

Nos. 12-60567, 60619

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

FLEX-N-GATE TEXAS, L.L.C.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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 Avenue 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

ROBERT J. ENGLEHART
Supervisory Attorney

JARED D. CANTOR
Attorney

National Labor Relations Board
1099 14.th Street N.W.
Washington, DC 20570
(202) 273-2978
(202) 273-0016

STATEMENT REGARDING ORAL ARGUMENT

Petitioner/Cross-Respondent Flex-N-Gate Texas, LLC, is challenging a Board order based on labor law issues, and is also belatedly seeking to raise constitutional challenges to the President's appointment of several members of the Board pursuant to the Recess Appointments Clause. The Board does not believe that oral argument is independently warranted by Flex-N-Gate's non-constitutional objections to the Board's determinations that Flex-N-Gate violated the National Labor Relations Act, though it stands ready to present argument on that issue if the Court desires it. Additionally, because the constitutional objections have clearly been waived by Flex-N-Gate's failure to present them in its opening brief, the Board also does not believe that oral argument is warranted on the waiver issue. Should the Court wish to address the merits of the constitutional challenges, however, the Board believes that oral argument would be appropriate.

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S. Exec. J., 4th Cong., 2d Sess. (1796).....	41
 Other Authorities	 Page(s)
11 Minutes of the Supreme Exec. Council of Pa. 545 (Theo Fenn & Co., 1852)...29	
13 Oxford English Dictionary (2d ed. 1989).....	27
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2 A Documentary History of The English Colonies in North America (Peter Force, ed., 1839).....	29
2 Samuel Johnson, Dictionary of the English Language 1650 (1755).....	27
27 THE PAPERS OF THOMAS JEFFERSON (John Catanzariti, ed. 1990).....	40

Other Authorities-Cont'd	Page(s)
3 H.L. Jour. 61 (Mar. 22, 1621).....	28
3 H.L. Jour. 74 (Mar. 27, 1621).....	28
5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, (Jonathan Elliot, ed., 2d ed. 1836).....	30
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Articles of Confederation of 1781, art V.....	28
Articles of Confederation of 1781, art X.....	28
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Other Authorities-Cont'd	Page(s)
Letter from George Washington to John Jay (Sept. 2, 1787), 3 Farrand, Records of the Federal Convention	28, 37
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Letter from John Adams to James McHenry (April 16, 1799), 8 The Works of John Adams, Second President of the United States.....	41, 43
Letter from John Adams to James McHenry (May 16, 1799), 8 Adams Works.....	41
Neal Goldfarb, <i>The Recess Appointments Clause (Part 1)</i> , LawNLinguistics.com, Feb. 19, 2013, at <a href="http://lawlinguistics.com/2013/02/19/the-recess-appointments-
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Riddick & Frumin, Riddick's Senate Procedure: Precedents and Practices, S. Doc. No. 101-28 (1992).....	35
Robert, Robert's Rules of Order (1876).....	25
S. Rep. No. 58-4389 (1905).....	34
Tachau, Federal Courts in the Early Republic: Kentucky 1789-1816 (1979).....	41
The Federalist No. 67 (Clinton Rossiter ed., 1961).....	30
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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on a petition for review filed by Flex-N-Gate Texas, L.L.C. (“Flex-N-Gate”), and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of the Board’s Order finding that

Flex-N-Gate committed unfair labor practices when it interrogated employees about their union preference, promised benefits if employees did not support the International Union, United Automotive and Agricultural Implement Workers of America (“the Union”), threatened to discharge employees, and discharged three employees because of their union activities.

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. The Board’s Decision and Order issued on June 27, 2012, and is reported at 358 NLRB No. 76. (D&O 1-16.)¹ The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final, and the unfair labor practices occurred in Texas. Flex-N-Gate’s petition for review, filed on July 23, 2012, and the Board’s cross-application for enforcement, filed on August 6, 2012, were timely because the Act places no time limit on the initiation of enforcement or review proceedings.

¹ “D&O” references are to the Board’s Decision and Order. “Tr.” references are to the hearing transcript, and “GCX,” “RX” and “JX” references are to the exhibits introduced by the Board’s General Counsel, Flex-N-Gate, or both parties jointly, respectively. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to Flex-N-Gate’s opening brief.

STATEMENT OF THE ISSUES

1. Whether the President's January 4, 2012 appointments to the NLRB were invalid (a) because they were made during an intrasession recess; or (b) because they filled vacancies that first arose before the recess in question.

2. Whether substantial evidence supports the Board's finding that Flex-N-Gate violated Section 8(a)(1) of the Act by interrogating employees about their union preference, promising benefits if employees did not support the Union and threatening to discharge employees for their union activities.

3. Whether substantial evidence supports the Board's finding that Flex-N-Gate violated Section 8(a)(3) and (1) of the Act by discharging employees Rainey, Irving and Lloyd, because of their union activities.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that Flex-N-Gate committed various violations of the Act. After a hearing, an administrative law judge found that Flex-N-Gate violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by interrogating employees regarding their union preference, promising benefits if employees did not support the Union and threatening to discharge employees due to their union activities. (D&O 4-8.) The judge also found that Flex-N-Gate violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by discharging employees Chris Rainey, Alsee Irving and Rockey Lloyd, because of their union activities.

(D&O 12.) The judge further found that Flex-N-Gate failed to carry its burden of demonstrating that Rainey, Irving and Lloyd were supervisors within the meaning of Section 2(11) of the Act. (D&O 14.)

On review, the Board modified some of the judge's reasoning but affirmed the judge's conclusions, and adopted the recommended Order. (D&O 1 & n.1.)

I. THE BOARD'S FINDINGS OF FACT

A. Background: Flex-N-Gate's Organization and Operations

Flex-N-Gate operates manufacturing plants that produce parts for the automotive industry, and sequencing facilities that assemble the parts for its customers. (D&O 3.) The events at issue occurred at Flex-N-Gate's sequencing facility in Arlington, Texas. (D&O 3; Tr. 376.) Flex-N-Gate's management includes general manager Paul Connolly, who supervises the Arlington facility, which he visits approximately once or twice a month, and a facility in Ada, Oklahoma. (D&O 3; Tr. 376-77.) The Arlington facility is directly supervised by plant manager Michael Luckie, who is in daily contact with Connolly. (D&O 3; Tr. 318, 321, 378.)

Approximately 80 employees work at the Arlington facility. (D&O 3; JX 2.) Many employees directly assemble vehicle fascias on either the front or rear production lines, each of which has a first and second shift. (D&O 3; Tr. 114, 194.) Each shift on each line is lead by a team leader. (D&O 3; Tr. 116, 176, RX O.) Each shift is also staffed by an employee responsible for the proper

functioning of the facility's computer systems. (D&O 14; Tr. 49.) The first shift is staffed by IT manager Joe Lee (D&O 3; Tr. 320), and the second shift by an IT technician, who reports directly to the IT manager. (D&O 14; Tr. 49, RX Q.)

B. Rainey's, Irving's and Lloyd's Well-Known Union Activity

Chris Rainey started working for Flex-N-Gate in June 2005 (D&O 3; Tr. 48), and eventually became the IT technician for the second shift. (D&O 3; Tr. 51, 80, 93.) In late June or early July 2010, Rainey contacted the Union about representing Flex-N-Gate's employees at the Arlington facility. (D&O 3; Tr. 58.) On August 11, 2010, the Union filed a petition with the Board seeking to represent all of Flex-N-Gate's full-time production and maintenance employees at the facility. (D&O 3; GCX 31.) The Board scheduled an election for September 22. (D&O 3; GCX 20.)

During the weeks leading up to the filing of the petition and the election, Rainey served on a committee that provided fellow employees with information about the Union. (D&O 3; Tr. 58-59, 120.) Committee members passed out union flyers, invited coworkers to attend organizational meetings and solicited coworkers to sign union-authorization cards. (D&O 3; Tr. 58-59, 120, GCX 4.) Rainey also attended approximately six to eight union meetings. (D&O 3; Tr. 60.) Superintendents David Mitchell and Brian Holland observed Rainey passing out leaflets and soliciting employees, and Rainey directly told them that he was the

person who initially had contacted the Union about representing Flex-N-Gate's employees. (D&O 3; Tr. 59-60, 318.)

Alsoe Irving started working for Flex-N-Gate in November 2005 (D&O 3; Tr. 114, 117), and became the team leader for the second shift of the front fascia production line. (D&O 3; Tr. 116.) Irving, also a member of the organizing committee, talked to employees about the Union and passed out union-authorization cards and information about the Union. (D&O 4; Tr. 58, 120, 123-25, GCX 4.) Irving attended four or five union meetings. (D&O 4; Tr. 124.)

To show their support for the Union, Rainey and Irving wore union buttons and union shirts to work every day during the campaign. (D&O 3-4; Tr. 60-65, 120-23, GCX 5, 6, 7, 8.) Unlike other employees, however, Rainey and Irving customized their shirts. (D&O 3-4; GCX 5, 6.) Rainey's shirt featured pro-union language in Spanish and English. (Tr. 62; GCX 6.) Rainey wore his shirt every day the month before the election and attached 15 to 20 union buttons to it. (D&O 3; Tr. 60-62, 64, GCX 6, 7, 8.) No other employee wore as many buttons as Rainey. (D&O 3; Tr. 65, 123.) Irving incorporated Luckie's name so his shirt read "WE LUCKIE (TENEMOS SUERTE)," and pinned 8 to 12 buttons on it. (D&O 4; Tr. 62-64, 121-23, GCX 5.) Irving wore his shirt every day for 2 weeks before and 2 weeks after the election. (D&O 4; Tr. 122.)

During the election campaign, Flex-N-Gate's managerial staff conducted mandatory employee meetings during which they presented information to employees about why the Union was not needed. (D&O 4; Tr. 66-72, 126-132, 196, 200, GCX 9, 10.) Rainey spoke at all but the first meeting about the discrepancies between what employees wanted versus what employees received from Flex-N-Gate in regard to wages, vacations and benefits. (D&O 4; Tr. 70, 131.) Irving spoke out about healthcare issues at the same meetings. (D&O 4; Tr. 71, 129-31.)

Rockey Lloyd was hired by Flex-N-Gate in November 2006 (D&O 3; Tr. 175, 177), and roughly a year later he became the team leader for the first shift of the rear fascia production line. (D&O 3; Tr. 176-77.) Approximately 2 weeks before the election, Lloyd wore a yellow union button to one of the mandatory meetings. (D&O 4; Tr. 189, 191, GCX 7.) Upon Lloyd entering the room, human resources manager Rick Schmidt approached him. (D&O 4; Tr. 189.) Schmidt asked Lloyd if he was "alright," and, even though Lloyd said he was, Schmidt again asked if he was "alright." (*Id.*) Throughout the exchange, Schmidt looked at the yellow union button that Lloyd wore. (*Id.*) Schmidt then walked over to a group that included Luckie and Holland and said something to them. (D&O 4; Tr. 189, 318.) The three then looked over at Lloyd. (*Id.*)

At another mandatory meeting presided over by management, including Luckie, Lloyd spoke up after a coworker was asked by a supervisor why he supported the Union. (D&O 1 n.1; Tr. 203, 207.) Lloyd stated that the employee did not have to respond to the supervisor's question. (D&O 1 n.1; Tr. 207-08.) During one of Connolly's visits to the Arlington facility during the campaign, Connolly approached Lloyd and asked him to explain his problems with the situation at the facility. (D&O 9; Tr. 184.) After hearing Lloyd's explanation, Connolly remarked that it "seems like it's the team leaders that have all the problems" (*Id.*)

C. Flex-N-Gate Unlawfully Interrogates Employees, Promises Improved Benefits, and Threatens Rainey and Irving

In response to the organizing campaign, Flex-N-Gate distributed leaflets and flyers urging employees to reject the Union. (D&O 4; Tr. 131-32, GCX 9.) Management handed out these materials and left them at employees' workstations. (D&O 4; Tr. 131-32.) Flex-N-Gate also required employees to attend weekly mandatory meetings and occasional special meetings, during which management urged employees to reject the Union. (D&O 4; Tr. 66-72, 126-132, 196, 200, GCX 10.)

Flex-N-Gate also printed and distributed stickers stating "No means no." (D&O 4; Tr. 132, 352.) Floor supervisor Mathew Workman and supervisor Lee asked employee Lloyd daily, and sometimes several times a day, if he wanted a

sticker, although Lloyd consistently declined their offers. (D&O 4-5; Tr. 191-92, 318.) Workman and superintendent Margaret Johnson approached employee Juan Garcia, whom Johnson supervised, and offered him sticker. (D&O 4-5; Tr. 302, 318.) A week before the election, floor supervisor Henry Bates once or twice asked employee Jamy Nickerson if he wanted a sticker, an offer Nickerson declined. (D&O 4-5; Tr. 286-87.)

Sometime in September before the election, employee Raul Castaneda twice went to Luckie's office to discuss incidents involving a forklift. (D&O 7; Tr. 312.) Only Luckie and Castaneda were present for the conversations, and the door was closed during the first one. (D&O 7; Tr. 306.) During the first conversation, Luckie asked Castaneda how he felt about the Union, to which Castaneda replied that he had no knowledge about it. (*Id.*) In the second conversation, Luckie asked Castaneda whether he wanted the Union and told Castaneda that he did not want Castaneda to support the Union. (*Id.*) Castaneda then asked Luckie "what is better," and Luckie told him that employees made decent money at the facility. (D&O 7; Tr. 308.) Luckie then told Castaneda that if he had a problem, he should come to Luckie and Flex-N-Gate would resolve it. (*Id.*)

Supervisor Lee and employee Lloyd worked on the first shift and Lee occasionally talked about the organizational campaign, once telling Lloyd that Rainey and Irving were "taking it too far." (D&O 9; Tr. 194.) Lee further stated

that Rainey and Irving “don’t have a long life at [Flex-N-Gate] if they keep up all the things they’re doing, because they’re nothing but problems.” (D&O 9-10; Tr. 194.) Specifically speaking about Irving’s activities, Lee stated that “he’s going to end up losing his -- they [sic] going to end up getting rid of [him].” (Tr. 194.)

On September 22, 2010, after the Union lost the election, Rainey and Irving stood with a group of union supporters. (D&O 10; Tr. 74-75, 137.) Both wore their union shirts and buttons. (D&O 10; Tr. 75, 138.) At the same time, Lee exited the IT office, smiled at them and gestured toward them by raising his hands or arms as he walked past. (D&O 10; Tr. 75, 137-38, 160.) After the election, Luckie told Irving that he was “highly disappointed” in him for voting for the Union. (D&O 4; Tr. 126, 422.) Luckie felt that Irving, a team leader, had “jumped ship.” (D&O 9; Tr. 422.)

D. Flex-N-Gate Unlawfully Discharges Rainey, Irving and Lloyd

In late August 2010, general manager Connolly directly supervised the Arlington facility while Luckie was on vacation. (D&O 8; Tr. 334, 380.) During this time, Connolly decided to eliminate several of the team leader positions. (D&O 8, 10; Tr. 334, 336, 369, 380, 383.) Several weeks after the September 22 election, Connolly, in consultation with Luckie, specifically decided to terminate Rainey, Irving and Lloyd. (D&O 10; Tr. 333-34, 336, 379, 382, 384, JX 1, 2.) On November 5, 2010, Luckie separately called Rainey, Irving and Lloyd into a

meeting and said that Flex-N-Gate was terminating their employment because of a reduction in force and restructuring of the Arlington facility. (D&O 10; Tr. 47, 76, 114, 139-40, 210-11, GCX 2, 12, 14.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hayes and Block) affirmed the administrative law judge's findings that Flex-N-Gate violated Section 8(a) (1) of the Act by interrogating employees about their union preference, promising improved benefits and threatening to discharge employees; and violated Section 8(a)(3) and (1) by discharging Rainey, Irving and Lloyd. (D&O 1, 14-15.) The Board's Order requires Flex-N-Gate to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (*Id.*)

The Order affirmatively requires Flex-N-Gate to offer full reinstatement to Rainey, Irving and Lloyd to their former jobs, or if those positions no longer exist, to substantially equivalent positions. (D&O 15.) The Board's Order further requires Flex-N-Gate to make Rainey, Irving and Lloyd whole for any loss of earnings and other benefits suffered as a result of the unlawful discharges; to remove from their files any reference to the unlawful discharges, and to notify them in writing that the discharges will not be used against them in any way; to

preserve and make available all records necessary to determine the amount of backpay due to Rainey, Irving and Lloyd; and to post and electronically distribute a remedial notice, if Flex-N-Gate customarily communicates with its employees by such means. (*Id.*)

SUMMARY OF ARGUMENT

In a Rule 28(j) letter filed after its opening brief, Flex-N-Gate contends on the basis of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the Board lacked a quorum when it issued its order because several Board members had been invalidly given recess appointments by the President in January 2012.

This Court need not consider Flex-N-Gate's untimely arguments because it has forfeited them. Rather than raising any constitutional challenges in its opening brief, Flex-N-Gate elected to raise only labor issues. In so doing, it forfeited the constitutional challenges that it is now belatedly advancing. Flex-N-Gate has no excuse for not raising in a timely manner arguments that were readily available to it. Moreover, under clear Supreme Court case law and a plain reading of the governing statutes, appointments challenges like this are non-jurisdictional and do not go to this Court's authority to decide the dispute before it.

In any event, Flex-N-Gate's untimely constitutional challenges fail on the merits. The claims approved in *Noel Canning* are wrong as a matter of constitutional text, history, and purpose. They conflict with the conclusions of every other

court of appeals to address such challenges. And they would throw out nearly two centuries of long-accepted Executive Branch practice.

Flex-N-Gate fares no better with its labor law challenges. In response to the filing of an election petition and the commencement of an organizational campaign, Flex-N-Gate undertook a vigorous anti-union campaign. Substantial evidence supports the Board's findings that it committed numerous violations of the Act during the Union campaign and after the election. First, Flex-N-Gate interrogated employees about their union preference when supervisors asked employees whether they wanted anti-union stickers, thereby pressuring employees to manifest their choice for or against the Union. Second, Flex-N-Gate further interrogated employees about their support for the Union and unlawfully promised benefits to employees when plant manager Luckie interrogated employee Castenada about his union preference, told Castenada that he did not want him to support the Union, and said that if Castenada had any problems, he should come to Luckie and Flex-N-Gate would resolve them. Third, Flex-N-Gate threatened to discharge employees Rainey and Irving when supervisor Lee stated that they were "taking it too far" with their union activities and threatened that, if they continued to do so, they would not have a long life at Flex-N-Gate. Finally, in a decision motivated by union animus, Flex-N-Gate discharged Rainey, Irving and Lloyd, three well-known and active supporters of the Union, and failed to carry its burden

of showing that they were statutory supervisors excluded from the Act's protections.

STANDARD OF REVIEW

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Thus, when 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 (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 (1996) (internal citation omitted) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)).

The Board's findings of fact are conclusive if supported by substantial evidence. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Valmont Indus.*, 244 F.3d at 463. 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. *Accord Valmont Indus.*, 244 F.3d at 463. 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).

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

ARGUMENT

I. FLEX-N-GATE'S BELATED RECESS APPOINTMENT CHALLENGES HAVE BEEN FORFEITED, AND IN ANY EVENT LACK MERIT

A. Flex-N-Gate Has Waived Any Challenge to the President's Recess Appointments to the Board

1. Flex-N-Gate did not challenge the composition of the Board during the administrative proceedings, nor did it do so in its opening brief in this Court. Subsequently, however, Flex-N-Gate filed a letter in which it argues, for the first time, that the Board lacked a quorum because the President improperly invoked the Recess Appointments Clause to appoint two of its Members. The letter relies on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

As we explain below, the President's appointments comport with the decisions of three Courts of Appeals and nearly two centuries of constitutional history and practice, and *Noel Canning's* contrary interpretations are profoundly mistaken. But there is no need for this Court to address these constitutional issues here, because Flex-N-Gate has waived them.

It is a bedrock principle of appellate practice that "[a]ny issue not raised in an appellant's opening brief is deemed waived." *United States v. Pompa*, 434 F.3d 800, 806 n.4 (5th Cir. 2005); *United States v. Ogle*, 415 F.3d 382, 383 (5th Cir. 2005). Here, by its own admission, Flex-N-Gate did not raise any appointments challenge in its opening brief. It thereby waived that issue. It cannot redeem that

waiver by subsequently presenting an entirely new issue in a Rule 28(j) letter. A Rule 28(j) letter is insufficient to present new claims—let alone significant constitutional ones—for this Court’s resolution. *See United States v. Scroggins*, 599 F.3d 433, 447 n.8 (5th Cir. 2010) (Rule 28(j) letter was “too little and too late to raise [an] issue properly”).

If the validity of the President’s recess appointments were a jurisdictional issue, this Court would be obligated to address that issue, notwithstanding Flex-N-Gate’s waiver. But a constitutional challenge to the appointment of an agency official is “nonjurisdictional” and thus “not subject to the axiom that jurisdiction may not be waived.” *Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-756 (D.C. Cir. 2009) (party forfeited an Appointments Clause claim by failing to raise it until after the close of regular briefing); *see also Evans v. Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (*en banc*) (challenge to the recess appointment of an Eleventh Circuit judge was not a jurisdictional question).

The Supreme Court has explained that a claim that an appointed official lacked the lawful authority to act, like any other claim that an agency has acted *ultra vires*, is a “nonjurisdictional” objection that goes to the challenged action’s validity. *See Freytag v. CIR*, 501 U.S. 868, 878-79 (1991). In *Freytag*, the petitioners argued that Appointments Clause challenges reflect structural constitutional interests so fundamental that they “cannot be waived” by litigants.

Pet. Br., *Freytag*, No. 90-762, 1991 WL 11007938, at *44-*45. The Court, however, did not accept that characterization, and instead categorized the petitioners' belated challenge to the appointment of a Tax Court special trial judge as a "nonjurisdictional" contention that the Court had the "discretion," but not the obligation, to decide. 501 U.S. at 878-79. *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) ("[N]or is the validity of *qui tam* suits under [the Appointments Clause] a jurisdictional issue that we must resolve here."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (district court erred in treating an alleged defect in the appointment of an agency examiner as a jurisdictional question that could be raised for the first time on judicial review).

Accordingly, the courts of appeals have repeatedly refused to decide appointment-related claims—including constitutional claims—that were not timely asserted. In *Intercollegiate Broadcast System*, for example, the D.C. Circuit declined to address an untimely Appointments Clause claim in an appeal from a final determination of the Copyright Royalty Board. The D.C. Circuit concluded that it "need not resolve the dispute" because the Appointments Clause claim was "untimely" and there was no reason "to depart from our normal forfeiture rule." 574 F.3d at 755-56. Likewise, in *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008), the Federal Circuit refused to entertain an untimely constitutional claim that the Patent

Office administrative judges whose decision was under review had not been validly appointed by the head of an Executive department. *Id.* at 1378-81. And in *NLRB v. Newton-New Haven Co.*, 506 F.2d 1035 (2d Cir. 1974), the Second Circuit refused to grant relief on an untimely claim that a Board decision was invalid due to the participation of staff attorneys on the Board panel, notwithstanding that the court of appeals had previously accepted the same argument in a case in which it was timely asserted. *See id.* at 1038.²

This body of authority makes clear that a constitutional challenge to the appointment of an administrative officer is not a jurisdictional question. Unlike an error of Article III standing or statutory subject-matter jurisdiction, an alleged defect in the appointment of an agency official does not affect a federal court's power to enter a binding judgment. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (emphasizing that “a rule should not be referred to as

² *See also FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 706-07 (D.C. Cir. 1996) (constitutional defect in composition of FEC may be forfeited if not timely asserted); *LaRouche v. FEC*, 28 F.3d 137, 139-40 (D.C. Cir. 1994) (constitutional challenge to the FEC's membership was waived because it was presented for the first time in reply brief). In a decision predating *Freytag* and *Stevens*, the Ninth Circuit treated a challenge to the recess appointment of an Article III judge as jurisdictional. *See United States v. Woodley*, 751 F.2d 1008, 1009 n.2 (9th Cir. 1985) (en banc). Since that time, however, the Supreme Court has both clarified that constitutional appointments challenges are “nonjurisdictional,” *Freytag*, 501 U.S. at 878; *see also Stevens*, 529 U.S. at 778 n.8, and underscored the narrow range of questions that are properly denominated “jurisdictional,” *see, e.g., Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (“[W]e have tried in recent cases to bring some discipline to the use of this term.”).

jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction"). The principle that jurisdictional questions cannot be waived therefore has no relevance here.

2. In its Rule 28(j) letter, Flex-N-Gate asserts that if the Board issues an order at a time when it lacks a quorum of validly appointed members, the order does not satisfy the jurisdictional requirements of Section 10(e) of the National Labor Relations Act. Section 10(e) authorizes the Board to petition a court of appeals for the enforcement of an unfair labor practice "order." 29 U.S.C. § 160(e); *cf. id.* §160(f) (authorizing petitions for review of "final orders" of the Board). Flex-N-Gate argues that a Board order issued without a quorum is not an "order" for purposes of this jurisdictional provision, and hence this Court lacks jurisdiction to enforce such an order, rendering the quorum issue jurisdictional.

That argument is plainly incorrect. The Board's order constitutes a final determination that the employer has violated the law, and it directs Flex-N-Gate to take remedial actions. It thus has the classic attributes of an administrative order. *See* 5 U.S.C. § 551(6) ("order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing"). A claim that members of the Board were not constitutionally appointed goes not to whether the Board has issued an order, but rather to whether the order is valid. *Cf.* 5 U.S.C. § 706(2)(C)

(authorizing courts to set aside final agency action that is “in excess of statutory jurisdiction, authority, or limitations”). Whatever the merits of such a claim may be, it has no bearing on this Court’s jurisdiction under Section 10(e).

If this Court were to accept Flex-N-Gate’s argument that orders issued by invalidly appointed officials are not “orders” for purposes of judicial review statutes, the perverse effect would be to insulate such orders from judicial review at the behest of private parties who are aggrieved by the orders. Unlike the Board’s unfair labor practice orders, which are not operative until and unless they are judicially enforced, most administrative orders are self-enforcing, and the regulated party bears the burden of obtaining judicial review if it wishes to avoid their effects. HHS orders denying reimbursement to Medicare providers, SSA orders denying applications for disability benefits, FDA orders disapproving new drug applications, FERC orders regulating natural gas rates, Commerce Department orders denying export licenses, NTSB orders sustaining the suspension or revocation of pilot licenses: all of these orders take effect without the need for judicial enforcement, and the only way that a regulated party can obtain relief is by invoking the jurisdiction of the federal courts to review the orders.³ Yet under

³ In some circumstances, a regulated party theoretically may obtain judicial review of an administrative order by violating the order and then challenging the order’s validity as a defense to a subsequent enforcement action. 5 U.S.C. § 703. But in practice, the sanctions for violating the order will often be too large for a prudent company to deliberately run the risk of an unsuccessful defensive challenge. And

Flex-N-Gate’s theory, these kinds of administrative orders would be exempt from judicial review when issued by officials who were invalidly appointed, because the officials’ lack of authority would mean that there are no “orders” for jurisdictional purposes, and the courts would therefore be divested of jurisdiction to review them.

The absurdity of that result speaks for itself. An order issued by an official acting without authority may well be invalid, but it is an order nonetheless. There is no reason to place such an order beyond the reach of statutes that grant courts jurisdiction to review administrative “orders,” and no reason to think that Congress intended such a result.

Flex-N-Gate quotes *Noel Canning* for the proposition that “there is no order to enforce [where] there was no lawfully constituted Board.” 705 F.3d at 497 (internal quotation marks omitted). But *Noel Canning* was not addressing whether an order issued without a quorum qualifies as an “order” for jurisdictional purposes under Section 10(e). Instead, it was addressing the separate question of whether a party is obligated to raise challenges to the Board’s composition before the Board itself in order to preserve them for judicial review. *Id.* at 497-98. The Board disagrees with *Noel Canning*’s resolution of that question. But right or wrong,

when administrative orders involve the withholding of government benefits, rather than the imposition of duties, obtaining judicial review by “violating” the order is not even a theoretical option.

Noel Canning was not addressing the jurisdictional meaning of “order” under Section 10(e).⁴

3. No categorical bar prevents the Court from resolving defaulted claims of appointment error. *See Freytag*, 501 U.S. at 878-80; *Willy v. Administrative Review Bd.*, 423 F.3d 483, 490 n.20 (5th Cir. 2005). But nothing excuses Flex-N-Gate’s waiver here. The potential constitutional claims raised in the Rule 28(j) letter had already been considered (and rejected) in published decisions by three courts of appeals. *See Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 942 (2005); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1048 (1986); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963). Flex-N-Gate had every reason and opportunity to mount a timely challenge to the Board’s recess appointees in this Court if it wished. Indeed, other employers raised the same challenges in a timely manner, and had done so before the *Noel Canning* decision issued. *See, e.g.*, Brief for Petitioner at 15-22, *Big Ridge, Inc. v. NLRB*, Nos. 12-3120 & 12-3258 (7th Cir.) (filed Dec. 14, 2012).

⁴ The employer also cites *NLRB v. Cheney Lumber Co.*, which states that a court “need not render [a] decree [under Section 10(e)] if the Board has patently traveled outside the orbit of its authority so that there is legally speaking no order to enforce.” 327 U.S. 385, 388 (1946). That statement addresses whether such an order is enforceable, not whether it qualifies as an “order” for jurisdictional purposes. In any event, the statement is dictum, as *Noel Canning* noted. *See* 705 F.3d at 497.

Flex-N-Gate chose to forgo asserting those claims at a time when case law in other circuits was adverse, then changed course when a favorable decision appeared after it filed its opening brief. That is not how the appellate process works. This case does not implicate the constitutional role of the Article III courts. *Cf. Nguyen v. United States*, 539 U.S. 69 (2003); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). Rather, it is a routine proceeding for review of an administrative order, in which the petitioner chose not to raise any appointments challenge until after its opening brief had been filed. In these circumstances, there is no reason to depart from the bedrock rule of appellate procedure that claims not timely asserted are forfeited.⁵

B. Flex-N-Gate's Recess Appointment Challenges Lack Merit

If the Court nonetheless reaches Flex-N-Gate's challenges, it should reject them on the merits. The challenged appointments to the NLRB were announced on January 4, 2012. *Noel Canning* concluded that these appointments were unconstitutional on the theory that they were made during an *intrasession* recess, and thus outside the scope of the Recess Appointments Clause. It also found the appointments invalid on the alternative theory that they improperly filled vacancies

⁵ Similar waiver issues are presented in *D.R. Horton, Inc. v. NLRB*, No. 12-60031 (argued Feb. 5, 2013), and have been addressed by the NLRB at the Court's direction in a supplemental post-argument brief. In at least one case already pending in this Court, the present constitutional claims are squarely raised in the employer's opening brief, and the Court will thus likely have the opportunity to address them there. *See Entergy Mississippi, Inc. v. NLRB*, No. 12-60644.

that first arose before the recess in question. This Court should reject Flex-N-Gate's challenges based on *Noel Canning*.⁶

1. Nothing in the Recess Appointments Clause confines the President's appointment authority to Intersession Recesses

Flex-N-Gate's first challenge argues that the President may make recess appointments only during recesses that occur between enumerated sessions of the Senate, commonly known as *intersession* recesses. In common parlance, intersession recesses occur when the Senate uses a specific type of adjournment known as an adjournment *sine die*, the long-accepted parliamentary mechanism for terminating a legislative session. *See* Robert, Robert's Rules of Order 148, 155 (1876) (legislative sessions terminate at the time the legislature adjourns "*sine die*"—literally "without [a] day" specified for reconvening).

When a legislature instead adjourns to a particular day, rather than adjourning *sine die*, the adjournment does not end the session, and the resulting recess is commonly referred to as an *intrasession* one. In Flex-N-Gate's view, the President is powerless to make recess appointments during intrasession recesses, even though such recesses are today far more common, and often longer, than intersession recesses. *See* Congressional Directory for the 112th Congress 529-38 (2011) (hereinafter "Congressional Directory"). Although this argument was

⁶ The Board has determined, in consultation with the Solicitor General, to petition the Supreme Court for a writ of *certiorari* in *Noel Canning*. That petition is due April 25, 2013.

recently accepted in *Noel Canning*, it was squarely rejected by the *en banc* Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (2004), *cert. denied*, 544 U.S. 942 (2005).

Flex-N-Gate's position flies in the face of constitutional text and history. Since the 19th Century, Presidents have made more than 400 recess appointments during intrasession recesses. *See* Hogue, Cong. Res. Serv., *Intrasession Recess Appointments* 3-4 (2004); Hogue, et al., Cong. Res. Serv., *The Noel Canning Decision and Recess Appointments Made From 1981-2013*, at 22-28 (2013). These intrasession recess appointments include three cabinet secretaries, five court of appeals judges, ten district court judges, a CIA Director, a Federal Reserve Chairman, numerous board members in multi-member agencies, and a variety of other critical government posts. *See* Hogue, *Intrasession Recess Appointments*, *supra*, at 5-31. The practice has continued regularly since Attorney General Daugherty, relying on the Senate's own interpretation of the Recess Appointments Clause, confirmed nearly a century ago that such appointments are within the President's authority. *See* 33 Op. Att'y Gen. 20 (1921); S. Rep. No. 58-4389 (1905). The Legislative Branch itself has acquiesced in the President's power to

make such appointments.⁷ Flex-N-Gate nevertheless urges that every one of these appointments was unconstitutional. This Court should reject that contention.

a. Flex-N-Gate’s argument founders at the outset on the text of the Recess Appointments Clause, because that text “does not differentiate between inter- and intrasession recesses.” *Evans*, 387 F.3d at 1224. The plain meaning of the term “recess,” both at the Framing and today, means a “period of cessation from usual work” and does not differentiate between recesses that are between sessions of the Senate and those that are within sessions. 13 Oxford English Dictionary 322-23 (2d ed. 1989) (citing sources from 1642, 1671, and 1706); *see also* II Webster, An American Dictionary of the English Language 51 (1828) (defining “recess” as a “[r]emission or suspension of business or procedure”); 2 Samuel Johnson, Dictionary of the English Language 1650 (1755) (same); *Evans*, 387 F.3d at 1224-25. Consistent with that understanding, the Senate itself described the period at issue here as part of its “recess.” 157 Cong. Rec. S8783.

Furthermore, at the time of the Framing, the term “the Recess of the Senate” would have naturally been understood to encompass both intrasession and intersession recesses. The British Parliament, whose practices formed the basis for American legislative practice, used the term “recess” to encompass both kinds of

⁷ *See, e.g.*, 41 Op. Att’y Gen. 463, 468 (1960); 28 Comp. Gen. 30, 34-36 (1948) (opinion of the Comptroller General, a legislative officer, describing the 1921 opinion as establishing the “accepted view” of the Recess Appointment Clause, and interpreting the Pay Act in a consistent manner).

breaks. *See, e.g.*, Thomas Jefferson, *A Manual of Parliamentary Practice*, preface & § LI (2d ed. 1812) (describing a “recess by adjournment” as one occurring during an ongoing session). Indeed, the Oxford English Dictionary, in defining the word “recess,” provides a usage example from Parliament in 1621 that refers to an *intrasession* recess. *See* 13 Oxford English Dictionary, *supra* at 322-23 (citing a usage in 3 H.L. Jour. 61 (Mar. 22, 1621)); 3 H.L. Jour. 74 (Mar. 27, 1621) (start of the referenced recess, in which the house adjourned until April 17).

Founding-era legislative practice in the United States conformed to this understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States “in the recess of Congress” (Arts. IX & X). The only time Congress did so was for a scheduled *intrasession* recess.⁸ And when the Constitutional Convention adjourned for what amounted to a short *intrasession* recess, delegates referred to that adjournment as “the recess.”⁹

⁸ *See* 26 J. CONTINENTAL CONG. 1774-1789, at 295-96 (Gaillard Hunt ed., 1928); 27 J. CONTINENTAL CONG. 1774-1789, at 555-56. The scheduled recess was *intrasession* because new congressional terms began annually in November, *see* Articles of Confederation of 1781, art. V, but Congress had adjourned only until October 30.

⁹ *See, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787) (expressing regret that he had been unable to come to New York “during the adjournment” because a broken carriage had impaired his travel “during the recess”), *reprinted in* 3 Farrand, RECORDS OF THE FEDERAL CONVENTION 76; 3 Farrand, *supra*, at 191 (recounting a 1787 speech by Luther Martin in which he discussed matters that occurred “during the recess” of the Convention); *see also* 2 Farrand, *supra*, at 128.

State legislatures employed the same usage. The Pennsylvania and Vermont Constitutions authorized state executives to issue trade embargoes “in the recess” of the legislature. *See* Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. 2, § XVIII. Both provisions were invoked during legislative recesses that were not preceded by *sine die* adjournment or its equivalent and that were therefore intrasession recesses in common parlance.¹⁰ And in 1775, the New York legislature appointed a “Committee of Safety” to act “during the recess” of the legislature; the referenced recess was a 14-day intrasession one.¹¹

This understanding of the constitutional text is further reinforced by subsequent congressional practice under the Senate Vacancies Clause. The Clause allowed state governors to “make Temporary Appointments” of Senators “if Vacancies happen * * * during *the Recess* of the Legislature of any State.” Art. I, § 3, cl. 2 (emphasis added). Under this provision, the Governor of New Jersey appointed a Senator during an intrasession recess in 1798, and the Senate accepted

¹⁰ *See, e.g.*, 11 MINUTES OF THE SUPREME EXEC. COUNCIL OF PA. 545 (Theo Fenn & Co., 1852) (August 1, 1778 embargo); 1 J. OF THE H.R. OF PA. 209-11 (recessing from May 25, 1778 to September 9, 1778); 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VT. 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 J. & PROCEEDINGS OF THE GENERAL ASSEMB. OF THE STATE OF VT. 235 (P.H. Gobie Press, Inc., 1924) (recessing from April 16, 1781 to June 13, 1781). In both cases, the next annual legislative session did not commence until October. *See* Pa. Const. of 1776, sec. 9; Vt. Const. of 1777, ch. II, sec. VII.

¹¹ 2 A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA 1346-48 (Peter Force, ed., 1839).

the commission without objection.¹² The absence of objection is telling, for the Senate has a long history of objecting to—and ousting—members it believed were invalidly appointed, and in so doing, often looked to the minutiae of state legislative practices. *See generally* Butler & Wolf, *United States Senate Election, Expulsion and Censure Cases: 1793-1990* (1995).

This interpretation also best serves the purpose of the Recess Appointments Clause, which is to ensure that the President may fill vacant offices when the Senate is unavailable to offer advice and consent on nominations, while also freeing the Senate from having “to be continually in session for the appointment of officers.” *The Federalist* No. 67, at 410 (Clinton Rossiter ed., 1961) (Alexander Hamilton).¹³ The Senate is just as unavailable to provide advice and consent during an intrasession recess as it is during an intersession one, and the need to fill vacancies is just as great. Indeed, intrasession recesses often last longer than

¹² *See* 8 *Annals of Cong.* 2197 (Dec. 19, 1798) (noting that Franklin Davenport, “appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature * * * took his seat in the Senate”); N.J. LEGIS. COUNCIL J., 23rd Sess. 20-21 (1798-99) (intrasession recess between November 8, 1798 and January 16, 1799).

¹³ *See also* 5 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 242 (Jonathan Elliot, ed., 2d ed. 1836) (ELLIOT’S DEBATES) (Charles Cotesworth Pinckney) (expressing concern that Senators would settle where government business was conducted). The Clause also enables the President to meet his continuous constitutional responsibility to “take Care that the Laws be faithfully executed.” U.S. Const. art. II, § 3; *see also* 4 ELLIOT’S DEBATES 135-36 (Archibald Maclaine) (explaining that the power “to make temporary appointments * * * can be vested nowhere but in the executive”).

intersession ones. *See Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken “zero-day intersession recesses” as well as “intrasession recesses lasting months”). And in modern Senate practice, intrasession recesses account for more of the Senate’s absences than intersession recesses. *See Congressional Directory*, *supra*, at 530-37.

By contrast, Flex-N-Gate’s position would apparently empower the Senate unilaterally to eliminate the President’s recess appointment authority even when the Senate is unavailable to advise and consent, simply by recasting an adjournment *sine die* as an equally long adjournment to a date certain. For example, the 82nd Congress’s second session ended on July 7 when Congress adjourned *sine die*, and the President was able to make appointments from then until January 3, when the next session of Congress began pursuant to the 20th Amendment. *Congressional Directory*, *supra*, at 529. If the Senate had adjourned from July 7 to a date immediately before the next congressional session (say, January 2), the break would have been equally long, but it would have constituted an intrasession recess, during which the President would have been powerless to make recess appointments under Flex-N-Gate’s theory. The Framers could hardly have intended such a result. Rather, the Framers must have intended the Senate’s practical unavailability to control in that hypothetical setting, despite the Senate’s

efforts to elevate form over substance in the manner of adjourning and reconvening.

Finally, the longstanding historical practice of the Executive Branch, in which the Legislative Branch has acquiesced, further supports the government's interpretation. The Supreme Court has stressed that "[t]raditional ways of conducting government give meaning to the Constitution," and "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Mistretta v. United States*, 488 U.S. 361, 401 (1989); *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Instead of giving "great weight" to this vast and settled body of practice, the *Noel Canning* court looked to the fact that no intrasession recess appointment had been documented before 1867. 705 F.3d at 501-03. But until the Civil War, there were no intrasession recesses longer than 14 days, and only a handful that even exceeded three days. *See Congressional Directory, supra*, at 522-25. Lengthy intrasession recesses were relatively infrequent until the mid-20th Century. *See id.* at 525-28. Thus, the early rarity of intrasession recess appointments most likely reflects the early rarity of intrasession recesses beyond three days.

b. *Noel Canning* reasoned that the Clause's reference to "*the* Recess of the Senate" confines the Clause to intersession recesses because it "suggests specificity." 705 F.3d at 500 (emphasis added). But as the *en banc* Eleventh

Circuit explained, the word “the” can also refer generically to a *class* of things, *e.g.*, “The pen is mightier than the sword,” rather than a specific thing, *e.g.*, “The pen is on the table.” *See Evans*, 387 F.3d at 1224-25 (citing dictionary usages). In context, it is obvious that the Framers used the word “the” in its former sense, as referring to *all* periods during which the Senate is unavailable to conduct business, rather than a *specific* one.¹⁴

Contrary to *Noel Canning*’s suggestion, 705 F.3d at 505, this usage is not solely a modern one. The Constitution itself elsewhere uses “the” to refer to a class of things. For example, the Adjournment Clause requires both the House and Senate to consent before adjourning for more than three days “during *the Session* of Congress.” Art. I, § 5, cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to “the Session” cannot be limited to a single one. Similarly, the Constitution directs the Senate to choose a temporary President “in *the Absence* of the Vice President,” Art. I, § 3, cl. 5 (emphasis added), a directive that applies to all Vice Presidential absences rather

¹⁴ Indeed, it is apparent that even the *Noel Canning* court could not have meant to use the definition of “the” on which it purported to rely. *See Noel Canning*, 705 F.3d at 500 (“‘the’ [is] an ‘article noting a *particular* thing’” (quoting Johnson, *supra* at 2041)). *Noel Canning* did not read “the Recess of the Senate” as referring to a particular recess in the same way that “the pen on the table” refers to a particular pen. Instead, it read “the Recess” as referring generically to the *class* of all intersession recesses. Once that Rubicon is crossed, “the” provides no textual basis for drawing a constitutional line between a restrictive class of recesses limited to intersession ones, and a broader class that includes intrasession ones as well.

than one in particular. Nor is that contemporaneous usage confined to the Constitution. *See supra* pp. 28-29.

The fact that the Clause uses the singular “Recess” rather than the plural “Recesses,” *Noel Canning*, 705 F.3d at 499-500, 503, is equally inapposite. The Senate is constitutionally required to have at least two enumerated sessions per Congress, *see* Amend. XX, and in the 18th and 19th Centuries, the Senate regularly had three or four enumerated sessions. *See generally* Congressional Directory, *supra*, at 522-26. Thus, the Senate regularly had at least two intersession “Recesses” per Congress.

c. The Executive Branch and the Senate have long employed a common functional definition of “the Recess of the Senate,” a definition that is equally applicable to intersession and intrasession recesses. *Compare* 33 Op. Att’y Gen. at 21-22, 25 (1921 opinion noting that the “essential inquiry” looks to whether the adjournment is “of such duration that the members of the Senate owe no duty of attendance;” whether the Senate’s “chamber [is] empty;” and whether the Senate is “absent so that it can not receive communications from the President or participate as a body in making appointments”), *with* S. Rep. No. 58-4389, at 2 (1905) (Senate Judiciary Committee report looking to similar factors).¹⁵ *Noel Canning* com-

¹⁵ The Senate’s modern parliamentary precedents continue to cite the 1905 report as an authoritative source “on what constitutes a ‘Recess of the Senate.’” *See*

plained that the “inherent vagueness” of this functional definition “counsels against it.” 705 F.3d at 504. But in the context of the Constitution’s provisions allocating powers among the Branches, there is nothing novel or objectionable about a test that may result in close cases at the margins. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 670-72 (1988) (applying a multi-factor test under which the distinction between principal and inferior officers under the Appointments Clause is “far from clear”).

Noel Canning also concluded that the Constitution treats a “recess” and a “session” as mutually exclusive, so that the Senate cannot have a recess during a session. *See* 705 F.3d at 500-01. *Noel Canning* derived this supposed dichotomy from the fact that the Clause provides that recess appointments expire at the end of the Senate’s “next” session. But the fact that recess appointments terminate at the end of the Senate’s “next Session” says nothing about whether a recess can occur within an enumerated session. *Noel Canning* viewed the specified termination point as conclusive evidence that the Framers anticipated that the recess appointment power could be invoked only between enumerated congressional sessions. *Ibid.* (citing Federalist No. 67). But as shown above, intrasession recesses were a recognized legislative practice at the time of the Framing. If the Framers meant to exclude them, they would hardly have expressed that intent in

such an oblique manner, through the provision setting the termination date for the appointments. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) (“Congress * * * does not, one might say, hide elephants in mouseholes.”).

Because the Constitution sometimes uses the verb “adjourn” or the noun “adjournment,” rather than “recess,” the *Noel Canning* decision also inferred that the term “recess” must have a meaning narrower than “adjournment.” *Noel Canning*, 705 F.3d at 500. But to the extent that these terms were distinguished from one another during the Framing Era, the distinction was not the one that *Noel Canning* perceived. The Framers used “adjournment” to refer to the “act of adjourning,” 1 Oxford English Dictionary, *supra*, at 157 (emphasis added), and used “recess” to refer to the “period of cessation from usual work,” 13 Oxford English Dictionary, *supra*, at 322 (emphasis added). Compare, e.g., Art. I, § 7, cl. 2 (Pocket Veto Clause) (“unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law”) with Art. II, § 2, cl. 3 (“[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate”).¹⁶ Thus, when the Continental Congress convened a committee “during the recess,” it did so under an intrasession “adjournment.” 27 J.

¹⁶ That understanding is reinforced by the fact that, at the time of the Framing, the word “recess” was generally not used as a verb, as that function was instead performed by the word “adjourn.” See Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LawNLinguistics.com, Feb. 19, 2013, at <http://lawninguistics.com/2013/02/19/the-recess-appointments-clause-part-1/>.

Continental Cong. 1774-1789, at 555-56. And to the extent that “adjournment” was used at that time to refer to breaks in legislative business, rather than to the act of adjourning, it was used interchangeably with “recess.” For instance, George Washington used the terms “recess” and “adjournment” in the same paragraph to refer to the same 10-day break in the Constitutional Convention. *See, e.g.*, Letter from Washington, *supra* (expressing regret that he had been unable to come to New York “during the adjournment” because a broken carriage had impaired his travel “during the recess”).

In any event, the government’s position is consistent with the possibility that “recess” may be narrower than “adjournment,” and with the conclusion that the Recess Appointments Clause does not apply to the period following all adjournments. The Adjournment Clause makes clear that the action of taking even an extremely short break counts as an “adjournment,” *see* Art. I, § 5, cl. 4 (recognizing that breaks of less than three days are still “adjourn[ments]”), but the Executive has long understood that such short breaks that do not genuinely render the Senate unavailable to provide advice and consent do not trigger the President’s authority under the Recess Appointments Clause. 33 Op. Att’y Gen. at 22.

2. The President may fill all Vacancies during a Recess, not just Vacancies that arise during that Recess

Flex-N-Gate also asserts that the President lacked the authority to make the January 2012 recess appointments because they did not arise during a recess. The

theory that the President may fill only vacancies that arise during a recess has been considered and rejected by three courts of appeals, two of them sitting en banc. *See Evans*, 387 F.3d at 1226-27 (11th Cir.) (*en banc*); *Woodley*, 751 F.2d at 1012-1013 (9th Cir.) (*en banc*); *Allocco*, 305 F.2d at 709-715 (2d Cir.). *Noel Canning's* contrary conclusion is erroneous.

a. The Recess Appointments Clause states that “[t]he President shall have Power to fill up all Vacancies *that may happen* during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3 (emphasis added). Nearly two hundred years ago, Attorney General Wirt advised President Monroe that this language encompasses all vacancies that exist during a recess, including those that arose beforehand. He pointed out that “happen” is an ambiguous term, which could be read to mean “happen to occur,” but “may mean, also * * * ‘happen to exist.’” 1 Op. Att’y Gen. 631, 632 (1823). He explained that the “exist” interpretation rather than the “occur” interpretation is more consonant with the Clause’s purpose of “keep[ing] these offices filled,” *id.*, and the President’s duty to take care of public business. Accordingly, “all vacancies which * * * *happen to exist* at a time when the Senate cannot be consulted as to filling them, may be temporarily filled.” *Id.* at 633 (emphasis added).

Attorney General Wirt’s interpretation fits the durational nature of vacancies. While the event that *causes* a vacancy, such as a death or resignation, may “happen” at a single moment, the resulting vacancy itself continues to “happen” until the vacancy is filled. *Accord* Johnson, *supra*, at 2122 (defining “vacancy” in 1755 as the “[s]tate of a post or employment when it is unsupplied”); *see* 12 Op. Att’y Gen. 32, 34-35.¹⁷ That durational usage accords with common parlance. For example, it would be conventional to say that World War II “happened” during the 1940s, even though the war began on September 1, 1939. And the durational sense of “happen” is all the more appropriate when asking if one durational event (a vacancy) happens in relation to another (a recess). Thus, although some eighteenth century dictionaries defined “happen” with a variant of “come to pass,” *Noel Canning*, 705 F.3d at 507, as applied to a durational event like a vacancy, that definition is consistent with Attorney General Wirt’s interpretation.

For nearly two centuries, the Executive Branch has followed the opinion provided by Attorney General Wirt to President Monroe, himself one of the Founding Fathers, and Congress has consistently acquiesced. *See Allocco*, 305 F.2d at 713-14. As noted above, such a longstanding and uncontroverted

¹⁷ *See also* Hartnett, *Recess Appointment of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 381-84 (2005) (giving examples of events that “happen” over an extended period).

interpretation is entitled to “great weight” in “determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.” *The Pocket Veto Case*, 279 U.S. at 688-90.

This interpretation is also consistent with Executive Branch practice reaching back to the first Administration. President Washington made at least two recess appointments that would have run afoul of the rule proposed by Flex-N-Gate and adopted in *Noel Canning*. In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position created by a statute enacted in April 1792.¹⁸ Under *Noel Canning*'s interpretation, the vacancy did not “happen” during the recess because it arose when the statute was first passed, and was then filled up during a later recess after at least one intervening session.¹⁹ And in October 1796, Washington recess appointed William Clarke to be the United States Attorney for Kentucky, even though the position had gone

¹⁸ 27 THE PAPERS OF THOMAS JEFFERSON 192 (John Catanzariti, ed. 1990); S. Exec. J., 3rd Cong., 1st Sess., 142-43 (1793) (indicating that the office of Engraver was previously unfilled); 1 Stat. 246.

¹⁹ Scot's appointment was occasioned by Joseph Wright's death. 27 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 192. Wright, however, apparently was never formally commissioned to serve in that office, and even if he had been, it would have also been during the same recess in which Scot was appointed, and after at least one intervening session (in which case Wright's commission would have run afoul of *Noel Canning*). See 17 Am. J. Numismatics 12 (Jul. 1883); Fabian, JOSEPH WRIGHT, AMERICAN ARTIST, 1756-1793, at 61 (1985).

unfilled for nearly four years.²⁰ President Washington's immediate successor, John Adams, expressed the same understanding as the government does today (as did apparently the fourth President, James Madison, and possibly also the third, Thomas Jefferson).²¹

This long-settled interpretation is also more consistent with the purpose of the Recess Appointment Clause. If an unanticipated vacancy arises shortly before the beginning of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination, while the Senate remains in session. Moreover, the slowness of long-distance communication in the 18th Century meant that the President might not even have *learned* of such a vacancy until after the Senate's recess began. *See* 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant for months during a recess merely because news of the death during the session had not

²⁰ Dep't of State, *Calendar of Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Tachau, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816*, at 65-73 (1979).

²¹ *See* Letter from John Adams to James McHenry (April 16, 1799), *reprinted in* 8 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* ("ADAMS WORKS") 632-33; Letter from James McHenry to Alexander Hamilton (April 26, 1799), *reprinted in* 23 *THE PAPERS OF ALEXANDER HAMILTON* 69-71 (H.C. Syrett ed., 1976); Letter from John Adams to James McHenry (May 16, 1799), *reprinted in* 8 *ADAMS WORKS*, at 647-48; Hartnett, *supra*, at 391-401.

reached the Nation's capital until after the Senate was already in recess. Flex-N-Gate's position, by contrast, would make the President's ability to fill offices turn on the fortuity of when the previous holder left office. But "[i]f the [P]resident needs to make an appointment, and the Senate is not around, when the vacancy arose hardly matters; the point is that it must be filled now." Herz, *Abandoning Recess Appointments?*, 26 *Cardozo L. Rev.* 443, 445-46 (2005).

b. Flex-N-Gate's position also creates serious textual difficulties. If, as Flex-N-Gate urges, the phrase "during the Recess of the Senate" were read to modify the term "happen," and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and would be unavailable to limit the *time* when the President may exercise his "Power to fill up" those vacancies through granting commissions. As a result, Flex-N-Gate's reading would mean that the President would retain his power to fill the vacancy that arose during the recess *even after the Senate returns from a recess*, an interpretation that cannot possibly be correct. *See* 12 *Op. Att'y Gen.* at 38-39 (criticizing the "happen to arise" interpretation for this reason). The government's interpretation does not suffer from this defect. It allows for "during the Recess of the Senate" to delimit the President's "Power to fill up" all "Vacancies."

Noel Canning contended that the government's interpretation renders the words "that may happen" superfluous. *See* 705 F.3d at 507. But in the Framing

era, the words “that may happen” could be appended to the word “vacancies” without signifying any apparent additional meaning. *See, e.g.*, George Washington, General Order to the Continental Army, Jan. 1, 1776 (“The General will, upon any Vacancies that may happen, receive recommendations, and give them proper consideration[.]”). In any event, the government’s reading does not necessarily render any words superfluous. Without the phrase “that may happen,” the Clause could be read to enable the President to fill up known future vacancies, such as when an official tenders a resignation in advance of its effective date. Construing “that may happen” as the Executive has long read it confines the President to filling up vacancies in existence at the time of the recess.

Noel Canning also relied on a 1792 opinion from Attorney General Randolph that endorsed the “happen to arise” interpretation. *See* 705 F.3d at 508-09. Randolph’s opinion has been thoroughly repudiated by a long line of Attorney General opinions dating back to 1823, *see Allocco*, 305 F.2d at 713, and it is not clear that any President ever found the advice wholly persuasive. As noted above, even George Washington, to whom Randolph gave his advice, departed from it on more than one occasion. At most, Randolph’s opinion shows an early “difference of opinion,” Letter from John Adams to John McHenry (May 16, 1799), *reprinted in* 8 *Adams Works*, *supra*, at 647, regarding an ambiguous constitutional provision.

Any such early differences were resolved by Attorney General Wirt's 1823 opinion, which has been adhered to consistently for nearly two hundred years.

Noel Canning also dismissed Congress's longstanding acquiescence in the Executive Branch's interpretation as a departure from a position supposedly expressed in an 1863 statute. *See* 705 F.3d at 509. But far from rejecting the Executive's interpretation, the 1863 statute acknowledged it. *See* 16 Op. Att'y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. And in any event, Congress subsequently amended the statute to permit such appointees to be paid under certain conditions. *See* Act of July 11, 1940, 54 Stat. 751.

Finally, *Noel Canning* attempted to minimize the damaging consequences of its decision by suggesting that Congress could more broadly provide for "acting" officials. *See* 705 F.3d at 511. The very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some positions (*e.g.*, Article III judgeships) cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting

officials to fill other positions for an extended period of time, such as Cabinet level positions or positions on boards designed to be politically balanced.²²

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT FLEX-N-GATE VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR UNION PREFERENCE, PROMISING BENEFITS IF EMPLOYEES DID NOT SUPPORT THE UNION AND THREATENING TO DISCHARGE EMPLOYEES FOR THEIR UNION ACTIVITIES

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) grants employees the right to “self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted

²² Even if the Recess Appointments Clause were confined to vacancies that arise during a recess, this Court would nevertheless be required to uphold the Board’s order, because under the facts found by *Noel Canning* the appointment of the only recess appointee on the panel that issued the challenged order—Sharon Block—met that purported requirement. The other two panel members, Brian Hayes and Mark Pearce, were Senate-confirmed members of the Board.

Member Block’s seat was previously held by Craig Becker. *Noel Canning* understood Becker’s recess appointment to have terminated pursuant to the Recess Appointments Clause “at the end” of the Senate’s session—at noon on January 3, 2012. *See* 705 F.3d at 512. *Noel Canning* nevertheless appears to have erroneously regarded Becker’s appointment as having ended *during* the Senate’s earlier session. *Id.* at 513. That view cannot be squared with the Recess Appointments Clause’s provision regarding the termination date of appointments. If Becker occupied the position until the end of the Senate’s session, the vacancy Block filled could not have arisen in that same session. By definition, the vacancy must have arisen *after* the earlier recess appointment ended at the end of the session—*i.e.*, during the recess. The appointment of Block on January 4 was thus made during that same period in which the vacancy she filled had arisen.

activities for the purpose of collective bargaining or other mutual aid or protection.” Those rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which provides that “it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights.

“[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). The test is objective – that is, whether the employer’s questions or statements tend to be coercive, “not whether the employees were in fact coerced.” *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 560 (5th Cir. 2003). Factors the Board considers 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; *see also Tellepsen Pipeline*, 320 F.3d at 561 (setting forth circuit’s analogous *Bourne* test).

Section 8(c) of the Act (29 U.S.C. § 158(c)) permits an employer to express “any views, argument, or opinion,” without it being an unfair labor practice, provided that “such expression contains no threat of reprisal or force or promise of

benefit.” However, “Section 8(a)(1) prohibits an employer from questioning employees about their union involvement or how they plan to vote in a representation election if, under the totality of the circumstances, the interrogation tends to coerce employees in the exercise of their right to organize under [S]ection 7 of the Act.” *Tellepsen Pipeline*, 320 F.3d at 560. Moreover, in finding that an employer’s statements constitute an unlawful promise of benefits, there is no requirement of an express statement that particular benefits would be given in exchange. *Dow Chem. Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1981). The Act is violated by statements from which promises may reasonably be inferred. *Id.*

B. The Board Reasonably Found that Flex-N-Gate Interrogated Employees by Asking if They Wanted “No means no” Stickers

Substantial evidence supports the Board’s finding (D&O 5) that Flex-N-Gate interrogated employees in violation of Section 8(a)(1) by asking employees if they wanted an anti-union “No means no” sticker. Supervisor Workman and IT manager Lee asked employee Lloyd daily, and sometimes several times a day, if he wanted a sticker, although he had declined their previous offers to take one. (Tr. 191-92, 318.) Similarly, during the campaign Workman and superintendent Johnson approached Garcia, whom Johnson directly supervised, and offered him a sticker. (Tr. 302, 318.) And in the week before the election, floor supervisor Bates

once or twice asked employee Nickerson if he wanted a sticker, which he declined. (Tr. 286-87.)

The Board reasonably found (D&O 5) that Workman's, Bates' and Lee's conduct was unlawful because they pressured Lloyd, Garcia and Nickerson into making an observable choice about their union preference by asking them if they wanted an anti-union sticker. In making this finding, the Board relied (D&O 4-5) on established precedent that an employer violates the Act when its distribution of paraphernalia coerces an employee into visibly manifesting a choice for or against a union in the presence of a supervisory official. *See Tappen Co.*, 254 NLRB 656, 656 (1981); *Garland Knitting Mills*, 170 NLRB 821, 821 (1968), *enforced*, 414 F.2d 1214 (D.C. Cir. 1969), *cert. denied*, 398 U.S. 951 (1970). The Board, with court approval, has consistently found such conduct unlawful. *See, e.g., Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 842 (7th Cir. 2000) (administrator hung anti-union poster which included spaces for employees to sign); *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, 2011 WL 7052272, at *4 (2011) (supervisor, acting through employee, distributed anti-union shirts and beanies); *Barton Nelson, Inc.*, 318 NLRB 712, 712-12 (1995) (supervisors distributed anti-union hats); *Lott's Elec. Co.*, 293 NLRB 297, 297, 304 (1989) (supervisor distributed "Vote No" buttons).

Contrary to Flex-N-Gate's claims (Br. 27), it is irrelevant that Luckie allegedly told supervisors only to give stickers to employees who asked for them, that he was unaware of any actions contrary to his instruction, and that no employees complained. Garcia and Nickerson offered un rebutted testimony that supervisors offered stickers to them (D&O 5), and the judge reasonably credited Lloyd's testimony that Lee and Workman repeatedly offered him a sticker over Lee's denial (D&O 5; Tr. 447), a determination Flex-N-Gate does not challenge. *See Dynasteel Corp.*, 476 F.3d at 257 (credibility determinations upheld as valid unless shown otherwise). Although Flex-N-Gate claims (Br. 27) that "Nickerson confirmed no supervisor ever asked him to wear a sticker," Nickerson testified that "Henry" offered him a sticker. (Tr. 296-97.) Henry Bates, an admitted supervisor (Tr. 318), did not testify to dispute Nickerson's account. Finally, the cases cited (Br. 27) by Flex-N-Gate, including ones the Board found inapplicable (D&O 5), are factually distinguishable because the employees themselves requested the paraphernalia, *Philips Indus., Inc.*, 295 NLRB 717, 733 (1989); *Daniel Constr. Co.*, 266 NLRB 1090, 1100 (1983), or voluntarily elected to wear it. *Wm. T. Burnett & Co.*, 273 NLRB 1084, 1092-93 (1984); *McIndustries, Inc.*, 224 NLRB 1298, 1300 (1976); *Jefferson Stores, Inc.*, 201 NLRB 672, 673, 676 (1973).

C. Substantial Evidence Supports the Board's Finding that Flex-N-Gate Interrogated an Employee About His Union Preference and Promised Benefits if He Did Not Support the Union

Substantial evidence also supports the Board's finding (D&O 7) that Flex-N-Gate violated Section 8(a)(1) when Luckie interrogated employee Castaneda about his union preference and promised Castaneda unspecified benefits if he did not support the Union. In September before the election (D&O 1 n.1), Castaneda twice went to Luckie's office to discuss incidents involving a forklift. (Tr. 312.) During one conversation, which lasted 15 minutes and took place behind closed doors, Luckie asked Castaneda how he felt about the Union, to which he replied that he had no knowledge about it. (Tr. 306.) During another conversation, Luckie asked Castaneda whether he wanted the Union and Luckie told Castaneda that he did not want him to support the Union. (Tr. 308.) Castaneda asked Luckie "what is better," and Luckie told him that employees made decent money at the facility and that if Castaneda had a problem, he should come to Luckie and Flex-N-Gate would resolve it. (*Id.*) Only Luckie and Castaneda were present for both conversations. (Tr. 306.)

Given these facts, the Board reasonably found (D&O 7) that Luckie's interrogation of Castaneda was coercive. Indeed, Luckie, the highest-ranking official at the facility, twice questioned Castaneda about his union preferences, and once did so behind closed doors. *See Tellepsen Pipeline*, 320 F.3d at 561; *Poly-*

Am., Inc. v. NLRB, 260 F.3d 465, 486 (5th Cir. 2001). There was no evidence that Castaneda was a known union supporter (D&O 7) and Luckie failed to convey any valid purpose for questioning Castaneda about his union preference. *See Tellepsen Pipeline*, 320 F.3d at 561. Moreover, Luckie never assured Castaneda that there would be no reprisals if Castaneda elected to exercise his right to support the Union. *See Tellepsen Pipeline*, 320 F.3d at 561; *Poly-Am.*, 260 F.3d at 486. In fact, Luckie conveyed an unlawful purpose when he told Castaneda that he did not want him to support the Union and promised unspecified benefits if Castaneda did not. *Cf. Tellepsen Pipeline*, 320 F.3d at 561 (coercive questioning coupled with threat of reprisal).

The Board also reasonably found (D&O 7) that Luckie unlawfully promised Castaneda unspecified benefits in exchange for not supporting the Union when Luckie told Castaneda that if he had a problem, he should come to Luckie and Flex-N-Gate would resolve it. (Tr. 308.) Luckie made this promise within the same conversation that he told Castaneda he did not want him to support the Union. (*Id.*) Although Luckie did not expressly say what benefit would be conferred, the context shows that Luckie was willing to render a special favor in exchange for Castaneda not supporting the Union. *See Dow Chem.*, 660 F.2d 644.

Flex-N-Gate asserts (Br. 29) that Castaneda voluntarily went to Luckie's office and there was no evidence of coercion. Castaneda, however, went to discuss

incidents involving forklifts, but both times Luckie turned the conversation into an interrogation of Castaneda about his union preference. (Tr. 306, 308, 312.)

Moreover, Luckie went well beyond the type of speech permitted by Section 8(c) when he unlawfully promised benefits to Castaneda if he did not support the Union.

D. The Board Reasonably Found that Flex-N-Gate Threatened To Terminate Rainey and Irving Because of Their Union Activities

The Board also found (D&O 8, 9-10) that Flex-N-Gate violated Section 8(a)(1) when Lee threatened Rainey and Irving. Specifically, in a conversation with Lloyd prior to the election, supervisor Lee threatened that Rainey and Irving were “taking it too far” with their union activities and that they “don’t have a long life at [Flex-N-Gate] if they keep up all the things they’re doing, because they’re nothing but problems.” (D&O 9-10; Tr. 194.) In its brief, Flex-N-Gate does not specifically address whether Lee’s threats violated Section 8(a)(1). (Br. 27-29.) It only discusses Lee’s threats in relation to the Board’s finding that they are evidence of animus under Section 8(a)(3). (Br. 17-19.) Flex-N-Gate, therefore, has waived this issue, and the Board is therefore entitled to summary enforcement. *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008).

Regardless, given Lee’s express threat that Rainey and Irving would be discharged if they continued to actively support the Union, substantial evidence supports the Board’s finding that Flex-N-Gate violated Section 8(a)(1) by threatening

employees engaged in protected activity, notwithstanding that Lee made the threats in a conversation with Lloyd. *See, e.g., Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 255 (5th Cir. 1983); *Delchamps, Inc. v. NLRB*, 585 F.2d 91, 94 (5th Cir. 1978).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT FLEX-N-GATE VIOLATED SECTION 8(a)(3) AND 8(a)(1) OF THE ACT BY DISCHARGING RAINEY, IRVING AND LLOYD BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) provides that it shall be an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” An employer therefore violates Section 8(a)(3) and (1) when it discharges an employee for engaging in protected union activity.²³ *Valmont Indus.*, 244 F.3d at 463.

The analysis in an unlawful discharge case is governed by the test the Board articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 89 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and the Supreme Court approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, if substantial evidence supports the Board’s finding that the employer knew of an employee’s protected activity and that

²³ A violation of Section 8(a)(3) produces a “derivative” violation of Section 8(a)(1). *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

protected activity was “a motivating factor” in the employer’s adverse action, the Board’s finding of a violation must be affirmed, unless the record compels the conclusion that the employer would have taken the same action against the employee even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 295, 397-403. *Accord Valmont Indus.*, 244 F.3d at 464-65. When the Board reasonably finds that the employer’s proffered justification for its action is only a pretext, there is no remaining basis for determining whether the employer would have taken the same action in the absence of the employee’s protected activity. *Marathon LeTourneau*, 699 F.2d at 252; *Wright Line*, 251 NLRB at 1083-84.

Accordingly, the central inquiry under *Wright Line* is the employer’s motivation for taking the adverse action. 251 NLRB at 1089. However, “[s]ince an employer rarely admits that it discharged an employee for engaging in protected . . . activities, the [Board] may rely on circumstantial evidence in determining an employer’s actual motive.” *Elec. Data Sys. Corp. v. NLRB*, 985 F.2d 801, 804-06 (5th Cir. 1993) (quoting *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 313 (5th Cir. 1988)). The Board may, therefore, infer unlawful motive by relying on circumstantial evidence, including the questionable timing of the action, other unfair labor practices, anti-union bias and the shifting, contrived or implausible nature of the employer’s proffered reason for its action. *Valmont Indus.*, 244 F.3d

at 465 (citing cases); *NLRB v. Adco Elec., Inc.*, 6 F.3d 1110, 1118-19 & n.6 (5th Cir. 1993) (same). An employer's knowledge of an employee's protected union activity likewise may be inferred from circumstantial evidence. *See, e.g., Poly-Am.*, 260 F.3d at 489-90.

B. The Board Reasonably Found that Flex-N-Gate Unlawfully Discharged Rainey, Irving and Lloyd Due to Their Protected Union Activity

Applying the established *Wright Line* test, the Board reasonably found that Flex-N-Gate unlawfully discharged Rainey, Irving and Lloyd due to their protected union activity. (D&O 1 n.1, 12.) Substantial evidence supports the Board's finding (D&O 1 n.1, 9) that Flex-N-Gate knew of their union activity and the Board's finding (D&O 12) that Flex-N-Gate's decision to discharge them was unlawfully motivated by union animus, which are the only aspects of the Board's *Wright Line* analysis challenged in Flex-N-Gate's brief. (Br. 13-23.)

1. Substantial evidence shows that Flex-N-Gate knew of Rainey, Irving and Lloyd's union activity

In order to find under *Wright Line* that Flex-N-Gate unlawfully discharged Rainey, Irving and Lloyd, the Board must find, relying on either direct or circumstantial evidence, that Flex-N-Gate knew of their protected union activity. *Poly-Am.*, 260 F.3d at 489. Substantial evidence supports the Board's finding (D&O 1 n.1, 8-9) that Flex-N-Gate knew of Rainey's, Irving's and Lloyd's union

activity because knowledge of their union activity can be imputed to general manager Connolly, the ultimate decision-maker.

Rainey and Irving openly demonstrated their support of the Union, including in the presence of supervisors and management. As active members of the organizing committee, they passed out union flyers at the workplace and solicited fellow employees to attend union meetings and sign authorization cards. (Tr. 58-59, 120, 123-25.) Rainey directly informed superintendents Mitchell and Holland that he contacted the Union about representing Flex-N-Gate's workers, and both supervisors witnessed Rainey passing out leaflets and soliciting employees. (Tr. 59-60.) Rainey and Irving also openly advocated on behalf of the Union at Flex-N-Gate's mandatory meetings, during which they spoke out against Flex-N-Gate's anti-union messages in the presence of supervisors and management. (Tr. 70-71, 128-31.) In the weeks before the election, Rainey and Irving visibly demonstrated their union support by wearing numerous pro-union buttons and customized pro-union shirts every day to work. (Tr. 60-65, 120-23, GCX 5, 6, 7, 8.)

Lloyd also vocally and visibly supported the Union. Two weeks before the election, Lloyd wore a yellow union button to one of Flex-N-Gate's mandatory meetings, which attracted the attention of human resources manager Schmidt. (Tr. 189, 191, GCX 7.) After twice asking if Lloyd was "alright" while eyeing the button, Schmidt returned to a group that included Luckie, said something, and the

group collectively turned and looked at Lloyd. (Tr. 189.) At another meeting attended by management, including Luckie, Lloyd interjected when a supervisor asked a fellow employee why he supported the Union, stating that the employee did not have to respond to the question. (Tr. 203, 207-08.) Lloyd also repeatedly declined to accept one of Flex-N-Gate's "No means no" anti-union stickers from supervisors Workman and Lee. (Tr. 191-92.)

Connolly also was aware of the details of the union campaign. He communicated with Luckie on a daily basis and he visited the Arlington facility once or twice a month, including during the campaign. (Tr. 377-78, 389.) Connolly knew that the Union filed an election petition and he was informed of the ensuing campaign, including developments such as employees wearing pro-union shirts. (Tr. 389.) Although he did not work at the Arlington facility daily, Connolly knew the names of almost three-quarters of the employees. (Tr. 377-78.) Throughout the campaign, Connolly attended some of Flex-N-Gate's mandatory meetings (Tr. 128, 200), the type of meetings where Rainey and Irving regularly advocated on behalf of the Union and challenged Flex-N-Gate's anti-union message. (Tr. 70-71, 128-31.) During one of his visits, Connolly specifically asked Lloyd to explain his problems with the situation at the facility, and in response to Lloyd's answer, Connolly stated that it "seems like it's the team leaders that have all the problems" (Tr. 184.)

Not surprisingly, Luckie specifically testified that he knew Rainey, Irving and Lloyd supported the Union. (Tr. 339.) And, as the Board explicitly found (D&O 1 n.1), Luckie “had direct input into the decision to discharge the three employees.” Luckie’s involvement was contemporaneous with Connolly’s initial decision in late August to terminate several team leader positions, and his direct involvement continued through the process of determining how many positions to eliminate and which specific employees to discharge. (Tr. 333-36, 369, 379-84, 388.) Although Luckie “didn’t make the final decision,” he admittedly “was involved in the process” (Tr. 333), and Connolly testified that he and Luckie made the decision together. (Tr. 379.)

Given the extensive and open union activity, Luckie’s firsthand knowledge of Rainey’s, Irving’s and Lloyd’s union activity, and Connolly’s knowledge of the union campaign and daily communications with Luckie about the Arlington facility, there is no merit to Flex-N-Gate’s assertion (Br. 14-17) that the Board erred by “mechanically imput[ing]” knowledge of union activity to Connolly. Established circuit precedent permits the Board to find that a decision maker, despite his denial, had knowledge of an employee’s union activity on the basis of the same types of circumstantial evidence relied on by the Board. *See, e.g., Poly-Am.*, 260 F.3d at 489-90 (imputing knowledge to manager when supervisors knew of employee’s union activity, regular “information flow” of personnel matters

existed from supervisors to manager, and supervisors and manager had close, daily working relationship); *Delchamps*, 585 F.2d at 94 (permissible to impute knowledge to decision-maker if evidence shows supervisor with knowledge involved in adverse action or communicated with decision-maker); *Schill Steel Products*, 340 F.2d 568, 572 (5th Cir. 1965) (imputing knowledge to foreman when employee actively supported union, including serving on organizing committee and soliciting authorization cards, supervisors interrogated the employee about his union activity, and employee admitted to supervisor he was a union leader).

Flex-N-Gate's criticism (Br. 14-15) of the judge's reliance on *GATX Logistics, Inc.*, 323 NLRB 328, 333 (1997), *enforced*, 160 F.3d 35 (7th Cir. 1998), fails to further its cause. Contrary to Flex-N-Gate's claims, that case applied the well-established principle that in certain circumstances an employer's knowledge can be inferred from a lower-level supervisor's actual knowledge. *See id.*; *see also Vulcan Basement Waterproofing of Ill., Inc. v. NLRB*, 219 F.3d 677, 685 n.7 (7th Cir. 2000) (employer's knowledge in *GATX* not mechanically imputed but properly inferred from evidence). Consistent with this, the judge here provided a detailed analysis of circumstantial evidence (D&O 8-9, 11-12) upon which she imputed knowledge to Connolly and, in adopting the judge's finding, the Board further explicated the relevant evidence and bolstered that analysis. (D&O 1 n.1.)

Similarly, despite Flex-N-Gate's assertion (Br. 13-17), the judge did not "effectively eviscerate the General Counsel's burden of proof" under *Wright Line* or require Flex-N-Gate "to disprove knowledge." (Br. 17.) The judge's decision clearly states (D&O 8, 9, 12) that the General Counsel bore the burden of establishing that Flex-N-Gate knew of Rainey's, Irving's and Lloyd's union activity, and the Board reiterated this principle when adopting the decision. (D&O 1 n.1.) Likewise, contrary to Flex-N-Gate's claim (Br. 16), the judge also did not "presume" Connolly knew of the union activity because of the small plant doctrine. The judge simply observed that the Arlington facility had 80 employees and that it would be reasonable to infer that Connolly would know which employees openly supported the Union. (D&O 9.) This is consistent with Connolly's testimony that he knew the names of almost three-quarters of the Arlington employees (Tr. 377-78), and that he visited the Arlington facility once or twice a month, including during the election campaign. (Tr. 377-78, 389.)

2. Substantial evidence shows that Flex-N-Gate's decision to discharge Rainey, Irving and Lloyd was motivated by union animus

Substantial evidence also supports the Board's finding (D&O 12) that Flex-N-Gate's decision to discharge Rainey, Irving and Lloyd was motivated by union animus. First, the Board reasonably found (D&O 10, 12) the violations of Section 8(a)(1), discussed above, as well as statements and conduct by management and

supervisors showed Flex-N-Gate's union animus. *See Adco Elec.*, 6 F.3d at 1118 n.6 (open hostility to union is "significant" indicator of union animus); *NLRB v. McCullough Env'tl. Servs., Inc.*, 5 F.3d 923, 937 (5th Cir. 1993) (unfair labor practices evidence of animus); *NLRB v. Brookwood Furniture*, 701 F.2d 452, 465 (5th Cir. 1983) (discharge considered against backdrop of employer's established animosity to union). As shown, supervisor Lee threatened that Rainey and Irving "don't have a long life at [Flex-N-Gate] if they keep up all the things they're doing" (Tr. 194), and Connolly told Lloyd that it seemed as if team leaders had "all the problems." (Tr. 184.)

Additionally, shortly after the announcement that the Union lost the election, Lee exited the IT office, smiled at Rainey and Irving as they stood with a group of union supporters wearing pro-union shirts and buttons, and gestured at them by raising his hands or arms as he walked past. (Tr. 74-75, 137-38, 159-60.) Lee's expression and gesture conveyed a powerful negative sentiment to Rainey, whom he directly supervised, and Irving. (D&O 10; Tr. 75, 137-38, 159-60.) Also following the election, Luckie told Irving that he was "highly disappointed" in him for voting for the Union (Tr. 126, 422), because he felt that Irving, as a team leader, had been disloyal to management and had "jumped ship." (Tr. 422.)

Second, the Board reasonably found that the timing of Flex-N-Gate's decision to eliminate the positions held by Rainey, Irving and Lloyd demonstrated

its union animus. (D&O 10, 12.) The Union filed its election petition on August 11, 2010. (GCX 31.) Shortly thereafter, Rainey began wearing his union shirt. (Tr. 62.) The testimony of Connolly and Luckie show that Connolly first decided to eliminate several “team leader” positions in late August 2010, while supervising the Arlington facility during Luckie’s vacation. (Tr. 334, 336, 369, 380-83.) After the September 22 election, Connolly, in consultation with Luckie, decided to terminate Rainey, Irving and Lloyd, (Tr. 382, 336) and approximately a week later on November 5, Luckie informed each of them that they were discharged. (Tr. 138-40, 76, 210, GCX 2, 12, 14, 20.) The initial decision to eliminate team leaders, as well as the ensuing discussions between Connolly and Luckie, however, occurred on or about the same time that the Union filed the election petition and Rainey began wearing his union shirt. *McCullough Env’tl. Servs.*, 5 F.3d at 937 (timing evidence of animus when employee disciplined 1 month after testifying before administrative law judge); *Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1435 (5th Cir. 1991) (timing evidence of animus when company changed subcontractor only after learning of union’s election petition).

Third, the Board reasonably found (D&O 12) that Flex-N-Gate’s proffered reason for the discharge, an alignment of staffing levels and planned reduction in force, was pretextual. Indeed, despite its claim that it constantly reviewed staffing levels, Flex-N-Gate presented no evidence as to how or when it conducted such

reviews. (D&O 11; Tr. 62, 334-36, 369, 380-84, GCX 31.) Further, Connolly allegedly determined that Rainey's, Irving's and Lloyd's positions should be eliminated on the basis of his review of two documents – one showing staffing levels for disparate job classifications across Flex-N-Gate's many operations (JCX 1), and the other listing ratios of employees to supervisors at Flex-N-Gate's various facilities. (JCX 2.) In explaining his use of the documents, Connolly simply testified that he considered team leaders similar to supervisors, that he reviewed the number of supervisors at the Ada facility, and that he then determined the ratio of employees to team leaders at the Arlington facility was much higher than the ratio of employees to supervisors at the Ada plant. (Tr. 386-87, JX 2.) The Ada facility, however, had no team leaders (JX 1(b)), and Connolly provided no explanation why the Ada and Arlington facilities were comparable or how equating supervisors and team leaders was relevant to a determination of a proper ratio of employees to supervisors for the purpose of a reduction in force. Flex-N-Gate, moreover, previously had not eliminated team leader positions as part of a staffing alignment or reduction in force. (D&O 11; Tr. 169, 237.) And, except for the elimination of positions held by Rainey, Irving and Lloyd, all other team-leader positions were retained. (D&O 1; Tr. 330.) The inconsistency between Flex-N-Gate's reason and its actions is accepted evidence of animus, as is Flex-N-Gate's failure to credibly support its claim, which undermines the plausibility of its

proffered reason for the discharges. *See, e.g., Tellepsen Pipeline*, 320 F.3d at 565 (inconsistency and implausibility accepted evidence of animus).

In claiming that its decision was not motivated by animus, Flex-N-Gate first asserts (Br. 17-23) that the Board erred in finding that Lee's threats and gesture and Luckie's statement are evidence of animus. As to Lee's threats, Flex-N-Gate's claim (Br. 18) that they were "stray remarks" and referred to earlier disciplinary issues between Lee and Rainey, is undermined by evidence that the threats occurred prior to the election, during a conversation between Lee and Lloyd about the union campaign, and referred to both Rainey *and* Irving. (Tr. 194.) In addition, contrary to Flex-N-Gate's claim (Br. 17), Lee's threats support a finding of animus regardless of whether he was a "low-level" supervisor uninvolved in Connolly's decision. *See Brookwood Furniture*, 701 F.2d at 460, 465 (foreman's threat evidence of employer's union animus, despite no role in decision to terminate).

Moreover, with regard to Lee's gesture, in reconciling the testimony of Rainey and Irving, the judge reasonably credited the portions of each that conveyed the same essential facts, namely, that Lee raised his hands and/or arms and gestured towards Rainey and Irving, and that Lee's gesture conveyed a powerful, negative sentiment. (D&O 10; Tr. 74-75, 137-38, 159-60.) *See Trencor, Inc. v. NLRB*, 180 F.3d 264 (5th Cir. 1999) (per curium) (judge reasonably may

accept portions of testimony consistent with other testimony and decline to accept divergent portions). Although Flex-N-Gate emphasizes (Br. 18-19) that Lee denied making the threats or gesture, it fails to show that the judge unreasonably discredited his denials. In resolving conflicting evidence and evaluating the credibility of witnesses, particularly as to animus, the judge's determinations, as adopted by the Board (D&O 1 n.1), are entitled to "special deference." *See Brookwood Furniture*, 701 F.2d at 464.

There is similarly no merit to Flex-N-Gate's claims (Br. 20-21) that Luckie's statement cannot constitute evidence of animus because it is "devoid of any context, date or time frame." Because Luckie referred to Irving's vote, he necessarily made the statement after the election but before Irving's termination. Regardless of the precise date, the Board reasonably found that it evinces animus because it reflected Luckie's feeling that Irving's pro-union vote was disappointing and disloyal. (D&O 12; Tr. 126, 422.)

Flex-N-Gate's second assertion (Br. 21-23), that the timing of its decision "actually favor[s] the Company's position," also fails. The evidence shows that the Union filed the election petition on August 11 (GCX 31), Rainey began wearing his union shirt shortly afterward (Tr. 62), and during the third week of August, while supervising the facility during Luckie's vacation, Connolly decided to eliminate several team leader positions. (Tr. 334, 336, 369, 380-83.)

Connolly's initial decision, therefore, occurred on or about the same time that Flex-N-Gate became aware of the union campaign. This timing reasonably serves as evidence of animus. *See Texas World Serv.*, 928 F.2d at 1435.

Flex-N-Gate's final assertion (Br. 22-24), that the judge failed to consider evidence that the terminations were part of a "continuous streamlining, efficiency or 'lean manufacturing' process," and were consistent with its employee handbook, is undermined by the foregoing discussion of the Board's finding (D&O 12) that Flex-N-Gate's proffered reason is pretextual. Furthermore, although Flex-N-Gate posits that it "followed its employee handbook" (Br. 23) when selecting Rainey, Irving and Lloyd for discharge, the Board reasonably rejected this claim (D&O 11) because it did so only after deciding to eliminate several team leader positions in the wake of the Union filing the election petition and the commencement of the organizational campaign. (Tr. 62, 334-36, 369, 380-84, GCX 31.)

Accordingly, because the Board reasonably found that Flex-N-Gate's proffered justification for its action is pretextual, there is no remaining basis for determining under *Wright Line* whether it would have taken the same action in the absence of the employee's protected activity. *See Marathon LeTourneau*, 699 F.2d at 252; *Wright Line*, 251 NLRB at 1083-84.

C. Substantial Evidence Supports the Board’s Finding that Flex-N-Gate Failed to Carry Its Burden of Proving that Rainey, Irving and Lloyd Are Supervisors Under the Act

Flex-N-Gate claims that its decision to discharge Rainey, Irving and Lloyd is not unlawful because they are statutory supervisors and, therefore, excluded from the Act’s protection. The Board reasonably rejected Flex-N-Gate’s claim.

1. Applicable principles

Section 2(3) of the Act excludes “any individual employed as a supervisor” from the statutory definition of “employee.” 29 U.S.C. § 152(3). In turn, 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.

29 U.S.C. § 152(11). These criteria are listed in the disjunctive, so possession of one renders an individual a supervisor. *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

Authority, however, is only supervisory within the meaning of the Act if it is exercised with “independent judgment.” *Id.*; *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001). In the seminal case *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692-93 (2006), the Board clarified that “to exercise ‘independent judgment,’ an individual must at a minimum act, or effectively recommend action,

free of the control of others and form an opinion or evaluation by discerning and comparing data.” The Board further explained that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693 (footnote omitted).

The burden of demonstrating supervisory status rests with the party asserting it. *Dynasteel Corp.*, 476 F.3d at 257-58. To carry its burden, the party must establish supervisory status by a preponderance of the evidence. *See, e.g., Frenchtown Acquisition Co., Inc. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). Supervisory status must be proven by the criteria set forth in Section 2(11); various non-statutory “secondary indicia” are relevant only if one primary criterion is established. *See, e.g., Frenchtown Acquisition*, 683 F.3d at 315; *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1081 (10th Cir. 2005). “Supervisory status is not construed broadly because those deemed supervisors lose rights which the Act seeks to protect.” *Entergy Gulf States*, 253 F.3d at 208. Accordingly, “this [C]ourt has repeatedly declined to merely second guess Board determinations regarding supervisory status.” *Adco Elec.*, 6 F.3d at 1117 (internal quotation marks omitted). “Whether an employee is a supervisor is a question of fact.” *Id.*

2. The Board reasonably found that Flex-N-Gate failed to carry its burden of proving that Rainey, Irving and Lloyd are statutory supervisors

In a cursory paragraph devoid of any citations to supporting evidence in the record, Flex-N-Gate contends (Br. 26) that it is “clear” that Rainey, Irving and Lloyd, are supervisors. Substantial evidence, however, supports the Board’s finding (D&O 14) that Flex-N-Gate failed to carry its burden of showing that team leaders Irving and Lloyd and IT technician Rainey were statutory supervisors.

First, despite its claim (Br. 26), Flex-N-Gate failed to adduce evidence showing that Rainey, Irving or Lloyd possessed any authority to assign team members to a place, time or task, or to adjust their teams on the basis of their own authority or with the exercise of independent judgment to meet “hotshot orders.” (D&O 13, 14.) *See Oakwood Healthcare*, 348 NLRB at 689 (to “assign” means to designate an employee to a specific physical place or appoint to a specific work time, or to give significant overall duties to). Luckie simply asserted that team leaders can assign employees work on a daily as well as longer term basis. (Tr. 420.) Substantial evidence, however, shows that Irving and Lloyd received daily instructions from their supervisors regarding set assignments for their team and merely relayed the instructions to their team. (Tr. 116, 119, 145, 180-81, 186, 216, 218). *See NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1279 (5th Cir. 1986) (editors not supervisors when, with respect to assignments, they “serve primarily as a

conduit for those decisions already made by the coverage manager”). Only team leaders’ supervisors possessed authority to assign employees to positions on the production line. (Tr. 119, 145, 186, 218.) Luckie in fact testified that team leaders cannot add to or change the set production schedule. (Tr. 421.) In performing their duties, team leaders simply make routine decisions that are part of the production process. (D&O 14; Tr. 116, 146, 180-81.) Although team leaders continue to operate their lines if a supervisor is offsite, they consult with them over the telephone if any issue arises. (Tr. 148-49, 440-41.) Similarly, hotshot orders are first reviewed by a supervisor, who then assigns it to a team leader and his team to fulfill. (Tr. 87-90, 181.) A team leader’s only task is to ensure that the hotshot order is completed in the specified timeframe. (Tr. 421.)

As the only IT technician, Rainey was responsible for utilizing his skills and training to complete his assigned task of maintaining Flex-N-Gate’s computers and software. (Tr. 83, 85, 86.) Rainey worked alone, did not assign work to any other employee (Tr. 83), his job description listed no discretionary or supervisory functions (RX Q), and Flex-N-Gate failed to offer any evidence to the contrary. (D&O 13-14.)

Second, Flex-N-Gate failed to prove its claim (Br. 26) that team leaders are accountable for their teams’ work and that they are disciplined for their teams’ mistakes. (D&O 13-14.) *See KDFW-TV*, 790 F.2d at 1278 (to be supervisor, one

must be “held fully accountable and responsible for the performance and work product of the employees” that one directs); *Oakwood Healthcare*, 348 NLRB at 689 (same) (citing *KDFW-TV*, 790 F.2d at 1278). Once again, Flex-N-Gate primarily relied on Luckie’s unsupported assertions, (Tr. 418-19, 421) but substantial evidence shows to the contrary. (Tr. 119, 186, 187.) The only evidence put forward by Flex-N-Gate that any team leader was ever disciplined for their teams’ mistakes is a 2009 verbal written warning given to Irving when his team shipped an incorrect order – the only warning given to Irving during 4 years as team leader. (Tr. 158-59, RX K.) The Board reasonably found (D&O 13) that this was an isolated incident and therefore insufficient to show that Flex-N-Gate holds team leaders accountable. Similarly, as the only IT technician, Rainey worked alone and without a team (Tr. 83), and Flex-N-Gate offered no evidence that he was accountable for, or disciplined because of, other employees’ work. (D&O 13-14.)

Third, Flex-N-Gate also failed to prove its claim (Br. 26) that Rainey, Irving and Lloyd are supervisors because they “made recommendations about who to hire, fire or discipline.”²⁴ (D&O 13-14.) In making this argument, Flex-N-Gate fails to mention the mandatory requirement under Section 2(11) that an employee must “effectively [be able] to recommend” these actions in order to be considered a

²⁴ Luckie admitted that team leaders do not have the authority to hire, fire or to discipline other employees. (Tr. 355.)

supervisor. *See KDFW-TV*, 790 F.2d at 1279 (editors not supervisors because could not effectively recommend discharging employees). Other than Luckie's assertion that he seeks team leaders' input (Tr. 419-20), Flex-N-Gate failed to introduce evidence showing that Rainey, Irving and Lloyd ever effectively recommended that an employee be hired, fired or disciplined. (D&O 13-14.)

Substantial evidence in fact shows that none of the three had the ability to effectively recommend any of these actions. Rainey testified that he had no role in hiring employees and that he had never disciplined an employee. (Tr. 57, 109.) Irving and Lloyd testified that they could theoretically recommend that Flex-N-Gate hire a candidate, but that Flex-N-Gate retained sole discretion to do so. (Tr. 150, 188.) *Adco Elec.*, 6 F.3d at 1117 (veteran employee recommending someone for hire is "nothing more than what Adco, or any other employer, would expect from experienced employees" and does not make supervisor); *NLRB v. Sec. Guard Serv., Inc.*, 384 F.2d 143, 148 (5th Cir. 1967) (ability to make recommendations does not show supervisory status).

Irving and Lloyd also credibly testified that they simply documented employee misconduct and then relayed it to a supervisor for resolution and the imposition of any discipline. (Tr. 153, 154, 156, 166, 168, 186.) *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 500 (5th Cir. 1992) (employee not "effectively" recommending discipline when he merely reported facts and

management imposed any discipline required). Luckie concurred, stating that team leaders report any employee's job failings to their supervisor. (Tr. 355.) The one piece of evidence (RX J) put forward by Flex-N-Gate actually undercuts its position. The evidence, which ironically involved Irving documenting Rainey talking and disrupting his line, shows that Irving simply recorded Rainey's conduct in order for it to be addressed by a supervisor and that Irving did not even make a recommendation as to potential discipline. (Tr. 154-56, 166, RX J.)

Finally, Flex-N-Gate relies on several secondary indicia (Br. 26) in claiming that Rainey, Irving and Lloyd are supervisors. Absent established primary indicia, however, secondary indicia are insufficient to prove supervisory status.

Nevertheless, as to training, Rainey testified without dispute that he did not train anyone. (Tr. 84.) Although Irving and Lloyd helped employees on their lines and trained new line employees (Tr. 116, 146, 149), a senior, experienced employee guiding or instructing inexperienced or new workers does not render that employee a statutory supervisor. *See, e.g., Adco Elec.*, 6 F.3d at 1117 (veteran employee occasionally guiding and instructing new apprentices does not elevate him to supervisor); *NLRB v. Am. Cable Sys., Inc.*, 414 F.2d 661, 665 (5th Cir. 1969) ("trusted employee who was appointed by the general manager to . . . train new employees" not supervisor under Act).

Further, although Rainey, Irving and Lloyd were compensated more than production employees (D&O 13, 14; Tr. 48, GCX 11 page 11), that single secondary indicia does not establish supervisory status. *See, e.g., NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 643 (5th Cir. 1986) (receiving higher pay as “leadman” did not make employee supervisor). Likewise, although team leaders attended some management meetings, Flex-N-Gate put forth no evidence as to the nature or frequency of the meetings, and Lloyd testified without contradiction that Flex-N-Gate started excluding team leaders from some meetings when the organizing campaign commenced. (Tr. 182-83.) Finally, although Flex-N-Gate claims (Br. 26) that Rainey, Irving and Lloyd are supervisors because they received Company radios and email addresses (Tr. 99, 440), these are not recognized secondary indicia, *see, e.g., Poly-Am.*, 260 F.3d at 479; *Monotech of Miss. v. NLRB*, 876 F.2d 514, 518 (5th Cir. 1989), and Flex-N-Gate fails to explain why they are relevant to such an analysis.²⁵ Accordingly, substantial evidence shows that Rainey, Irving and Lloyd were not statutory supervisors and, therefore, Flex-N-Gate’s decision to discharge them was unlawful.

²⁵ Flex-N-Gate’s claim (Br. 26) that the judge erred in relying on its failure to challenge team leaders voting in the election, is misplaced. The judge merely referenced this undisputed fact when evaluating Luckie’s assertion that Flex-N-Gate considers team leaders part of management (D&O 13), and did not reference it again or rely on it as “persuasive evidence” in finding that Rainey, Irving and Lloyd, were not supervisors. (D&O 13-14.)

CONCLUSION

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

Respectfully submitted,

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

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

JARED D. CANTOR
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-0016

MARCH 2013

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

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FLEX-N-GATE TEXAS, LLC)		
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Petitioner/Cross-Respondent)		
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v.)	Nos. 12-60567	
)	12-60619	
NATIONAL LABOR RELATIONS BOARD)		
)	Board Case Nos.	
Respondent/Cross-Petitioner)	16-CA-27742	
)	16-CA-27790	
and)		
)		
INTERNATIONAL UNION, UNITED AUTOMOTIVE)		
AND AGRICULTURAL IMPLEMENT WORKERS)		
OF AMERICA)		
)		
Intervenor)		
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

John T. L. Koenig
Barnes & Thornburg LLP
Prominence in Buckhead
3475 Piedmont Road N.E.
Suite 1700
Atlanta, Georgia 30305-2954

Samuel Morris, Esq.
Timothy Taylor, Esq.
Goodwin, Morris, Laurenzi
& Bloomfield, P.C.
50 N. Front Street, Suite 800
Memphis, TN 38103

/S/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th St., NW
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, DC
this 15th day of March 2013

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)	
Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 17,998 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, are identical to the hard copy of the Board's brief filed with the court and served on the Petitioner/Cross-Respondent.

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According to that program, the CD-ROM is free of viruses.

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

Date at Washington, D.C.
this 15th day of March 2013