *enforced per curiam*, 180 F. App'x 178 (D.C. Cir. 2006). Factors to consider include: "(1) the background; (2) the nature of the information sought; (3) the identity of the

questioner; and (4) the place and method of interrogation.” *Rossmore House*, 269 NLRB at 1178 n.20.⁷

A review of the circumstances surrounding the exchange between May and Martin supports the Board’s determination that May’s interrogation was coercive. As the Company’s vessel supervisor for Disney cruise ships, May was the highest management official present at the terminal on each working day, and his father is a part-owner of the Company. May was not shy about sharing the Company’s disdain for unions and told employees that the Company “didn’t like the idea of being unionized.” (Tr. 399.) May approached Martin at the start of the work day when no one else was around and, after mentioning that he had received a letter from the Union, asked Martin point-blank “where [he] stood.” (*Id.* at 54-55.) There is no evidence that May knew Martin’s position regarding the Union before the interrogation: Martin was not an active union supporter and did not publicize his opinions on this subject. *Cf. Rossmore House*, 269 NLRB at 1178 (finding no

⁷ The Eleventh Circuit’s law for reviewing the coercive nature of an interrogation predates *Rossmore House*. See *TRW, Inc. v. NLRB*, 654 F.2d 307, 314 n.7 (5th Cir. Unit A Aug. 1981) (explaining the history of this Court’s coercive-interrogation analysis). This test considers the following, non-exhaustive list of factors: (1) the history of the employer’s attitude toward its employees; (2) the type of information sought; (3) the questioner’s rank or position in the company; (4) the place and manner of the conversation; (5) the employee’s truthfulness; (6) the employer’s purpose in seeking the information; (7) whether this purpose was communicated to the employee; and (8) whether employees were assured that supporting the union would not generate reprisals. *Id.* at 314. The Board’s analytical framework is consistent with this test.

violation where interrogated employee was an active union supporter with openly declared union ties). Thus, May's question effectively amounted to asking Martin if he supported the Union. *See JHP & Assocs., LLC*, 338 NLRB 1059, 1062 (2003).

This Court has long recognized that employees are entitled to keep private their views concerning unions, so they may freely engage in concerted protected activity without concern for their employer's opinion or reaction. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 n.7 (5th Cir. 1980). "That the interrogation might be courteous and low keyed instead of boisterous, rude and profane does not alter the case." *Id.* (quoting *Laredo Coca Cola Bottling Co.*, 241 NLRB 167, 172 (1979)). The Board's finding that Martin's interrogation was coercive is consistent with applicable law and supported by substantial evidence on the record viewed as a whole.

2. May's Interrogation of Martin Was Unlawful Because the Company Has Not Carried its Burden of Showing Martin Was a Supervisor

The Act protects the organizing rights of employees, as opposed to supervisors. 29 U.S.C. §§ 152(3), 157. The Company argues that Supervisor May's interrogation of Martin was lawful because Martin was a supervisor under the Act.

Section 2(11) of the Act defines the term “supervisor” as:

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.

Id. § 152(11). These powers are listed in the disjunctive, so possession of any one is enough to make an individual a supervisor, as long as its exercise involves independent judgment. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713, 121 S. Ct. 1861, 1867 (2001).

The party asserting supervisory status bears the burden of demonstrating it by a preponderance of the evidence. *Id.* at 711-12, 121 S. Ct. at 1866. Conflicting or inconclusive evidence is insufficient to support a finding of supervisory status. *N.Y. Univ. Med. Ctr.*, 324 NLRB 887, 908 (1997), *enforced in relevant part*, 156 F.3d 405 (2d Cir. 1998). Rather, a party must support its claim with specific evidence of an employee’s actual responsibilities and not just conclusory or generalized testimony. *See, e.g., NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 489 (6th Cir. 2003) (employer failed to present specific evidence supporting manager’s general statements about employees’ duties). Finally, it is settled law that “paper evidence” such as job descriptions is insufficient to prove supervisory status. *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1345 (11th Cir. 2012), *pet. for reh’g en banc filed*, Nos. 11-12000 & 11-12638 (Dec. 6, 2012).

Martin worked as a leadman for Ambassador's predecessor, FTS. (D&O 5; Tr. 51-52.) As a unit employee, he voted in three decertification elections between 2003 and 2008. (D&O 5; Tr. 53.) When Ambassador took over the Disney contract, Martin received the title of porter supervisor (D&O 5; Tr. 100), but his job duties remained exactly the same (D&O 5; Tr. 52-53, 239, 267). Martin spends 80% of his work day driving a forklift, moving luggage and other items. (D&O 5; Tr. 52-53.) On ship days, Martin is in constant radio and cell-phone contact with Supervisor May, who is also present at the terminal. (Tr. 72-73, 140, 411.) The Company makes no claim that Martin has authority to hire, discharge, transfer, suspend, promote, reward, lay off or recall other employees. (D&O 5; Tr. 126-28.) Martin does not evaluate employees or recommend wage increases or bonuses. (Tr. 128.)

a. Martin Does Not Possess or Exercise the Authority to Assign Employees

As construed by the Board, the term "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Oakwood Healthcare*, 348 NLRB 686, 689 (2006); *accord Lakeland*, 696 F.3d at 1347. In this context, the terms "place," "time," and "work" are construed broadly, as part of the employee's "terms and conditions of employment." *Oakwood Healthcare*, 348 NLRB at 689.

For example, attributing a significant overall task to an employee, *e.g.*, restocking shelves on a regular basis, is an “assignment” within the meaning of the Act, but giving ad hoc instructions to restock shelves is not. *See id.*

The record establishes that Martin does not assign porters to a particular location, shift, or job, such as affects the terms and conditions of their employment. Supervisor May divides porters into teams and assigns each team to a specific task like unloading garbage or scanning luggage by x-ray. (D&O 5; Tr. 135-36.) May then rotates team assignments with each ship day. (*Id.*) May also assigns new hires to their teams. (D&O 5; Tr. 136.)

The Company argues that Martin’s authority to instruct porters to perform tasks or provide extra help where needed makes him a statutory supervisor. (Br. 14-15.) However, these are types of “ad hoc instructions” that are not assignments under the Act. *Oakwood Healthcare*, 348 NLRB at 689. In *Oakwood Healthcare*’s companion case, *Croft Metals, Inc.*, the Board found that factory leadmen who moved workers to different positions as needed to complete orders did not exercise assigning authority. 348 NLRB 717, 718, 721-22 (2006). Like the leadmen in *Croft Metals*, Martin can shift porters based on timing contingencies to areas or tasks where they are most needed. This is not sufficient to confer supervisory status. *Id.* at 722.

The Company also claims that Martin exercises supervisory authority in assigning employees to operate forklifts. However, Martin does not decide which employees can drive forklifts. In fact, forklift operators must be certified by the Occupational Safety and Health Administration (“OSHA”) to perform their job. (Tr. 143, 274-75, 297.) Every OSHA-certified forklift operator who appeared at the hearing testified that that he (or she) drives a forklift for the Company (Tr. 272, 297, 323), and there was no evidence presented that Martin assigns some certified forklift operators to drive forklifts and not others. Martin can tell forklift drivers to perform specific tasks, as he does with other porters, but these are no more than ad hoc instructions, which do not establish supervisory authority.

b. Martin Does Not Responsibly Direct Other Employees

Responsible direction exists when a person has “men under him” and decides “what job shall be undertaken next or who shall do it,” but only “provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Oakwood Healthcare*, 348 NLRB at 691 (other quotation marks and citation omitted).⁸ Independent judgment requires that an individual “act, or

⁸ The Board’s interpretation is consistent with congressional intent. Congress added the term “responsibly to direct” in Section 2(11) to ensure that individuals who exercise “basic supervision but lack the authority or opportunity to carry out any of the other statutory functions” would be counted as supervisors. *Oakwood Healthcare*, 348 NLRB at 690. However, the term was not meant to include “minor supervisory functions performed by lead employees, straw bosses, and set-

effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* at 693; *see also Lakeland*, 696 F.3d at 1339. Additionally, the act in question must involve “a degree of discretion that rises above the routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 693 (quotation marks and citations omitted). For example, a decision that is “obvious and self-evident” or “made solely on the basis of equalizing workloads” is routine and clerical in nature, even if it involves independent judgment. *Id.*

Martin’s directions to other employees do not involve “significant discretion and judgment” such as to make him a supervisor under the Act. (D&O 6 (quoting *Oakwood Healthcare*, 348 NLRB at 692 n.38).) Martin testified that, when he needs someone to perform a specific task, he decides based on availability and proximity (Tr. 137)—the kind of “obvious and self-evident” decision described in *Oakwood Healthcare*. Martin does not consider the individual qualifications of those around him because, as several porters (and Supervisor May) recognized, they are all equally capable of doing the work. (D&O 6; Tr. 186, 259, 283, 291, 411-12.) In any case, Martin typically confers with Supervisor May before moving porters to different tasks. (Tr. 84, 112).

The Company claims that Martin is accountable for his instructions to others and therefore has supervisory authority under the Act (Br. 19), but offers no

up men.” *Id.* *See generally id.* at 688 (quoting S. Rep. No. 80-105, at 4 (1947)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81, 94 S. Ct. 1757, 1765 (1974).

evidence to support it. Direction is “responsible” if “the person directing and performing the oversight . . . [is held] accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Oakwood Healthcare*, 348 NLRB at 691-92; *accord Lakeland*, 696 F.3d at 1344. The Company cites Martin’s job description, which is not probative on its own,⁹ *Lakeland*, 696 F.3d at 1345, and misrepresents testimony that Supervisor May “held Martin responsible for his actions . . . where he did something wrong.” (Br. 19.) In fact, May did not cite a single instance where “adverse consequences” befall Martin due to another employee’s failure to perform. May never even suggested that Martin *could* suffer adverse consequences in this situation, or what those consequences might be.

The Company also argues that Martin’s decisions are neither obvious nor self-evident because they are based on his observations and experience acquired in working as a stevedore. (Br. 21-23.) However, Martin is no different from the leadmen in *Croft Metals*, 348 NLRB at 718, who, based on their knowledge and years of experience, decided whether to switch workers to different positions in order to meet production deadlines. In any case, the complexity of a job does not

⁹ If paper evidence was dispositive, this issue might arguably be resolved by the Terms of Employment form that Martin signed when he joined the Company, as it lists his job position as “Stevedore/Porter.” (GC Ex. 11; Tr. 391-93.)

determine the supervisory status of the person who performs it. *See Ne. Utils. Serv. Corp. v. NLRB*, 35 F.3d 621, 625 (1st Cir. 1994) (holding that employees in control center overseeing regional power distribution were not supervisors, despite being “highly trained employees who use independent judgment to make and implement complex technical decisions that affect the entire region’s power supply.”). The Company offers no evidence that the decisions Martin makes to resolve backlogs and ensure that a ship is ready in time for its scheduled departure are neither obvious nor self-evident to a person of similar experience and background.

c. Martin Does Not Possess or Exercise the Authority To Discipline Other Employees

Despite the Company’s claims to the contrary (Br. 24-26), substantial evidence supports the Board’s determination that “[d]iscipline [is] administered by Donald May.” (D&O 5.) The record is uncontradicted that Martin does not have the authority to issue written discipline or recommend that an employee receive a warning, written or otherwise. (Tr. 115-16, 128-34, 143, 183, 306, 326, 429.)

Martin occasionally reprimands employees verbally for minor infractions such as appearance or idleness. (D&O 5-6, Tr. 116, 129, 306.) The Board has consistently held that, absent some showing of impact on the employees’ job status, verbal admonishments do not constitute “discipline” within the meaning of

the Act. *See, e.g., Capri Sun, Inc.*, 330 NLRB 1124, 1132 (2000); *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1386 & n.3 (1998).

Aside from occasional verbal reprimands, the bulk of the testimony establishes that Martin's standard operating procedure in the face of employee misconduct or insubordination is to "take it up with Donnie May." (D&O 5; Tr. 128 (problem between employee and customer or Disney), 128 (complaint or grievance), 129 (refusing to adjust uniform), 129-30 (intoxication), 131 (tardiness), 136 (refusing to be more careful on the job), 143 (refusing to get back to work)). A purported supervisor does not exercise independent judgment in disciplinary matters if he consistently refers to his manager beforehand. *See Phelps Cmty. Med. Ctr.*, 295 NLRB 486, 492 (1989) (talking to supervisor before imposing discipline, even for information purposes, affords supervisor a chance to review proposed action and approve or countermand it, thus negating independent judgment).

The Company cites Supervisor May's testimony that he and his father told Martin he had the authority to reprimand and fire porters whose work was not up to standard (Br. 24-25), but May's statements were not corroborated by his father, who did not testify, or by Martin. Significantly, despite the Company's assertion

to the contrary,¹⁰ none of the witnesses testified that Martin had the authority to discipline them. To the contrary, several porters said the most Martin could do was report an incident to May, who would decide how to proceed. (Tr. 183, 273-74, 283, 298, 306, 326.) Simply reporting factual information to management does not establish supervisory status under the Act. *See, e.g., Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 308 (6th Cir. 2012); *NLRB v. St. Clair Die Casting, L.L.C.*, 423 F.3d 843, 850 (8th Cir. 2005); *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

The Company also argues that Martin “sent employees home” at least twice (Br. 24), but fails to mention that the individuals in question were sick (D&O 5-6; Tr. 410). The decision to send home an employee who is unable to perform his job

¹⁰ The Company’s descriptions of the record (Br. 25-26) are misleading. Cody Scholer said that Martin could tell him to “go home” when asked to give examples of how Martin might direct his work. (Tr. 274.) This comment had no relation to discipline whatsoever. In fact, Scholer testified that, in case of insubordination, he would “answer to Donnie May.” (*Id.* at 273.) Jason Roschen “assume[d]” Martin could discipline him, but added that “[n]othing” would happen if he refused Martin’s instructions. (*Id.* at 290.) Joseph Hunt and Laure Priest similarly “assumed” Martin had disciplinary authority (*Id.* at 298, 325-26), but both admitted that if they refused to perform their duties, Martin would have no recourse but to speak to May (*id.*). Rodney Cantrell and Nathan Stafford testified that they were never told Martin had any disciplinary authority over them. (*Id.* at 267, 283.) The Company also quotes Priest’s testimony that Martin could “force” her to perform a certain task (Br. 17), but omits her admission, on the very next page, that Martin could not discipline her himself, but could only report her insubordination to Supervisor May (Tr. 326).

is an obvious one, which does not implicate the use of independent judgment.

Webco Indus., 334 NLRB 608, 610 (2001).

d. Martin Does Not Effectively Recommend Supervisory Actions

The authority to recommend is considered “effective” under Section 2(11) if the recommendations usually are or would be followed by the deciding official without conducting an independent investigation. *Children’s Farm Home*, 324 NLRB 61, 61 (1997). In other words, there must be “a direct correlation” between the alleged supervisor’s recommendation and the actions of management, where management relies on the advice without conducting a separate investigation of its merits. *NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 145 (1st Cir. 1999) (citing *First Healthcare Corp.*, 323 NLRB 1171, 1171-72 (1997)).

The Company cites Supervisor May’s “uncontradicted” testimony that Martin made recommendations regarding hiring, transferring, suspending and sending people home. (Br. 26.) Not only is May’s testimony devoid of specifics, but it is contradicted by Martin, who testified that he has never recommended taking any of these actions to management. (Tr. 126-27.) May also claimed that Martin recommended which discipline to impose on two employees. (Br. 27.) Again, Martin denied having any input into May’s decision to suspend the two employees in question. (Tr. 132-33.) Lastly, the Company claims May promoted Martin’s daughter, Dana Davis, to a higher position based on his recommendation.

(Br. 27.) However, May's testimony shows that he offered Davis the position before asking Martin for his opinion. (Tr. 366-67, 379.)¹¹

In sum, substantial evidence supports the Board's finding that Martin was not a supervisor as defined by the Act. Therefore, the Board reasonably found that Supervisor May violated Section 8(a)(1) of the Act by coercively interrogating Martin about his opinion of union-related matters.

B. Supervisor May Unlawfully Solicited Martin To Sign the Decertification Petition

It is a violation of 8(a)(1) of the Act for an employer to induce employees to sign any form of union-repudiating document. *See, e.g., NLRB v. Pope Maint. Corp.*, 573 F.2d 898, 905 n.17 (5th Cir. 1978); *NLRB v. Birmingham Publ'g Co.*, 262 F.2d 2, 7 (5th Cir. 1958). The Board found that Supervisor May solicited Martin, a statutory employee,¹² to sign the decertification petition, in violation of Section 8(a)(1). (D&O 1 n.1, 8.)

¹¹ The Company's remaining arguments (Br. 28-33) are based on secondary indicia of supervisory status. "Secondary indicia" are those not included among the 12 "primary indicia" listed in Section 2(11) of the Act. *See Williamette Indus., Inc.*, 336 NLRB 743, 743 (2001); *Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). As such, they are insufficient to establish supervisory status unless the evidence supports finding at least one of the primary indicia as well. *Dole Fresh Vegetables*, 334 F.3d at 487-88 (citing cases). Since the Company fails to show that Martin possesses any primary supervisory authority, the secondary indicia on which it relies cannot satisfy its burden.

¹² See pages 19-30, *supra*.

Martin testified that May asked him twice to sign the decertification petition. Martin initially declined, but eventually signed the document, feeling pressured to do so. The judge credited Martin's testimony, which was un rebutted. (D&O 8.) This evidence supports the Board's determination that May's conduct interfered with, restrained or coerced Martin in his decision whether to sign the petition. *See Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 352 (D.C. Cir. 2011) (citing *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 974 (D.C. Cir. 1998)).

C. Supervisor May Acted Unlawfully in Telling Brian Postmus that May Assisted in Preparing the Decertification Petition

An employer violates Section 8(a)(1) of the Act by “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative.” *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007) (quoting *Wire Prods. Mfg. Co.*, 326 NLRB 625, 640 (1998), *enforced per curiam sub nom. NLRB v. R.T. Blankenship & Assocs., Inc.*, 210 F.3d 375 (7th Cir. 2000)). Substantial evidence supports the Board's finding that Supervisor May told Brian Postmus that he helped prepare the decertification petition.

May told Postmus that it was not “a coincidence” that the petition appeared the same day Donald Bartlett was distributing copies of the Union's recognition letter because he and Swanson had been “working on it for a couple of weeks.” (D&O 7; Tr. 167.) In so doing, May conveyed to employees the message that the

Company assisted with the initiation and circulation of the petition, and actively supported the decertification effort, thereby violating Section 8(a)(1) of the Act, as found by the Board. (D&O 1 n.1, 7-8).

The Company does not dispute that May's statements, as found by the Board, violate the Act. Instead, the Company seeks to discredit Postmus, who testified as to what May said. As an initial matter, this Court defers to the Board's credibility determinations unless they are "inherently unreasonable or self-contradictory." *Int'l Bhd. of Boilermakers v. NLRB*, 127 F.3d 1300, 1306 (11th Cir. 1997) (internal quotation marks and citation omitted). There is nothing inherently unreasonable or self-contradictory about the judge's crediting Postmus.

First, Supervisor May, in agreement with Postmus, acknowledged talking with Postmus on May 27 about the decertification petition. But under May's version of the conversation, he told Postmus, "if [Swanson] is passing around a decertification petition, it has nothing to do with your job security." (Tr. 371.) The judge found May's asserted use of the word "if" undermined the credibility of his testimony, as May already knew that Swanson was passing out the decertification petition. (D&O 8.)

The Company challenges Postmus's testimony that he asked May if it was a "coincidence" that Swanson was circulating the decertification petition the same day that Bartlett was distributing copies of the Union's recognition letter. The

Company claims Postmus could not have asked about it being a coincidence because Martin testified that he saw Bartlett leafleting a week earlier, on May 20. (Br. 37-39.) However, Postmus's testimony was corroborated by Robert Ford, who testified on direct and cross examination that he saw Bartlett leafleting in the parking lot on the morning of May 27. (Tr. 174, 185.) In fact, contrary to the Company's implicit assertion that Bartlett was only there one day (Br. 38-39), testimony by several witnesses indicates that Bartlett was there several times. Swanson testified that he saw Bartlett "around the 22nd or 23rd, four or five days prior" to May 27 (Tr. 199), and that Bartlett could have been there on other days as well (*id.* at 215). Swanson also admitted hearing from other porters that Bartlett had been back on other occasions. (*Id.*) Even Supervisor May admitted that Bartlett could have returned after May 20 without May knowing about it. (*Id.* at 403.) In light of this evidence, the Company has not shown that Postmus's account was inherently unreasonable or self-contradictory.¹³

¹³ The Company argues Swanson had a primary role in preparing the decertification petition. (Br. 34-37.) Regardless of Swanson's involvement, however, May violated the Act by telling Postmus that he worked on the petition. May's statement about his involvement, coupled with May's coercion of Martin to sign the petition, were sufficient, without more in the Board's view (D&O 1 n.1), to taint the decertification petition. See pages 42-44, *infra*.

D. The Company Violated the Act by Maintaining a Rule Against Walking Off the Job

The Board found that the Company violated the Act by promulgating and maintaining a rule that prohibited “[w]alking off the job and/or leaving the premises during working hours without permission.” (D&O 1, 7.) Under established Board law, even if a work rule does not explicitly restrict Section 7 rights, it is nonetheless unlawful when “employees would reasonably construe the language to prohibit Section 7 activity.” *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 647 (2004).¹⁴ *See generally Fla. Steel Corp. v. NLRB*, 529 F.2d 1225, 1230-31 (5th Cir. 1976) (court held that the validity of a work rule must be viewed through the eyes of the average employee and that, in the absence of special circumstances, a no-solicitation rule applicable to employees during their non-working time is an unlawful interference with their right to discuss self-organization among themselves).

The Board found that employees could reasonably construe a rule against “walking off” the job to also prohibit such protected Section 7 activity as a strike, given the common use of the term “walkout” as a synonym for a strike. (D&O 2.)

The Board rejected the Company’s stated justification for the rule – that it was

¹⁴ A workplace rule not explicitly restricting Section 7 activity is also unlawful when the rule was “promulgated in response to union activity” or “has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage*, 343 NLRB at 647. The Board’s finding did not rely on either of these alternate theories. (D&O 2.)

necessary to ensure that supervisors knew of the employees' whereabouts at all times for security reasons – noting that these concerns could be satisfied with less restrictive language, such as prohibiting leaving the premises during working hours without permission. (D&O 2 n.4.) Accordingly, the Board held that the language of the rule was overbroad and unlawful under Section 8(a)(1) of the Act.

This finding is consistent with Board law. *See, e.g., TT&W Farm Prods., Inc.*, 358 NLRB No. 125, 2012 WL 3993537, at *2 (Sept. 1, 2012) (finding a rule prohibiting “[w]alking off the job” unlawfully overbroad); *Labor Ready, Inc.*, 331 NLRB 1656, 1656 n.2 (2000) (same). *Cf. 2 Sisters Food Grp.*, 357 NLRB No. 168, 2011 WL 7052272, at *3 (Dec. 29, 2011) (finding that rules prohibiting “[l]eaving . . . during a working shift without a supervisor’s permission” and “[s]topping work before shift ends or taking unauthorized breaks” were not reasonably construed as curtailing Section 7 rights).

The Company argues (Br. 53, 55) that the Board’s determination is inconsistent with the analysis of a similar rule by the hearing officer in *Jurys Boston Hotel*, 356 NLRB No. 114, 2011 WL 1127474, at *29 (Mar. 28, 2011). But the hearing officer’s analysis in that case was not reviewed by the Board, *id.* at *2 n.5, *3 n.7, and therefore takes on no precedential value. *See Stanford Hosp. &*

Clinics v. NLRB, 325 F.3d 334, 344 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997).¹⁵

The Company also errs in suggesting that, “[e]ven if the rule were unlawful,” the charge should be dismissed because there was no evidence of enforcement or that the rule was related to, or had an effect on, election-related activity. (Br. 55.) To the contrary, as courts have recognized, “[n]o such evidence is required to support the Board’s conclusion that the rule is overly broad and thus unlawful.” *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). *See also*, e.g., *Grandview Health Care Ctr.*, 332 NLRB 347, 349 (2000) (“It is axiomatic that merely maintaining an overly broad rule violates the Act.” (citation omitted)), *enforced sub nom Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002); *Brockton Hosp.*, 333 NLRB 1367, 1377 (2001) (finding confidentiality rule unlawful even though never applied to restrict Section 7 activity), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1017 (2001) (“The overall context of the [employer’s] rules

¹⁵ While the hearing officer in *Jurys*, 2011 WL 1127474 at *29, cited *Quantum Electric*, 341 NLRB 1270 (2004), for its finding that employees could be disciplined for leaving work early to attend a union meeting, *Quantum* went on to emphasize that, in departing early, the employees “were not engaging in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with working conditions.” 341 NLRB at 1279 (citation omitted). In these instances, no authorization is necessary because leaving work is, in itself, protected conduct.

does not alleviate a literal reading,” which may reasonably be understood to prohibit Section 7 activity).

Finally, the Company suggests that this issue is moot because the rule was rescinded as soon as it was challenged by the Union. (Br. 54.) The administrative law judge made no such finding, however, and the Company did not except to the judge’s failure to make this finding.¹⁶ Moreover, once the Board found the Company’s rule unlawful for its overbreadth, the Company failed to move for the Board to reconsider the portion of its Order requiring rescission of the rule. In any case, the Company’s assertion that the rule has been rescinded cuts against the Company’s separate argument (Br. 54) that the rule is necessary to ensure the security and safety of its operations and may explain why, as the Board noted, the Company presented no evidence that it was unable to safely perform its duties without such a rule. (D&O 2 n.4.)

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO RECOGNIZE AND BARGAIN WITH THE UNION

The basic command of Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), is that an employer must recognize and bargain with a labor organization selected by

¹⁶ The judge did find that another unlawfully broad rule banning any unauthorized soliciting had been rescinded. (D&O 7; GC Ex. 9 at 13, GC Ex. 10 at 1.)

a majority of its employees.¹⁷ In this case, the Union was certified in 2002 as the exclusive bargaining representative of all full-time and regular part-time porters employed by FTS. (D&O 4 & n.2.) A union certified as the exclusive representative of a bargaining unit enjoys a continuing presumption of majority support among employees in the unit. *Levitz Furniture Co.*, 333 NLRB 717, 723 (2001); *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 984 (11th Cir. 1989).

The Company admits that it is a successor to FTS under *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S. Ct. 1571 (1972). (D&O 4.) As such, the Company was obligated to recognize and bargain with the Union upon request. *See id.* at 280-81, 92 S. Ct. at 1578-79 (“[W]here the bargaining unit remains unchanged and the majority of the employees hired by the new employer are represented by a recently certified bargaining agent,” the new employer has a duty “to bargain with the incumbent union.”); *Computer Sci. Corp. v. NLRB*, 677 F.2d 804, 806 (11th Cir. 1982) (same). If an employer fails to recognize and bargain with a union in these circumstances, its failure constitutes an unlawful withdrawal of recognition unless it proves, as an affirmative defense, that the union

¹⁷ Section 8(a)(5) of the Act makes it “an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees.” Section 8(a)(1) makes it unlawful “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act],” which includes employees’ “right . . . to bargain collectively through representatives of their own choosing,” 29 U.S.C. § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *See Elec. Mach. Co. v. NLRB*, 653 F.2d 958, 960 (5th Cir. Aug. 1981).

has lost majority support. *See Flying Foods Grp. Inc.*, 345 NLRB 101, 103 (2005), *enforced sub nom. Flying Food Grp. v. NLRB*, 471 F.3d 178, 182-84 (D.C. Cir. 2006); *Levitz Furniture*, 333 NLRB at 725.

A. The Company Failed To Prove the Union’s Actual Loss of Majority Support

An employer is able to rebut the continuing presumption of majority status with objective evidence that the union has lost majority support— “for example, a petition signed by a majority of employees in the bargaining unit.” *Flying Food*, 471 F.3d at 182; *Levitz Furniture*, 333 NLRB at 725. When the employer relies on a decertification petition ostensibly signed by a majority of employees, the employer carries the burden, not necessarily at the time of withdrawal but at the unfair labor practice hearing, *Flying Foods*, 345 NLRB at 103 n.9, of authenticating the petition signatures of a majority of the bargaining unit employees, *see Flying Food*, 471 F.3d at 184, either through testimonial evidence or handwriting exemplars.¹⁸

¹⁸ The General Counsel’s guidelines for processing decertification petitions specify that, to establish the validity of a petition, “the employer must demonstrate that th[e] signatures are facially authentic, usually by comparing them with employee signatures contained in the employer’s business records or by witness authentication.” NLRB Gen. Couns. Mem. GC 02-01, *Guideline Mem. Concerning Levitz* 4 n.13 (Oct. 22, 2001) (citation omitted), *available at* <http://www.nlr.gov/publications/general-counsel-memos> (under “Memo Number,” select “GC 02-xx”).

Substantial evidence supports the Board's finding that the Company failed to authenticate the signatures of a majority of unit employees on the decertification petition. (D&O 1 n.1, 11.) During the relevant period, the bargaining unit consisted of 37 employees excluding May, who as a supervisor is not part of the unit. (D&O 11; R. Ex. 13.) The petition was signed by 26 individuals, but the administrative law judge found that the Company failed to authenticate 6 of these signatures, either through testimony or handwriting exemplars. (D&O 11.) The judge further found that, of the remaining 20 signatures, 2 were not valid: Donald May's, because he is an admitted supervisor (*id.*), and Martin's, because his signature was unlawfully coerced (*id.* at 8). Therefore, the petition contained only 18 valid signatures, one short of the 19-signature majority necessary to decertify the Union in a bargaining unit of 37. (*Id.* at 11.)

The Company argues that the judge should have counted the signatures of individuals who did not testify at the hearing because the General Counsel did not offer evidence that they were invalid. (Br. 56-57.) The Company argues, quoting *Flying Foods*, 345 NLRB at 103 n.9, that after the employer has introduced a decertification petition ostensibly signed by a sufficient number of employees, "the burden shifts to the General Counsel to show that some of the alleged signatures should not be counted." (Br. 57.) But the Company fails to note that the quote it relies on was only a concurring comment by Chairman Battista. Indeed, the

Company specifically omits the phrase “[i]n Chairman Battista’s view” that precedes the quoted passage. *Flying Foods*, 345 NLRB at 103 n.9. Therefore, the quote represents the individual view of then-Chairman Battista, not the holding of the Board.

The Company also claims that there were only 35 people in the bargaining unit, instead of 37. (Br. 4, 5, 57.) This is because the Company erroneously counts Christopher Justice and Martin as supervisors. The administrative law judge heard argument concerning Martin’s status and determined that he is not a supervisor under the Act. (D&O 5-7.) The judge also found that Justice, who did not testify at the hearing and as to whom the Company presented no evidence of supervisory status, was a statutory employee. (*Id.* at 11.) While the Company excepted to the judge’s supervisory finding concerning Martin, it did not do so with respect to Justice. (R-III-3, Respondent’s Exceptions to the Decision of the Administrative Law Judge, at 1-3.) Thus, the Court is precluded from considering the Company’s argument that Justice is a statutory supervisor.¹⁹

Therefore, even if this Court were to conclude that Martin is a supervisor, the bargaining unit would still include 36 employees. Consequently, and as correctly noted by the administrative law judge, the petition’s “18 authenticated

¹⁹ A party’s failure to file exceptions before the Board precludes appellate courts from asserting jurisdiction over those issues. 29 U.S.C. § 160(e); *Woelke & Romero*, 456 U.S. at 665, 102 S. Ct. at 2083; *Goya Foods*, 525 F.3d at 1122 n.2.

signatures do not constitute a majority of 36.” (D&O 11.) *See Flying Food*, 471 F.3d at 182 (holding that a valid decertification petition must contain authenticated signatures of a majority of employees in the bargaining unit); *Flying Foods*, 345 NLRB at 104 n.12 (a sufficient number of signatures on the petition are invalid “so as to preclude a finding a majority of unit employees no longer supported the union”); *see also Eastman Broad. Co.*, 188 NLRB 80, 81 (1971). Accordingly, there is no scenario under which the Company carries its burden to show, by authenticating their signatures, that a majority of bargaining unit signed the decertification petition.

B. In any Event, the Company’s Unfair Labor Practices Tainted the Decertification Petition

The Board also found that, even if the decertification petition contained valid signatures of a majority of bargaining-unit employees, the Company’s refusal to recognize and bargain with the Union was unlawful because the petition was tainted by Supervisor May’s unfair labor practices. (D&O 1 n.1, 10-11.)

Under established Board law, if an employer engages in unfair labor practices directly related to an attempt to decertify a union, such as “actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing, or filing of an employee petition seeking to decertify the bargaining representative[,]” the Board conclusively presumes that “the employer’s unlawful meddling tainted any resulting expression of employee disaffection.” *SFO Good-*

Nite Inn, LLC, 357 NLRB No. 16, 2011 WL 2883217, at *2 (July 19, 2011) (internal quotation marks and footnotes omitted), *enforced*, 700 F.3d 1 (D.C. Cir. 2012). This presumption requires no specific proof of causation or finding of actual coercive effect. *Id.*; *Hearst Corp.*, 281 NLRB 764, 765 (1986), *enforced mem.*, 837 F.2d 1088 (5th Cir. 1988) (table). Rather, it is predicated on the “tendency of such conduct to interfere with the free exercise of employee rights under the Act.” *Hearst Corp.*, 281 NLRB at 765 (quoting *Amason, Inc.*, 269 NLRB 750, 750 n.2 (1984), *enforced mem.*, 758 F.2d 648 (4th Cir. 1985) (table)). Because a tainted petition “does not represent ‘the free and uncoerced act of the employees concerned,’” a withdrawal of recognition predicated on such a petition is unlawful. *NLRB v. United Union of Roofers Local No. 81*, 915 F.2d 508, 512 n.6 (9th Cir. 1990) (quoting *E. States Optical Co.*, 275 NLRB 371, 372 (1985)); *see also V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281-82 (6th Cir. 1999).

There is substantial evidence to support the Board’s determination that the Company initiated, supported and encouraged the decertification effort.²⁰

Supervisor May told Brian Postmus that he worked on the petition with Eric

²⁰ Contrary to the Company’s claim (Br. 43-48), the Board did not find that May violated the Act by telling employees about the petition at a group meeting. The Board simply found that May’s acts of telling Postmus that he helped prepare the petition and soliciting Martin to sign it unlawfully tainted the petition. (D&O 1 n.1.) The Company also claims the judge imputed Martin’s personal opinion that porters should sign the petition to Supervisor May. (Br. 48.) Assuming arguendo this is true, the Board did not rely on this aspect of the judge’s decision to find the petition tainted. (D&O 1 n.1.)

Swanson “for a couple of weeks” (Tr. 167), thus conveying to employees that the Company endorsed and actively participated in the decertification effort. May also twice unlawfully solicited Martin to sign the petition. The second time, May took the petition out of his backpack and presented it to Martin, who signed it because he felt “a little pressured.” (*Id.* at 86.) This is the kind of “unlawful meddling” that the Board has found to conclusively taint a decertification effort. *SFO Good-Nite Inn*, 2011 WL 2883217, at *2. Accordingly, the Company is precluded from “relying on [the petition] to overcome the [U]nion’s continuing presumption of majority support.” *Id.* (footnote omitted).²¹

²¹ The Company relies on *Pacific Grove Convalescent Hosp.*, 350 NLRB 518 (2007), to challenge the Board’s finding that the decertification petition was tainted. (Br. 50-51.) First, *Pacific Grove* was decided before *SFO Good-Nite Inn* underscored that any unlawful employer involvement in a decertification petition taints the resulting petition. In any event, the facts differ materially from this case. In *Pacific Grove*, the employee who organized the decertification petition gathered signatures from a majority of co-workers and asked an administrator to obtain the signatures of two others whom *the organizer* had previously solicited and who had indicated their intent to sign. 350 NLRB at 520-21. By contrast, there is no evidence that Swanson or any other employee solicited Martin to sign the petition, or that he committed to signing it. The only person to solicit Martin was Supervisor May. And, while the only unfair labor practice committed in *Pacific Grove* was the solicitation of two signatures after a majority of employees had already signed the petition, *id.* at 521-22, in this case, Supervisor May also violated the Act by telling Postmus that he helped prepare the petition.

IV. THE BOARD POSSESSED A QUORUM AT THE TIME IT ACTED

In a Rule 28(j) letter submitted after Ambassador filed its opening brief, the employer for the first time in this case contends that the Board lacked a quorum when it issued its decision. Ambassador's letter relies on the D.C. Circuit's opinion in *Noel Canning v. NLRB*, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013), which held that the President's recess appointment power is limited to intersession recesses, may only be used to fill vacancies that first arise during such a recess, and must be invoked during the same recess in which the position first became vacant. According to Ambassador, two Board members were invalidly appointed under that test.

Ambassador's argument is categorically foreclosed by this Court's *en banc* decision in *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942, 125 S. Ct. 1640 (2005), a decision that the employer does not mention in its Rule 28(j) letter.²² *Evans* squarely holds that the Recess Appointments Clause extends to intrasession recesses, *see id.* at 1224-25, and that it allows the President to fill all vacancies that happen to exist during such a recess, whether they arose

²² Because *Evans* squarely forecloses the employer's constitutional claims, the Court need not address whether the employer waived or forfeited those claims by failing to raise them before the Board, or in its opening brief. *See, e.g.*, 29 U.S.C. 160(e) ("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."); *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1306-07 (11th Cir. 2012) (explaining that issues not raised in an appellant's opening brief are deemed waived).

during the recess or before it, *see id.* at 1226-27. The D.C. Circuit's opinion in *Noel Canning* acknowledges that its holdings on these issues are directly contrary to this Court's governing precedent in *Evans*. *See Noel Canning*, 2013 WL at *14-15, 19. The *en banc* decision in *Evans* is the law of the Circuit, and it forecloses any reliance by the employer on *Noel Canning* here.

This is true not only with respect to the D.C. Circuit's holdings regarding intrasession appointments, and appointments that did not first arise during such a recess, but also with respect to its holding that the President can fill the vacancy only during the same recess in which the vacancy first arose. That was the scenario in *Evans* itself: Judge Pryor was appointed to fill a vacancy that had first arisen more than three years earlier than the recess in which the President acted to fill the vacancy.²³ In sustaining Judge Pryor's recess appointment, *Evans* necessarily forecloses any argument that the President can fill a vacancy only during a particular recess.²⁴ That point was expressly acknowledged by Judge

²³ Judge Pryor was appointed in February 2004 to fill a vacancy that arose in December 2000, when Judge Cox took senior status. *See Presidential Statement*, 2004 WL 319038 (Feb. 20, 2004) (announcing the recess appointment of Judge Pryor).

²⁴ The D.C. Circuit's holding on that issue conflicts not only with the outcome in *Evans*, but also with the underlying logic of this Court's decision. This Court unambiguously interpreted the term "happen" in the Recess Appointments Clause to mean "happen to exist," rather than "happen to arise." *See Evans*, 387 F.3d at 1126. A vacancy happens to exist until it is filled (or the office is abolished), regardless of how many recesses intervene, and thus it would make no sense to refer to the "next Session" after a vacancy "happen[s]." Accordingly, the

Barkett in her dissent in *Evans*. See *Evans*, 387 F.3d at 1228 (Barkett, J., dissenting).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court deny the Company's petition and enforce the Board's Decision and Order in full.

STUART F. DELERY
*Principal Deputy Assistant
Attorney General*

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
JOSHUA P. WALDMAN
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

U.S. Department of Justice
Civil Division, Room 7259
950 Pennsylvania Ave N.W.
Washington, D.C. 20530
202-514-4052

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

/s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/ Gregoire Sauter
GREGOIRE SAUTER
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
202-273-2978
202-273-1714

February 2013

constitutional provision stating that appointments are valid until “the End of [the Senate’s] next Session,” U.S. Const. Art. I, § 2, cl. 3, must be a reference to the “next Session” after the President makes his appointment.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMBASSADOR SERVICES, INC.,)	
)	
Petitioner/Cross-Respondent	)	No. 12-15124
)	
v.	)	Board Case Nos.
	)	12-CA-026758
NATIONAL LABOR RELATIONS BOARD,	)	12-CA-026759
	)	12-CA-026832
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,603 words of proportionally-spaced, 14-point type, 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, N.W.
Washington, D.C. 20570-0001
(202) 273-1714

Dated at Washington, D.C.
this 21st day of February 2012

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMBASSADOR SERVICES, INC.,)	
)	
Petitioner/Cross-Respondent	)	No. 12-15124
)	
v.	)	Board Case Nos.
	)	12-CA-026758
NATIONAL LABOR RELATIONS BOARD,	)	12-CA-026759
	)	12-CA-026832
Respondent/Cross-Petitioner)	
)	

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and sent to the Clerk of the Court, by first-class mail, the required number of paper copies.

I further certify that this document was served on all parties or their counsel of record through the CM/ECF system, and that I sent the required number of paper copies, by first-class mail, to Petitioner/Cross-Respondent's counsel at the address listed below:

Daniel M. Shea
Matthew T. Gomes
Nelson Mullins Riley & Scarborough LLP
Atlantic Station
201 17th Street, NW, Suite 1700
Atlanta, GA 30363

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001
(202) 273-1714

Dated at Washington, D.C.
this 21st day of February 2012