

Nos. 13-684-ag (L) & 13-1240-ag (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner – Cross Respondent

v.

833 CENTRAL OWNERS CORP.

Respondent – Cross Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Statement of issues.....	2
Statement of the case.....	3
I. Statement of facts	4
A. The Company and its operations	4
B. Shikarchy hired as superintendent and joins the Company’s anti-Union campaign.....	5
C. The turning point: Shikarchy’s change of heart	7
D. Constantly harassed, Shikarchy files a grievance to protect himself; the Company responds with warnings and a 3-day suspension	8
E. The Company orders Shikarchy to renounce the Union; Shikarchy ignores the Company’s ultimatum and is fired	11
II. The Board’s Conclusions and Order	12
Summary of argument.....	13
Standard of review	15
Argument.....	16
I. The Board is entitled to summary enforcement of all Section 8(a)(1) violations because, with respect to some, the Company did not file exceptions before the Board and because, with respect to others, the Company failed to contest them in its opening brief	16

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by warning, suspending and discharging Shikarchy because of his Union activity	18
A. Applicable legal principles	18
B. Substantial evidence supports the Board’s finding that the Company unlawfully warned, suspended and discharged Shikarchy because he engaged in protected Union activity	21
C. Substantial evidence supports the Board’s finding that the Company failed to meet its <i>Wright Line</i> burden of showing that Shikarchy would have been warned, suspended and discharged even in the absence of protected conduct because the Company’s proffered reasons were pretextual and not in fact relied upon	23
III. The President’s recess appointments to the Board are valid.....	28
A. The President’s recess-appointment authority is not confined to inter-session recesses of the Senate	29
1. The constitutional text authorizes appointments during intra-session recesses	30
2. Intra-session recess appointments are necessary to serve the purposes of the Recess Appointments Clause	34
3. Long-standing practice supports intra-session recess appointments....	38
B. The Senate is in “recess” for purposes of the Recess Appointments Clause when, for 20 days, a Senate order provides for only fleeting, concededly “pro forma” sessions at which “no business” is to be conducted	42

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
1. The Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process.....	43
2. Despite the <i>pro forma</i> sessions, the 20-day period at issue here bore the hallmarks of a recess	45
3. The mere possibility that the Senate might suspend its “no business” order during the 20-day period did not prevent that period from constituting a recess.....	49
4. Even assuming the <i>pro forma</i> sessions could satisfy the Senate’s other constitutional obligations, they impermissibly disrupt the balance struck by Article II	52
C. The President may fill any vacancy that exists during a Senate recess.....	56
Conclusion	57

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abbey's Transp. Servs., Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988)	15, 18, 20, 23
<i>Embassy Vacation Resorts</i> , 340 NLRB 846 (2003).....	27
<i>Evans v. Stephens</i> , 387 F.3d 1220 (11th Cir. 2004)	40
<i>Gaetano & Assocs. v. NLRB</i> , 183 F. App'x 17 (2d Cir. 2006)	18
<i>Garcia v. Hartford Police Dep't</i> , 706 F.3d 120 (2d Cir. 2013)	17
<i>Golden State Foods Corp.</i> , 340 NLRB 382 (2003).....	19
<i>Gould v. United States</i> , 19 Ct. Cl. 593 (1884).....	39
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	41
<i>KBI Sec. Serv., Inc. v. NLRB</i> , 91 F.3d 291 (2d Cir. 1996)	17
<i>Laro Maint. Corp. v. NLRB</i> , 56 F.3d 224 (D.C. Cir. 1995).....	19, 27
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989)	40
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	56

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	35, 55
<i>N.Y. Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998)	18
<i>NLRB v. 833 Cent. Owners Corp.</i> , No. 12-CV-5502, 2012 WL 6021507 (E.D.N.Y. Dec. 4, 2012).....	4
<i>NLRB v. Am. Geri-Care, Inc.</i> , 697 F.2d 56 (2d Cir. 1982)	26, 28
<i>NLRB v. City Disposal Sys. Inc.</i> , 465 U.S. 822 (1984)	21
<i>NLRB v. Enterprise Leasing Co.</i> , 722 F.3d 609 (4th Cir. 2013)	29, 36
<i>NLRB v. G & T Terminal Packaging Co.</i> , 246 F.3d 103 (2d Cir. 2001)	15, 19
<i>NLRB v. J. Coty Messenger Serv., Inc.</i> , 763 F.2d 92 (2d Cir. 1985)	16
<i>NLRB v. Katz's Delicatessen of Houston St., Inc.</i> , 80 F.3d 755 (2d Cir. 1996)	15
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941)	19
<i>NLRB v. Long Island Airport Limousine Serv. Corp.</i> , 468 F.2d 292 (2d Cir. 1972)	20
<i>NLRB v. New Vista Nursing & Rehab.</i> , 719 F.3d 203 (3d Cir. 2013), <i>petition for reh’g pending</i> (filed July 1, 2013; stayed July 15, 2013).....	29, 31, 32, 33, 36, 55

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988)	20
<i>NLRB v. Thalbo Corp.</i> , 171 F.3d 102 (2d Cir. 1999)	20, 23
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983)	19
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013), <i>cert. granted</i> 133 S. Ct. 2861 (June 24, 2013)	29, 33, 35, 38
<i>Office & Prof’l Emps. Int’l Union v. NLRB</i> , 981 F.2d 76 (2d Cir. 1992)	18
<i>Pergament United Sales, Inc. v. NLRB</i> , 920 F.2d 130 (2d Cir. 1990)	20
<i>The Pocket Veto Case</i> , 279 U.S. 655 (1929)	41, 44, 45
<i>Shattuck Denn Mining Corp. v. NLRB</i> , 362 F.2d 466 (9th Cir. 1966)	28
<i>Torrington Extend-A-Care Emps. Ass’n v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994)	17, 18, 20
<i>UAW v. NLRB</i> , 520 F.3d 192 (2d Cir. 2008)	15
<i>United States v. Allocco</i> , 305 F.2d 704 (2d Cir. 1962).....	29, 35, 41, 56
<i>United States v. Midwest Oil Co.</i> , 236 U.S. 459 (1915)	41

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>United States v. Smith</i> , 286 U.S. 6 (1932)	48, 49
<i>United States v. Woodley</i> , 751 F.2d 1008 (9th Cir. 1985)	56
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	15
<i>USF Red Star, Inc. v. NLRB</i> , 230 F.3d 102 (4th Cir. 2000)	28
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	17
<i>Wright v. United States</i> , 302 U.S. 583 (1938)	36, 45
<i>Wright Line, a Div. of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 89 (1st Cir. 1981)	19, 28
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	41
United States Constitution	Page(s)
U.S. Const. Art. I, § 5, Cl. 4	34, 36, 42
U.S. Const. Art. I, § 7, Cl. 2	33, 42, 44
U.S. Const. Art. II, § 2, Cl. 2	55
U.S. Const. Art. II, § 2, Cl. 3	29, 30, 34, 37, 55
U.S. Const. Art. II, § 3	35, 50, 55
U.S. Const. amend. XX, § 2	36
U.S. Const. amend. XXV, § 4	42

TABLE OF AUTHORITIES

Statutes	Page(s)
National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.)	
Section 7 (29 U.S.C. § 157)	16
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 12, 16, 17, 18, 22, 27
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2, 3, 12, 18
Section 8(c) (29 U.S.C. § 158(c))	16
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	1, 2, 15, 17
Section 10(f) (29 U.S.C. § 160(f))	1, 2
Section 10(j) (29 U.S.C. § 160(j)).....	4
Attorney General Opinions	Page(s)
23 Op. Att’y Gen. 599 (1901).....	39
33 Op. Att’y Gen. 20 (1921).....	36, 40, 43, 44
Office of Legal Counsel Opinions	Page(s)
6 Op. O.L.C. 585 (1982)	40
16 Op. O.L.C. 15 (1992)	36
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Comptroller General Opinion	Page(s)
28 Comp. Gen. 30 (1948)	40

TABLE OF AUTHORITIES

Legislative Materials	Page(s)
Articles of Confederation of 1781	
Art. IX, Para. 5	32
Art. X, Para. 1	32
Congressional Research Service	
Henry B. Hogue, <i>Intrasession Recess Appointments</i> (2004).....	38
Christopher M. Davis, <i>Memorandum re: Calling Up Measures on the Senate Floor</i> (2011)	51
5 Cong. Rec. 333 (1876)	53, 54
133 Cong. Rec. 15,445 (1987).....	52
151 Cong. Rec. 19,417 (2005).....	50
157 Cong. Rec. S14 (Jan. 5, 2011)	47
157 Cong. Rec. S5297 (Aug. 5, 2011).....	49
157 Cong. Rec. S8783 (Dec. 17, 2011)	45, 46, 48
157 Cong. Rec. S8789 (Dec. 23, 2011)	49
158 Cong. Rec. S3 (Jan. 6, 2012)	46
158 Cong. Rec. S5 (Jan. 10, 2012)	46
158 Cong. Rec. S7 (Jan. 13, 2012)	46
158 Cong. Rec. S9 (Jan. 17, 2012)	46
158 Cong. Rec. S11 (Jan. 20, 2012)	46
158 Cong. Rec. S13 (Jan. 23, 2012)	46
158 Cong. Rec. S37 (Jan. 23, 2012)	47, 48
158 Cong. Rec. S41 (Jan. 23, 2012)	47
158 Cong. Rec. S5954 (Aug. 2, 2012).....	45, 49
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20 <i>Early State Papers of New Hampshire</i> (Albert Stillman Barchellor ed., 1891).....	33
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TABLE OF AUTHORITIES

Legislative Materials – Cont’d	Page(s)
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<i>Journal of the South Carolina General Assembly and House of Representatives 1776-1780</i> (William Edwin Hemphill et al. eds., 1970)	37
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5th Sess., 2nd Sitting (1781)	32
13 <i>The State Records of North Carolina</i> (Walter Clark ed., 1896).....	37
S. Rep. No. 4389, 58th Cong., 3d Sess. (1905)	39, 43, 47
Senate Rule IV, para. 1(a).....	47
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2 <i>A Documentary History of the English Colonies in North America 1346-1348</i> (Peter Force Ed., 1839).....	32
1 Blackstone, <i>Commentaries on the Laws of England</i> 180 (1765)	31
Sen. Tom Coburn, <i>Holding Spending</i> , available at www.coburn.senate.gov/public/index.cfm/holdingspending	31
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TABLE OF AUTHORITIES

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<i>J. Continental Cong. 1774-1789</i> (Gaillard Hunt ed., 1928)	
Vol. 26.....	32
Vol. 27.....	34
Thomas Jefferson, <i>A Manual of Parliamentary Practice</i> (1812)	30, 32, 46
2 Samuel Johnson, <i>A Dictionary of the English Language</i> (1755)	30-31
<i>NLRB v. Noel Canning</i> , No. 12-1281 (S. Ct.), available at www.justice.gov/osg/briefs/2013/3mer/2mer/20121281.mer.aa.pdf	38, 40
<i>Oxford English Dictionary</i> (2d ed. 1989)	
Vol. 1.....	33
Vol. 13.....	30, 31, 33
<i>Oxford English Dictionary Single Volume</i> (3d ed. June 2007), available at www.oed.com	45
<i>The Papers of Thomas Jefferson</i>	
Vol. 17 (Julian P. Boyd ed., 1965).....	53
<i>The Records of the Federal Convention of 1787</i> (Max Farrand ed., rev. ed. 1966)	
Vol. 1.....	37
Vol. 2.....	32
Vol. 3.....	32
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833 CENTRAL OWNERS CORP.

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the application for enforcement of the National Labor Relations Board (“the Board”), and the cross-petition for review of 833 Central Owners Corp. (“the Company”), of the Board’s Decision and Order issued on February 13, 2013, and reported at 359 NLRB No. 66. The Board’s Decision and Order is final with respect to all parties under Section 10(e) and (f) of

the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., 160(e) and (f).¹

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

STATEMENT OF ISSUES

1. Is the Board entitled to summary enforcement of the uncontested portions of its Order?
2. Does substantial evidence in the record as a whole support the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by warning, suspending and discharging employee Ezra Shikarchy because of his union-related activities?
3. Were the President’s recess appointments to the Board valid?

¹ Relevant portions of the Act are included in the Special Appendix to this brief.

STATEMENT OF THE CASE

This case originated when Local 621, United Workers of America (“the Union”), filed unfair labor practice charges against the Company. (D&O 3.)² The Board’s Acting General Counsel investigated these charges and issued a complaint alleging that the Company violated Section 8(a)(1) and 8(a)(3) of the Act, 29 U.S.C. § 158(a)(1) and 158(a)(3). (*Id.*) An administrative law judge held a hearing and found that the Company committed five separate violations of Section 8(a)(1) by threatening employee Ezra Shikarchy with reprisals for engaging in union activities, and by impliedly promising Shikarchy benefits to dissuade him from engaging in union activities. (D&O 9-10.) The judge further found that the Company violated Section 8(a)(3) and (a)(1) by warning, suspending and discharging Shikarchy because of his union activities. (D&O 10-11.) The Board affirmed the judge’s findings over the Company’s exceptions. (D&O 1-2.) The Board has applied to this Court for enforcement of its Order, and the Company has cross-petitioned for review.

While the Company’s exceptions were pending before the Board, the Regional Director for Region 29 petitioned the United States District Court for the

² “D&O” references are to the Board’s Decision and Order, which is located at pages 1-12 of the Special Appendix to this brief. “A” references are to pages of the Joint Appendix filed with the Company’s opening brief. Where applicable, references preceding a semicolon are to the Board’s findings, as set forth in the D&O; references following a semicolon are to the supporting evidence.

Eastern District of New York, pursuant to Section 10(j) of the Act, 29 U.S.C. § 160(j), to enjoin the Company from continuing its violations of the Act. *Paulsen ex rel. NLRB v. 833 Cent. Owners Corp.*, No. 12-CV-5502, 2012 WL 6021507 (E.D.N.Y. Dec. 4, 2012). The district court granted the injunction and ordered, *inter alia*, that the Company reinstate Shikarchy as superintendent. *Id.* at *6.

I. STATEMENT OF FACTS

A. The Company and Its Operations

The Company manages a cooperative apartment building in the Far Rockaway neighborhood of Queens, New York. (D&O 3.) The building has 56 units (D&O 3; A 74-75), a majority of which are occupied by senior citizens (D&O 3; A 70). The Company operates through a board of directors elected by the cooperative apartment owners. (D&O 3; A 243-44.) At all relevant times, Walter Berger was the Company's treasurer, Mark Hertzberg was the president of the board and Steven Friedman was a board member, and all were agents of the Company within the meaning of the Act. (D&O 3; A 406, 550.1, 550.8.)

The Company employs 7 staff members, including porters, doormen and a live-in superintendent, who provide service 24 hours a day, 7 days a week. (D&O 3; A 244-45.) All staff, including the superintendent, is represented by the Union. (D&O 3; A 97-98, 244.) The most recent collective-bargaining agreement between

the Company and the Union expired in November 2010. At the time of the hearing in this case, the parties were negotiating a successor agreement. (D&O 3; A 98.)

The Company employs Benedict Realty Group, LLC (“BRG”), to manage day-to-day operations in the building. (D&O 3; A 128, 242-45, 406.) BRG employee Jeffrey Herskovitz serves as property manager and supervises the Company’s employees, including the superintendent. (*Id.*) Herskovitz is an agent of the Company within the meaning of the Act. (*Id.*)

B. Shikarchy Hired as Superintendent and Joins the Company’s Anti-Union Campaign

In February 2010, on the recommendation of board member Friedman, the Company hired Ezra Shikarchy as superintendent. (D&O 3; A 127, 178-79.) Shikarchy’s duties included performing repairs and ordering supplies, scheduling and monitoring other employees, overseeing maintenance of the property, and hiring outside contractors when necessary. (D&O 6, 7; A 245, 247, 249.) He was paid \$17.50 per hour and received an apartment in the building as part of his compensation. (D&O 3-4; A 127, 245.) Shikarchy worked a 40-hour week, typically Monday through Friday from 7 a.m. to 3 p.m. (D&O 3; A 127-28, 255), and remained on call at all other times (D&O 3; A 128). Because Shikarchy was in the midst of a divorce and custody battle, the Company allowed him to travel on Fridays to New Jersey without worktime deductions so he could enjoy visitation rights with his children. (D&O 6; A 255-56.)

About 6 weeks after Shikarchy's hiring, Friedman told him the Company planned to install security cameras so that doormen and other unionized workers would no longer be needed and could be fired. (D&O 4; A 134, 183.) He told Shikarchy that union people were "very bad" and that the Union was costing the Company a lot of money. (D&O 4; A 133-34.) Shikarchy believed Friedman and decided to take the Company's side against the Union. (D&O 4; A 134, 136.)

In August 2010, Friedman directed Shikarchy to harass employee Kenny Boykin until he could be fired for doing something wrong. (D&O 4; A 136, 179, 182-83.) Friedman said Boykin should be fired because he was lazy and a member of the Union. (D&O 4; A 179-80, 183-84.) Stephen Sombrotto, the Union president, heard about the harassment from Boykin and assumed Shikarchy was the Company's henchman. (D&O 4; A 103-04.) Later that month, Boykin was fired along with another employee, Jason Gomez. (D&O 4; A 78.) Friedman and Shikarchy lobbied the Company to replace Boykin with Friedman's son, Joseph, so he could spy on the Union. (D&O 4; A 130-31, 182-83, 185-86.)

The Union filed a grievance concerning the Boykin/Gomez discharges and, in December 2010, Shikarchy went with Hertzberg and Herskovitz to meet with the Union and discuss settling the matter. (D&O 4; A 134-35.) Hertzberg and Herskovitz told Shikarchy that the Union was "no good" and "cost . . . a lot of money," and that they planned to get rid of it by installing security cameras in the

building. (*Id.*) The meeting failed to produce an agreement, so the parties referred the Boykin/Gomez grievance to arbitration, with a hearing scheduled for June 20, 2011. (D&O 4; A 98-99, 129.)

C. The Turning Point: Shikarchy's Change of Heart

Ahead of the arbitration hearing, Friedman, Hertzberg and Herskovitz asked Shikarchy to testify on the Company's behalf and offered to help him prepare his testimony. (D&O 4; A 133.) Despite their assistance, however, Shikarchy could not manage to prepare. (*Id.*) He was increasingly upset about his role in the harassment, which he felt was "terrible" and "wrong," and he felt that he had been "put . . . in a bad position against [his] will." (D&O 4; A 133, 136.)

On the day of the hearing, Shikarchy was still unprepared to testify, so the parties opted to settle the case. (D&O 4; A 104, 133.) Friedman was furious. He told Shikarchy that he was a "bad witness," and that the Company might have to reinstate Boykin; Friedman blamed Shikarchy for failing to prepare. (D&O 4; A 133.) The parties reached a settlement in which Boykin and Gomez received \$5000 each, Boykin was reinstated to a part-time position, and Gomez resigned his employment. (D&O 4; A 464-68.)

Before the Boykin/Gomez settlement, Shikarchy enjoyed good relations with the Company. Friedman and Shikarchy had been friends for 20 years. (D&O 3; A 127, 178.) Herskovitz praised Shikarchy as "wonderful and attentive," one of the

best superintendents he ever had, invited him to a party and gave him a bonus. (D&O 4; A 154, 177, 329-30.) Things changed dramatically after the settlement. (D&O 4; A 142-43, 146-48, 150-51, 177, 187.) The following week, Berger told Shikarchy that Hertzberg and Friedman were planning to get rid of him because he switched his support to the Union and his failure to testify in the arbitration hearing had brought about an unfavorable settlement. (D&O 4; A 132, 147, 194.) Berger advised Shikarchy to “leave quickly” or the Company would “destroy” him and make it impossible to find another job. (D&O 4; A 142-43.) Between mid-August and early December, Berger and Shikarchy had several similar conversations in which Berger told Shikarchy to leave and warned that he could not win against the Company. (D&O 5; A 158.)

D. Constantly Harassed, Shikarchy Files a Grievance To Protect Himself; the Company Responds with Warnings and a 3-Day Suspension

Shortly after the Boykin/Gomez settlement, Friedman and his son began harassing Shikarchy by following him, cursing and yelling at him, and generally interfering with his work. (D&O 4; A 143-44, 148-49, 191-92.) Shikarchy experienced so much stress that he suffered a stroke, but the Friedmans continued their harassment upon his return from medical leave. (D&O 4; A 105, 148-50.) On August 14, 2011, Friedman threatened to testify against Shikarchy in his child-custody case and make sure Shikarchy would “never . . . see [his] children.”

(D&O 4-5; A 146, 151-52.) Shikarchy sought help from the Union, which filed a grievance against the Company on his behalf. (D&O 5; A 105, 146-47, 469-78.)

This development greatly angered the company board. Hertzberg told Shikarchy he was “evil” and warned him to drop his grievance or “something bad” would happen to him and he would be fired. (D&O 5; A 157.) Friedman also said “something bad” would happen to Shikarchy if he didn’t withdraw the grievance. (D&O 5; A 156-57.) And Herskovitz bluntly warned Shikarchy, “you better drop [the grievance], if not I [will] get you back.” (D&O 5; A 151-52.)

On September 7, 2011, Shikarchy was summoned to BRG offices for a meeting with Herskovitz and BRG owner Daniel Benedict. (D&O 5; A 153.) Herskovitz told Shikarchy again to drop his grievance and gave him four sheets of paper to read after the meeting. (D&O 5; A 153, 155-56.) Then Benedict said that if Shikarchy remained quiet without a complaint for 3 months and refrained from taking sides, Benedict would tear up the papers. (D&O 5; A 155.) After the meeting, Shikarchy read the papers and realized they were four separate warnings, which stated that he:

- failed to maintain correct working hours for other employees (A 491);
- failed to attend a meeting scheduled at 3:30 p.m. on June 21, 2011, the day after the Boykin/Gomez settlement (A 492);

- acted insubordinately by asking board members for authorization to order equipment, do work, or utilize outside contractors, instead of consulting with Herskovitz (A 493); and
- falsely accused Joseph Friedman of attacking him (A 494).

The fourth warning bore the title, "Final Warning," and explained that future infractions would result in a 3-day suspension. (A 494.) Each warning was signed by Herskovitz and dated September 7, 2011. (D&O 5; A 491-94.) Shikarchy was not offered an opportunity to explain himself or respond to the warnings. (D&O 5; A 156.)

A month later, Shikarchy increased his involvement with the Union. (D&O 4; A 138.) He became the employee representative on the Union's contracts and grievances committee and attended collective-bargaining negotiations on behalf of the Union in October, November and December 2011. (D&O 4; A 111-12, 138-39.) He distributed flyers to employees and apartment owners, and signed up an employee for the Union. (D&O 4; A 480-90; A 112, 119, 138-41.) Shikarchy's leafleting particularly irritated the Company. First, Hertzberg, Berger and Herskovitz told him to stop his distributions. (D&O 4; A 53, 141-42.) Then, on October 27, 2011, Shikarchy received a 3-day suspension, allegedly for unsatisfactory job performance, and was warned that, absent improvement, he could face additional discipline or discharge. (D&O 5; A 159-60, 495.)

**E. The Company Orders Shikarchy To Renounce the Union;
Shikarchy Ignores the Company's Ultimatum and Is Fired**

On December 5, 2011, Shikarchy called Berger and, unbeknownst to Berger, recorded their conversation. (D&O 5; A 161-63, 411-46.) Berger told Shikarchy that the Company wanted the Union “off [its] back” and would have a stronger bargaining position with Shikarchy on its side. (D&O 5; A 418, 423, 426.) Berger said he and Herskovitz had a proposal for Shikarchy. (D&O 5; A 429, 437, 440.) Berger promised that “things could be worked out in a normal way” and that Shikarchy could keep his job without further harassment if he agreed to “stay away from the Union,” “retract the [grievance]” against the Company, and “stay away from the mediation meeting” with the Union scheduled 2 days later, on December 7, 2011. (D&O 5; A 415, 418, 423-24, 433, 436-37.) On the other hand, if Shikarchy stayed with the Union, Berger warned that the Company would “[p]robably fire [him].” (D&O 5; A 441.) Berger encouraged Shikarchy to speak with Herskovitz directly to resolve any questions about this quid-pro-quo arrangement. (D&O 5; A 427, 429, 440.)

The following day, Herskovitz informed Berger by e-mail that Shikarchy planned to attend the mediation. (D&O 5; A 56-57, 463.) Berger replied, “You have to do what you have to do.” (*Id.*) On December 13, 2011, less than a week after Shikarchy went to the mediation, the Company discharged him and gave him 3 days to vacate his apartment. (D&O 6; A 160-61, 496.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce, Members Griffin and Block) found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by threatening Shikarchy with discharge and other unspecified reprisals, and impliedly promising him benefits if he refrained from union activity. (D&O 1, 9-10.) The Board also found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by warning, suspending and discharging Shikarchy because of his union activity. (D&O 1, 10-11.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in their exercise of their statutory rights. (D&O 1.) Among other things, the Order affirmatively requires the Company to fully reinstate Shikarchy to his former job, make him whole for any loss of earnings and other benefits suffered as a result of the Company's actions, remove any reference to Shikarchy's unlawful warnings, suspension and discharge from its files, and post copies of a remedial notice. (D&O 1-2.)

SUMMARY OF ARGUMENT

Employers rarely admit discriminating against an employee based on union support; however, seldom are an employer's motives more transparent than here. For the first 18 months of his tenure at the Company, Shikarchy was valued not only for his work as superintendent, but also for sharing the Company's hostility toward organized labor and for cooperating in its scheme to harass pro-union employees until they quit or were fired. But when, feeling remorse, Shikarchy failed to testify against two employees at an arbitration hearing, he became the target of a similar harassment campaign, which led him to seek the Union's help in filing a grievance against the Company. The Company retaliated with unlawful threats and promises of benefits, written warnings and a suspension, ultimately firing Shikarchy from his job.

Before the Board, the Company did not challenge the finding that company board members Friedman and Hertzberg and property manager Herskovitz unlawfully threatened Shikarchy with discharge and unspecified reprisals unless he dropped his grievance. Additionally, the Company has now dropped its challenge to the Board's findings that treasurer Berger unlawfully threatened that the Company would destroy Shikarchy and his reputation; threatened him with discharge if he did not renounce the Union; and promised to let Shikarchy keep his job in exchange for dropping his grievance and severing ties with the Union. The

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

Substantial evidence supports the Board's finding that the Company was unlawfully motivated when it warned, suspended and discharged Shikarchy.

Substantial evidence also supports the Board's finding that the reasons given by the Company for its actions were pretextual, i.e., false or not relied upon.

Accordingly, the Board properly found that the Company's true motive was its hostility to Shikarchy's protected conduct.

Finally, the Company contends that the President's recess appointments to the Board were invalid. But that understanding of the Recess Appointments Clause is wrong as a matter of text, history, and purpose.

STANDARD OF REVIEW

This Court’s review of Board decisions is “highly deferential.” *UAW v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008). The Board’s findings of fact, such as whether the Company acted with an unlawful motive, and whether it offered a real or pretextual reason for discharging Shikarchy, are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Substantial evidence is that, which “a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477; *G & T Terminal Packaging*, 246 F.3d at 114. Thus, the Board’s reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it de novo. *Universal Camera*, 340 U.S. at 488; *see also Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988) (“Where competing inferences exist, we defer to the conclusions of the Board.”). In other words, this Court will not reverse the Board on the basis of a factual determination—such as a finding of employer motive—unless it is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *G & T Terminal Packaging*, 246 F.3d at 114 (quoting *NLRB v. Katz’s Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ALL SECTION 8(a)(1) VIOLATIONS BECAUSE, WITH RESPECT TO SOME, THE COMPANY DID NOT FILE EXCEPTIONS BEFORE THE BOARD AND BECAUSE, WITH RESPECT TO OTHERS, THE COMPANY FAILED TO CONTEST THEM IN ITS OPENING BRIEF

Section 7 of the Act guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements these guarantees by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.” *Id.* § 158(a)(1). An employer violates Section 8(a)(1) by threatening an employee with reprisals for engaging in union activities or supporting a union. *NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 97 (2d Cir. 1985). Likewise, an employer violates Section 8(a)(1) by promising benefits as a means to discourage employee support for a union. *Id.* at 96; *see also* 29 U.S.C. § 158(c) (expressions containing threats of reprisal or promises of benefits are not protected).

The administrative law judge found that the Company committed three separate violations of Section 8(a)(1) when Hertzberg, Friedman and Herskovitz individually threatened Shikarchy with discharge and unspecified reprisals unless he dropped his grievance. (D&O 1, 9.) The Company did not except to these

findings before the Board. It is well established that a litigant's failure to raise an objection to the Board precludes appellate courts from subsequently asserting jurisdiction over that issue. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *see also, e.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982); *KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996). Accordingly, the Board is entitled to summary enforcement of these uncontested portions of its Order. *See, e.g., Torrington Extend-A-Care Emps. Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

Moreover, the Company has dropped any challenge to three additional Section 8(a)(1) violations found by the Board. Specifically, the Board found that Berger threatened Shikarchy with unspecified reprisals when he said that the Company would destroy Shikarchy and his reputation; threatened Shikarchy with discharge when he said Shikarchy would be fired unless he withdrew his grievance and renounced the Union; and promised Shikarchy implied benefits to discourage him from supporting the Union by offering to let Shikarchy keep his job in exchange for dropping his grievance and renouncing the Union. (D&O 5, 9-10.) Since the Company did not raise these issues in its opening brief, it has waived objection to these findings of the Board. *See Garcia v. Hartford Police Dep't*, 706

F.3d 120, 130-31 (2d Cir. 2013); *Gaetano & Assocs. v. NLRB*, 183 F. App'x 17, 22 (2d Cir. 2006).

Finally, it is worth noting that these violations do not disappear simply because they are uncontested. Rather, they provide the background against which to consider the Board's remaining findings. *See Torrington*, 17 F.3d at 590.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY WARNING, SUSPENDING AND DISCHARGING SHIKARCHY BECAUSE OF HIS UNION ACTIVITY

A. Applicable Legal Principles

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) and (1)³ occurs when an employer takes adverse employment action against an employee for engaging in union activity, or in order to discourage such activity among other employees. *See N.Y. Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 411 (2d Cir. 1998).

The critical question in most Section 8(a)(3) cases is whether the employer's action was unlawfully motivated. *Abbey's Transp. Servs.*, 837 F.2d at 579. To assess an employer's motivations, the Board applies the framework established in

³ A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1). *Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1992).

Wright Line, a Div. of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 89 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under *Wright Line*, the Board’s General Counsel must demonstrate, by a preponderance of the evidence, that protected conduct was a “substantial” or “motivating factor” in the employer’s decision to take adverse employment action against the employee. *Transp. Mgmt.*, 462 U.S. at 400-01; *G & T Terminal Packaging*, 246 F.3d at 115-16. The employer may avoid liability only by proving, as an affirmative defense, that it was motivated by legitimate business reasons and that it would have taken the same action even in the absence of protected conduct. *Transp. Mgmt.*, 462 U.S. at 399-400, 401; *G & T Terminal Packaging*, 246 F.3d at 116. However, if the General Counsel shows, as here, that the employer’s proffered reasons for the decision are pretextual—that is, either false or not in fact relied upon—the violation is deemed proven. *See Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

Because employers seldom admit unlawful discrimination, courts have long recognized that the Board may rely on circumstantial evidence and inferences reasonably drawn from the totality of the evidence to determine the true motives underlying an employer’s actions. *See. e.g., NLRB v. Link-Belt Co.*, 311 U.S. 584,

602 (1941); *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (2d Cir. 1990); *Abbey's Transp. Servs.*, 837 F.2d at 579. Circumstantial evidence of unlawful motivation may include the employer's knowledge of the employee's union activities, the employer's hostility toward these activities, the questionable timing of the adverse action and the shifting, contrived or implausible nature of the employer's explanation. See *Torrington*, 17 F.3d at 591; *Abbey's Transp. Servs.*, 837 F.2d at 579-82; *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972). Courts afford a particularly deferential review to the Board's motive findings because "the Act vests primary responsibility in the Board to resolve these critical issues of fact." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 956 (2d Cir. 1988) (citation omitted). Moreover, this Court accords particular deference to Board findings that rest on credibility determinations made by an administrative law judge, and will not overturn them unless "the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony." *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (internal quotation marks and citations omitted).

B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Warned, Suspended and Discharged Shikarchy Because He Engaged in Protected Union Activity

The undisputed evidence establishes that Shikarchy engaged in protected conduct of which the Company was aware, and that the Company harbored deep-seated animus toward his activities and the Union in general.

The Company does not dispute that Shikarchy supported the Union and engaged in protected conduct. Shikarchy first showed his support for the Union on June 20, 2011, when he failed to prepare for, and testify at, the Boykin/Gomez arbitration hearing. Then, on August 15, 2011, having suffered a stress-induced stroke and distraught over Friedman's threats to prevent him from seeing his children, Shikarchy sought the Union's help to file a grievance against the Company. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 836 (1984) (“[T]he processing of a grievance . . . is concerted activity within the meaning of § 7.”) In October 2011, Shikarchy increased his involvement with the Union by joining its negotiating team, recruiting an employee to join, and distributing flyers to employees and cooperative apartment owners.

Substantial evidence supports the Board's finding that the Company was aware of Shikarchy's protected activities prior to warning, suspending and discharging him. (D&O 10.) The undisputed evidence shows that by the end of June 2011, the week following settlement of the Boykin/Gomez grievance,

Shikarchy learned that Hertzberg and Friedman blamed him for the unfavorable outcome and accused him of supporting the Union. Later, when the Company received notice of Shikarchy's grievance, Berger, Friedman and Herskovitz individually threatened to retaliate against him. Similarly, when Shikarchy began distributing fliers in the building, he was sharply rebuked by Hertzberg, Berger and Herskovitz. Finally, the Company was well aware that Shikarchy had joined the Union's negotiating committee because he attended three meetings with the Company between October and December 2011. Indeed, treasurer Berger warned that if Shikarchy attended the December meeting, the Company would retract its quid-pro-quo offer to cease all adverse action against him in exchange for his renouncing the Union and withdrawing his grievance.

The Company's multiple violations of Section 8(a)(1) of the Act⁴ offer substantial evidence supporting the Board's finding that the Company harbored animus against Shikarchy's protected activities and the Union in general. (D&O 10.) It is undisputed that, on several distinct occasions, the Company's agents directly threatened Shikarchy with discharge and other unspecified reprisals unless he acceded to their demands to curtail his protected activities and renounce the Union. It is also undisputed that treasurer Berger sought to discourage Shikarchy from engaging in protected conduct by promising that he could keep his job free of

⁴ See pages 16-18, *supra*.

harassment if he withdrew his grievance and ceased supporting the Union. These uncontested acts betray the Company's hostility toward Shikarchy's union-related activities and "provide powerful support for the Board's findings of knowledge and unlawful incentive." *Abbey's Transp. Servs.*, 837 F.2d at 580 (citations omitted).

Viewed as a whole, the record demonstrates that the Company was aware of Shikarchy's union-related activities and harbored deep-seated animus toward his actions and the Union in general. This is substantial evidence to support the Board's finding that Shikarchy's protected conduct was a motivating factor in the Company's decision to warn, suspend and discharge him.

C. Substantial Evidence Supports the Board's Finding that the Company Failed To Meet Its *Wright Line* Burden of Showing that Shikarchy Would Have Been Warned, Suspended and Discharged Even in the Absence of Protected Conduct Because the Company's Proffered Reasons Were Pretextual and Not in Fact Relied Upon

The Company claims that it would have warned, suspended and discharged Shikarchy regardless of his protected conduct because of allegedly substandard job performance. However, substantial evidence supports the Board's finding that the Company's rationale for its actions was simply a pretext to disguise its true motive, namely, to get rid of an active member of the Union.⁵ (D&O 11.)

⁵ The Board's finding of pretext is largely based on the credibility determinations of the administrative law judge, who found Shikarchy very credible compared to treasurer Berger and property manager Herskovitz. (D&O 8-9.) The judge's

Nowhere is the pretextual nature of the Company's defense more transparent than in Shikarchy's December 5, 2011, recorded conversation with treasurer Berger, the Company's stipulated agent. (D&O 3, 5; A 413-43, 550.8.) At the time, all but the final incidents on which the Company relies to justify discharging Shikarchy had already occurred. (A 313-16, 538, 548-49.) The Company had given Shikarchy 4 written warnings and a 3-day suspension, all related to his allegedly unsatisfactory job performance. Moreover, the Company had warned that unless Shikarchy's job performance improved, he would face additional penalties, including discharge. And yet, the Company does not dispute that, during the December 5 conversation, Berger offered Shikarchy a deal in which he could keep his job in exchange for renouncing his grievance and the Union. It simply defies logic for the Company to argue that Shikarchy's job performance was so dismal that he would have been fired regardless of his protected conduct, when in fact the Company was willing to excuse all of Shikarchy's alleged shortcomings if he only agreed to cease all union-related activities.

The timing of events leading to Shikarchy's discharge also offers substantial evidence on its own to support the Board's finding of pretext. Until June 2011, the Company perceived Shikarchy as an ally: Friedman, Hertzberg and Herskovitz confided in him their plan to get rid of the Union and Friedman recruited him to

credibility determinations are neither hopelessly incredible nor flatly contradicted by the record. *See Thalbo Corp.*, 171 F.3d at 112.

harass Boykin because he was a Union member. In his first 18 months on the job, Shikarchy never received so much as a verbal complaint about the quality of his work; to the contrary, the Company praised him as an excellent employee and displayed its appreciation by awarding him a bonus. However, once Shikarchy's support of the Union became apparent, the Company's hostility turned against him. Shortly after the Boykin/Gomez settlement, Friedman began to deploy against Shikarchy the same harassing tactics the Company had used against Boykin. When Shikarchy turned to the Union for help and filed his grievance, the Company responded, first with a host of unlawful retaliatory threats, and then by giving Shikarchy four written warnings *on the same day*. Tellingly, one warning cited Shikarchy's alleged failure to attend a meeting on June 21, 2011, *the day after* the arbitration, yet Shikarchy was not given this warning until over 2 months later, after he filed his grievance. When Shikarchy increased his involvement in the Union by joining its negotiating team and distributing flyers, the Company escalated matters further: it issued Shikarchy a 3-day suspension, and then made its final quid-pro-quo offer. And when Shikarchy effectively declined this offer by attending the December 7 mediation as a member of the Union's negotiating team, the Company discharged him.

Just as the Company failed to rebut the administrative law judge's finding of pretext before the Board, so it fails in its brief to this Court. The Company

suggests that it was unaware on the day of the Boykin/Gomez arbitration that Shikarchy had decided to support the Union. (Br. 37.) But the Company does not dispute that it had knowledge of Shikarchy's protected conduct before it committed any unfair labor practices against him. Indeed, Berger told Shikarchy the week after the arbitration that Hertzberg and Friedman were out to get him because he switched allegiance to the Union. Moreover, the Company also received notice of Shikarchy's grievance—which is protected conduct in and of itself—before it committed any unfair labor practices against Shikarchy.

The Company does not dispute the Board's findings about the timing of events leading to Shikarchy's discharge. Instead, the Company claims Shikarchy was fired because he exhibited "a continuous pattern" of poor work performance. (Br. 39.) A host of evidence belies this assertion. As noted by the Board (D&O 11), Shikarchy's record was that of an attentive employee until he began to support the Union. Furthermore, the e-mails on which the Company relies to impugn Shikarchy's job performance are, without exception, dated *after* the Company became aware of his support for the Union. (A 497-550.) Likewise, the Company has offered no reason for issuing four written warnings on the same day, especially since one warning concerned an incident that allegedly occurred over 2 months earlier. *See NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 61 (2d Cir. 1982) (Board properly could infer unlawful motivation from employer's "inability to explain

persuasively” the reasons for taking adverse action). The Company also provides no explanation as to why Shikarchy—whom Herskovitz described as one of the best superintendents he ever had—was never given a chance to defend himself against the Company’s accusations. *See Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003) (“An employer’s failure to permit an employee to defend himself before imposing discipline supports an inference that the employer’s motive was unlawful.”).

Finally, the Company does not dispute any of the Section 8(a)(1) violations found by the Board. This is particularly significant because these violations relate to threats made directly by the Company’s agents against Shikarchy, to intimidate and dissuade him from engaging in protected conduct. Hertzberg, Friedman and Herskovitz all told Shikarchy that something bad would happen to him unless he withdrew his grievance. Similarly, Berger warned Shikarchy that he could not win against the Company, that it would destroy him and his reputation, and that he would be fired unless he withdrew his grievance and abstained from representing the Union in negotiations with the Company. These uncontested violations provide additional support for the Board’s finding that the Company’s proffered reasons for its actions against Shikarchy were pretextual.

It is well established that “when the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . , the factfinder may not

only properly infer that there is some other motive, but ‘that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.’” *Laro Maint. Corp.*, 56 F.3d at 230 (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)). As shown here, substantial evidence supports the Board’s finding that the Company’s stated reasons for warning, suspending and discharging Shikarchy were pretextual, and that the Company’s true motivation was animus toward Shikarchy’s support for the Union and participation in union-related activities. Having so found, the Board properly declined to consider in detail the Company’s pretextual claims. *See Am. Geri-Care*, 697 F.2d at 63-64 (“Once the finding of pretext is made . . . , the adjudication is complete and neither the Board nor the Court need engage in the *Wright Line* analysis. . . . Indeed, implicit in the finding of pretext is the judgment of the court that the employer has not marshalled [sic] any convincing evidence to support its position.” (citation and footnote omitted)); *see also, e.g., USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000).

III. THE PRESIDENT’S RECESS APPOINTMENTS TO THE BOARD ARE VALID

From January 3 until January 23, 2012, a period of 20 days, the Senate was in recess. At the start of this recess, the Board’s membership dropped below a quorum. Accordingly, on January 4, 2012, the President invoked his constitutional

authority under the Recess Appointments Clause, Art. II, § 2, cl. 3, and appointed new Board members.

The Company urges that two of these Board members were appointed in violation of the Recess Appointments Clause. It asserts that the President may not make recess appointments during *intra*-session recesses, that the President could not make recess appointments during a 20-day period in which the Senate had declared “no business” was to be conducted at periodic *pro forma* sessions, and that the President may not fill vacancies that first arose before the recess in question. See Br. 15-36 (citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted* 133 S. Ct. 2861 (June 24, 2013), and *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013), *petition for reh’g pending* (filed July 1, 2013; stayed July 15, 2013)).⁶ The Company’s assertions are meritless, and have already been rejected in part by this Court. See *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962).

A. The President’s Recess-Appointment Authority Is Not Confined to Inter-Session Recesses of the Senate

A legislative body like the Senate characteristically begins a recess, whether long or short, in one of two ways. By adjourning *sine die* (*i.e.*, without specifying a day of return), it ends its current session, and the ensuing recess,

⁶ After *Noel Canning* and *New Vista*, a divided panel of the Fourth Circuit also held that the President cannot make recess appointments during intra-session recesses. See *NLRB v. Enterprise Leasing Co.*, 722 F.3d 609 (4th Cir. 2013).

which lasts until the beginning of the next session, is commonly known as an *inter-session* one. By adjourning, instead, to a specified time or date, the body typically resumes pending business when it reconvenes, and the intervening recess is commonly known as an *intra-session* one.⁷

The text and purposes of the Recess Appointments Clause, and long-established practice, cut decisively against excluding intra-session recesses from the Clause’s scope.

1. The constitutional text authorizes appointments during intra-session recesses

The Recess Appointments Clause authorizes the President to make temporary appointments “during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3. That unqualified reference to “the Recess of the Senate” attaches no significance to whether a recess occurs during a session or between sessions.

a. As understood both at the time of the Framing and today, a “recess” is a “period of cessation from usual work.” 13 *Oxford English Dictionary* 322-23 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); *see also* 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) (“[r]emission or suspension of business or procedure”); 2 Samuel Johnson, *A*

⁷ If there is no adjournment *sine die*, a session will end automatically at the time appointed by law for the start of a new session. *See* Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 166 (2d ed. 1812) (*Jefferson’s Manual*).

Dictionary of the English Language s.v. “recess” (1755) (“remission or suspension of any procedure”). That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

The Third Circuit suggested that other, less-apposite definitions of “recess” “contain some connotation of permanence or, at least, longevity.” *New Vista*, 719 F.3d at 221-22. But any such connotation is inapplicable to Senate recesses. The Senate has had many inter-session recesses that were zero, one, or two days long, including a substantial number in the 18th and 19th centuries. *See* S. Pub. 112-12, *Official Congressional Directory, 112th Congress 522-535* (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.⁸ Intra-session recesses are often much longer, and since 1867 have frequently been several weeks or even months long. *Id.* at 525-38.

b. In the legislative context, the Founding generation understood the term “recess” to encompass breaks both during and between sessions. The term described both kinds of breaks in British Parliamentary practice. *See, e.g.*, 13 *OED* 323 (quoting request about a “Recess of this Parliament” that was during a session) (citing 3 H.L. Jour. 61 (1620)); 33 H.L. Jour. 464 (Nov. 26, 1772) (King’s reference to a “Recess from Business” that was between sessions); *Jefferson’s*

⁸ Parliament’s inter-session recesses were “sometimes only for a day or two.” 1 Blackstone, *Commentaries on the Laws of England* 180 (1765).

Manual § LI, at 165 (describing procedural consequences of “recess by adjournment,” which did not end a session).

Founding era American legislative practice was in accord. The Articles of Confederation authorized Congress to convene a “Committee of the States” during “the recess of Congress.” Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1. Congress invoked that power only once, for a scheduled intra-session recess. *See 26 J. Continental Cong. 1774-1789*, at 295-96 (Gaillard Hunt ed., 1928); *27 id.* at 555-56.⁹ Similarly, the Constitutional Convention of 1787 adjourned intra-session from July 26 to August 6, and delegates referred to that break as “the recess.”¹⁰

Founding era state legislative practice was similar. For example, legislatures in New York, New Jersey, Massachusetts, and New Hampshire used “the recess” in the 1770s and 1780s to refer to breaks prompted by adjournments to a date certain.¹¹ Revolutionary-era constitutions in Pennsylvania and Vermont authorized

⁹ *New Vista* dismissed this example because Congress failed to reconvene on schedule, *see* 709 F.3d at 226 n.18, but when Congress appointed the Committee it could not have known of the future scheduling issue.

¹⁰ 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1966) (*Farrand*) (letter from Washington to John Jay); 3 *Farrand* 191 (speech of Luther Martin); 2 *Farrand* 128 (July 26 adjournment), 649 (“Adjournment sine die” in September).

¹¹ 2 *A Documentary History of the English Colonies in North America 1346-1348* (Peter Force ed., 1839) (New York legislature’s 1775 appointment of a committee to act “during the recess,” a 14-day intra-session break); *New Jersey Legislative*

the Executive to issue embargoes “in the recess” of the legislature; those powers were exercised during intra-session breaks. *See New Vista*, 719 F.3d at 225.

This and other historical evidence wholly undermines *Noel Canning*’s reliance on “*the Recess of the Senate*.” 705 F.3d at 499-500 (emphasis added). Indeed, after acknowledging that “the” could be used generically (as it is elsewhere in the Constitution), the Third Circuit properly rejected *Noel Canning*’s reliance on that language, finding “the” to be “uninformative.” *New Vista*, 719 F.3d at 227-28.

c. *Noel Canning* also noted that the Constitution sometimes uses the verb “adjourn” or the noun “adjournment” rather than “recess,” and inferred that “recess” must have a more restrictive meaning than “adjournment.” 705 F.3d at 500. Historically, however, “adjournment” typically referred to the *act* of adjourning, while “recess” referred to the resulting *period* of cessation from work—a distinction reflected in the Constitution itself.¹² When the Continental

Council Journal, 5th Sess., 1st Sitting 70 (1781); *id.*, 2d Sitting 9 (1781 direction to purchase ammunition “during the recess,” an intra-session break); *Journal of the Massachusetts Senate*, entries for July 11 and October 18, 1783 (on file with Massachusetts State Archives) (documenting a Committee’s appointment and work “in the recess;” the Committee served during an adjournment from July to September 1783, the equivalent of an intra-session break); 20 *Early State Papers of New Hampshire* 452, 488 (Albert Stillman Batchellor ed., 1891) (1786 New Hampshire legislative journal referring to a period following an adjournment to a date certain as “the recess”).

¹² Compare, e.g., 1 *OED* 157 (using “adjournment” to refer to the “act of adjourning”), and U.S. Const. 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 13 *OED* 322 (using “recess” to refer to the “period of cessation from

Congress convened a committee “during the recess” in 1784, it did so following an intra-session “adjournment.” 27 *J. Continental Cong.* at 555-56.

Even if the Constitution were thought to use “adjournment,” like “recess,” to refer to the period of a break, as distinct from the act of adjourning, the Executive’s position is entirely consistent with a distinction between a recess covered by the Recess Appointments Clause and an adjournment. The Adjournment Clause makes clear that the taking of a legislative break of three days or less “during the Session of Congress” is still an “adjourn[ment].” Art. I, § 5, Cl. 4. But as noted below, the Executive has long understood that such short intra-session breaks do not trigger the President’s recess-appointment authority.

2. Intra-session recess appointments are necessary to serve the purposes of the Recess Appointments Clause

Excluding intra-session recesses from the Recess Appointments Clause would undermine its central purposes.

a. The Recess Appointments Clause ensures that vacant offices may be temporarily filled when the Senate is unavailable to advise and consent, and it frees the Senate from the obligation of being “continually in session for the appointment of officers.” *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke

usual work”), and U.S. Const. 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”); *see* Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LAWnLinguistics.com, Feb. 19, 2013, <http://lawlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1>.

ed., 1961). The Clause enables the President to meet his continuous responsibility to “take Care that the Laws be faithfully executed,” Art. II, § 3, which requires the “assistance of subordinates.” *Myers v. United States*, 272 U.S. 52, 117 (1926).

Those purposes apply regardless of whether a recess occurs during a session or between sessions. The Senate is equally unavailable for advice and consent during intra-session and inter-session recesses. The President is no less in need of officers to execute the laws. And, for the Nation, it will often be equally “necessary for the public service to fill [certain vacancies] without delay.” *Federalist No. 67*, at 455. Indeed, the need to fill vacancies may be greater during intra-session recesses, which have often accounted for more of the Senate’s absences than have inter-session recesses. *See Congressional Directory* 529-38. This Court has refused to interpret the Recess Appointments Clause in a way that permits vacancies to go unfilled during lengthy Senate absences, *see Allocco*, 305 F.2d at 712, and the same result should apply here.

b. There is no reasonable basis to fear that Presidents will use intra-session recess appointments to evade the Senate. *See Noel Canning*, 705 F.3d at 503. The authority to make intra-session recess appointments has been accepted for nearly a century, yet Presidents routinely seek Senate confirmation when filling vacant offices—and have strong incentives to do so, because recess appointments are only temporary and because seeking Senate consent alleviates inter-Branch

friction. Moreover, the Third and Fourth Circuits misapprehended the government's arguments when they indicated that the government's position would permit appointments in intra-session breaks shorter than three days. *See New Vista*, 719 F.3d at 230; *Enterprise Leasing*, 722 F.3d at 649. The Executive has long understood that such short intra-session breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the President's recess-appointment authority. *See, e.g.*, 33 Op. Att'y Gen. 20, 24-25 (1921); 16 Op. O.L.C. 15, 15-16 (1992); *see also Wright v. United States*, 302 U.S. 583, 593-96 (1938) (making similar point in construing Pocket Veto Clause); Art. I, § 5, Cl. 4 (Adjournment Clause, providing that legislative breaks of three days or less do not require the other House's consent).

The Company's position, by contrast, would permit the Senate unilaterally to strip the President of his constitutional authority to make recess appointments despite its unavailability to give advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain near the constitutionally mandated end of the session. *See* Amend. XX, § 2. The Framers could not have contemplated that the President could thus be disabled from filling important positions when the Senate is concededly unavailable.

c. For similar reasons, the Recess Appointments Clause’s purposes are served by the decision to require such appointments—whether they are made during an inter- or intra-session recess—to “expire at the End of [the Senate’s] next Session.” Art. II, § 2, Cl. 3 (emphasis added). Some intra-session recesses last almost until the end of the sessions they interrupt. *See Congressional Directory* 528-29, 533-34, 536 (noting Senate’s returns from recess less than three days before Session’s end). The Framers were also well aware that various vicissitudes might prevent a legislature from returning on schedule, which could shorten, or even eliminate, the part of a session scheduled to follow an intra-session recess.¹³ In such situations, the uniform termination date ensures that there will always be at least one full session during which an appointee may carry out the duties of the office while the President and the Senate engage in the nomination-and-confirmation process.

¹³ *See, e.g.*, 1 *Farrand* 1, 3 (demonstrating that the Constitutional Convention was supposed to convene on May 14, 1787, yet it “adjourned from day to day” until enough delegates arrived on May 25); 13 *The State Records of North Carolina* 792 (Walter Clark ed., 1896) (North Carolina legislature delayed in 1779 due to smallpox); *Journal of the South Carolina General Assembly and House of Representatives 1776-1780*, at xvi, 299 (William Edwin Hemphill et al. eds., 1970) (South Carolina legislature reconvened two years late in 1782 due to Revolutionary War).

3. Long-standing practice supports intra-session recess appointments

a. There are no comprehensive records of all recess appointments made throughout history, and information regarding military appointments is particularly difficult to ascertain. *See* Henry B. Hogue, Cong. Research Serv., *Intrasession Recess Appointments* 1-2 (2004). Nonetheless, we know that since the 1860s at least 14 Presidents have collectively made more than 600 civilian appointments and thousands of military appointments during intra-session recesses of the Senate. *See* Appendix A, Petitioner’s Opening Brief, *NLRB v. Noel Canning*, No. 12-1281 (S. Ct.) (“*Noel Canning App. A*”), available at <http://www.justice.gov/osg/briefs/2013/3mer/2mer/2012-1281.mer.aa.pdf>.

The significance of that historical practice cannot be negated based on the lack of intra-session appointments in the Nation’s early years, *see Noel Canning*, 705 F.3d at 501-02, since during that time, there were no lengthy intra-session recesses. Before the Civil War, only five intra-session recesses exceeded three days; each was less than two weeks long and confined to the period around the winter holidays. *See Congressional Directory* 522-25. And until 1943 there were only four years with longer intra-session recesses (at a different time of year). *Id.* at 525-27. In every one, the President made multiple intra-session recess appointments. *See Noel Canning App. A* 1a-11a.

To be sure, for a relatively brief period beginning in 1901, the Executive Branch took a different view. Attorney General Knox concluded that “the Recess” did not include intra-session recesses, in large part because he could otherwise “see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday.” 23 Op. Att’y Gen. 599, 600, 603 (1901). In doing so, however, Knox had to reject the only judicial precedent on point. *See Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884). And Knox’s approach was short-lived, since in 1905, after controversial appointments made during a putative *inter*-session recess, the Senate charged its Judiciary Committee with determining “[w]hat constitutes a ‘recess of the Senate’ ” for recess-appointment purposes. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905 *Senate Report*). The committee concluded that the word “recess” is used “in its common and popular sense” and means:

the period of time when the Senate is *not sitting in regular or extraordinary session* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 1, 2. Per Senate precedent, that report remains an authoritative construction of the term “recess.” *See Riddick’s Senate Procedure: Precedents and Practices* 947 & n.46 (1992). In 1921, Attorney General Daugherty relied on that report and recognized the same considerations for determining whether a “recess” exists for

purposes of the Clause. 33 Op. Att’y Gen. at 24-25. Daugherty rejected Knox’s reasoning and concluded that intra-session recesses of sufficient length do trigger the Recess Appointments Clause. *Id.* at 21, 25.

b. The frequency of intra-session recesses—and appointments—increased dramatically during World War II and the beginning of the Cold War. During the 1940s, presidents made thousands of intra-session recess appointments during the Senate’s increasingly frequent months-long recesses, including Dwight D. Eisenhower to be a major general during World War II and thousands of military officers in the Army and Air Force. *See Noel Canning* App. A. at 11a-24a. And in 1948, the Comptroller General (a legislative officer) described the President’s ability to make intra-session appointments as “the accepted view.” 28 Comp. Gen. 30, 34 (1948).

Since then, Presidents have made, collectively, hundreds of additional intra-session recess appointments. *Noel Canning* App. A at 27a-64a. Throughout that period, opinions of the Attorney General, the Office of Legal Counsel, and the en banc Eleventh Circuit reaffirmed the validity of such appointments. *See, e.g., Evans v. Stephens*, 387 F.3d 1220, 1224-26 (11th Cir. 2004) (en banc); 20 Op. O.L.C. 124, 161 (1996); 6 Op. O.L.C. 585, 585 (1982).

c. Such “[t]raditional ways of conducting government . . . give meaning to the Constitution.” *Mistretta v. United States*, 488 U.S. 361, 401 (1989)

(internal quotation marks and citation omitted). Especially in the separation-of-powers context, “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions.” *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *id.* at 690 (“[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.”) (internal quotations marks and citation omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Indeed, this Court has expressly recognized the importance of longstanding practice in interpreting the Recess Appointments Clause. *See Allocco*, 305 F.2d at 713-14.¹⁴

The D.C. Circuit’s reasoning would dramatically upset the long-settled equilibrium between the political Branches. *See United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915) (“[O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department.”). This Court should maintain that equilibrium and confirm that future Presidents may,

¹⁴ *INS v. Chadha*, 462 U.S. 919, 944 (1983), is not to the contrary. Unlike here, there had been a long and repeated history of *objection* to the practice at issue. *See id.* at 942 n.13.

like so many of their predecessors, make recess appointments during intra-session recesses.

B. The Senate Is in “Recess” for Purposes of the Recess Appointments Clause when, for 20 Days, a Senate Order Provides for only Fleeting, Concededly “Pro Forma” Sessions at which “No Business” Is To Be Conducted

The Company contends (Br. 26-34) that the Senate was not in recess on January 4, 2012 because its *pro forma* sessions transformed what would have been a 20-day recess into a series of three-day breaks (not counting Sundays), each of which was, in isolation, too short to constitute a recess.¹⁵ Yet the Company does not and cannot dispute the essential facts supporting the President’s conclusion that the Senate was in recess under the ordinary and traditional understanding of the Recess Appointments Clause: throughout the 20-day period, the Senate had undertaken to conduct “no business” and was no more available to sit as a body than it is during a traditional intra-session recess.

¹⁵ Unlike other provisions that specify a certain number of days Sundays are expressly “excepted” from the Pocket Veto Clause. *Compare* Art. I, § 5, Cl. 4 (Adjournment Clause), *and* Amend. XXV, § 4 (Presidential Inability), *with* Art. I, § 7, Cl. 2. Congress has nevertheless excluded Sundays from many calculations, which accounts for the Company’s description of the three- and four-day breaks here as three days. (Br. 16).

1. The Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process

For more than 90 years, the Senate and the Executive have agreed on a functional understanding, under which short intra-session breaks of three or fewer days do not trigger the Recess Appointments Clause, but longer breaks can do so. As discussed above (*see* pp.39-40, *supra*), the Senate Judiciary Committee explained in 1905 that, for Recess-Appointments-Clause purposes, a “recess” exists during “the period of time when” the Senate’s “members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.” *1905 Senate Report* 2. The committee thus rejected the proposition that there had been a “constructive” inter-session recess when the Senate was in active session at noon on December 7, 1903, and by operation of law one session automatically terminated and the next began. *Id.* at 3. Just as there was no such thing as a “constructive session” of the Senate, the committee concluded there can be no “constructive recess.” *Id.* at 2.

In 1921, Attorney General Daugherty relied on that report to conclude that the President may make recess appointments during a 28-day intra-session recess. 33 Op. Att’y Gen. at 24-25. He concluded it was reasonable for the President to determine that “there is a real and genuine recess making it impossible for him to

receive the advice and consent of the Senate.” *Id.* at 25. In a passage he described as “unnecessary” to his decision, Daugherty also suggested that an “adjournment for 5 or even 10 days” would not constitute a qualifying recess. *Id.* at 24, 25.

Daugherty’s analysis has continued to govern the Executive’s approach, providing the basis for appointments by multiple Presidents during intra-session recesses as short as ten days. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___, at 5-9 (Jan. 6, 2012) (*OLC Pro Forma Op.*), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf; *id.* at 7.

In 1929, the Supreme Court adopted a similar approach with respect to the Pocket Veto Clause (Art. I, § 7, cl. 2), which addresses circumstances in which Congress renders itself unavailable to participate in the legislative process before the end of the ten-day period that the Constitution affords the President to review a bill. The Court held that the President is required to return a bill to the relevant House of Congress only when that House is “sitting in an organized capacity for the transaction of business.” *The Pocket Veto Case*, 279 U.S. at 683. As the Court explained, the House is not available in the constitutionally relevant sense “when it

is not in session *as a collective body* and its members are dispersed.” *Ibid.*

(emphasis added).¹⁶

2. Despite the *pro forma* sessions, the 20-day period at issue here bore the hallmarks of a recess

The Company contends (Br. 30-34) that the January 2012 *pro forma* sessions were materially indistinguishable from the Senate’s regular sessions. But that is plainly not so. As the “*pro forma*” moniker indicates, the sessions were “[h]eld, made, or done (merely) as a matter of form.” *OED* s.v. “pro forma” (3d ed. June 2007), www.oed.com/view/Entry/238153; *see* 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Congressional Research Service report describing “‘pro forma’ sessions” as “held for the sake of formality”). In actuality, the entire period from January 3 to 23 bore the hallmarks of a single 20-day recess during which no work was done, no messages were laid before the Senate, and its members were dispersed.

a. The December 17, 2011, unanimous-consent order, *see* 157 Cong. Rec. S8783-S8784, addressed two periods: one at the end of the First Session of the 112th Congress, and one at the beginning of the Second Session. The division between the First and Second Sessions was effectuated by Section 2 of the

¹⁶ The Court later held that an adjournment of only three days did not make the Senate unavailable for purposes of the Pocket Veto Clause. *Wright*, 302 U.S. at 598. But it stressed that the bill in question had in fact been “laid before the Senate” two days after the President returned it and that the Court’s holding did not apply to an adjournment for longer than three days. *Id.* at 593, 598.

Twentieth Amendment at noon on January 3, 2012. *See Jefferson's Manual* § LI, at 166. The Senate's order expressly provided that, throughout both periods, the Senate would "convene for pro forma sessions only, with no business conducted," at specified times between December 19, 2011, and January 20, 2012. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). Then, according to the order, the Senate would convene on January 23, 2012, in a session that would include "the prayer and pledge," "leader remarks," "morning business," and "executive session." *Id.* at S8783-S8784. As relevant here, the December 17 order barred the Senate as a body from conducting any business—including providing advice and consent on nominations—for the entire 20-day period between January 3 and 23.

During that 20-day period, the Senate conducted no business whatsoever. It considered no bills, passed no legislation, and voted on no nominees.¹⁷ No speeches were made, and no debates were held. Each *pro forma* session lasted no more than 30 seconds. *See* 158 Cong. Rec. S3 (daily ed. Jan. 6, 2012); *id.* S5 (Jan. 10); *id.* at S7 (Jan. 13); *id.* at S9 (Jan. 17); *id.* at S11 (Jan. 20).

When the Senate finally convened for a regular session on January 23, it began with a prayer and the Pledge of Allegiance. 158 Cong. Rec. S13 (daily ed.). The Acting President pro tempore recognized the Majority Leader, who "welcome[d] everyone back after the long break we had." *Ibid.* Messages from

¹⁷ As discussed below (*see* p.49 & n.18, *infra*), the Senate did pass legislation in the First Session on a day when it had been scheduled to hold a *pro forma* session.

the President and the House of Representatives that had arrived on January 12 and January 18 were formally laid before the Senate, as were committee reports submitted on January 13. *Id.* at S37, S41.

Thus, just as its order had prescribed, before January 23 the Senate spent 20 days conducting “no business.” That period satisfied both the plain meaning of the term “recess” and the understanding of that term the political branches have operated under since 1905, under which Senators evidently understood that they “owe[d] no duty of attendance” and they were unable as a body to “receive communications from the President or participate as a body in making appointments.” *1905 Senate Report 2.*

b. The Senate’s own rules and procedures reinforce the conclusion that the *pro forma* sessions were a stratagem to paper over what was in substance a continuous Senate recess of 20 days. Senate Rule IV, para. 1(a), requires the recitation of a prayer and the Pledge of Allegiance at the start of each “daily session[]”; neither was said at the *pro forma* sessions. Similarly, under the terms of the Senate’s usual standing order, the Secretary of the Senate is authorized “to receive messages from the President” when “the Senate is in recess or adjournment.” 157 Cong. Rec. S14 (daily ed. Jan. 5, 2011). Messages are laid before the Senate only when it returns. Here, the Secretary invoked the standing order to receive messages from the President and the House on January 12 and 18,

and those messages were not laid before the Senate as a body until January 23 (*see* 158 Cong. Rec. at S37), indicating that the intervening *pro forma* sessions had been indistinguishable from—rather than interruptions of—an ongoing recess.

Other orders the Senate adopted on December 17, 2011, further support the conclusion that the *pro forma* sessions did not interrupt the Senate’s ongoing recess. By rule and practice, it is only while the Senate is in session in its chamber that committees may report bills and submit reports to the full Senate, that the Senate may make legislative appointments to certain boards and commissions, and that the President pro tempore may sign enrolled bills. Before lengthy recesses, however, the Senate regularly adopts orders allowing such acts to occur while the Senate is away. *See Riddick’s Senate Procedure* at 427, 830, 925, 1023, 1193. On December 17, 2011, the Senate adopted such orders, notwithstanding the planned *pro forma* sessions. *See* 157 Cong. Rec. at S8783. And other orders tellingly characterized the upcoming break as “the Senate’s recess.” *Ibid.* If the Company were correct that *pro forma* sessions are no different from any other sessions, those orders would have been unnecessary.

c. Under the circumstances, it was entirely reasonable for the President to rely on the Senate’s order that no business would be conducted during its 20-day January break and its repeated descriptions of that impending break as “the Senate’s recess.” *See United States v. Smith*, 286 U.S. 6, 35-36 (1932) (explaining

that “[i]t is essential to the orderly conduct of public business * * * that each branch be able to rely upon definite and formal notice of action by another”; warning against the “uncertainty and confusion” of requiring the President to “determin[e] through unofficial channels” the meaning of a Senate communication).

3. The mere possibility that the Senate might suspend its “no business” order during the 20-day period did not prevent that period from constituting a recess

The Company notes (Br. 31-33) that, at a *pro forma* session, the Senate might have overturned its unanimous-consent order directing that “no business” be conducted before January 23, 2012. In particular, the Company stresses (*ibid.*) that the Senate did conduct business, by passing a bill, during a December 2011 session that had been originally scheduled to be *pro forma*. But the remote possibility that unanimous consent to conduct business would be obtained, despite the December 17 order, cannot suffice to prevent an extended break from being a “recess” in the relevant sense. Indeed, the possibility of reconvening early exists during traditional intra-session—and even inter-session—recesses that take place pursuant to concurrent resolutions.¹⁸

¹⁸ The Congressional Research Service identified 114 *pro forma* meetings between January 4, 2005, and March 8, 2012, and found only “two at which legislative business appears to have been conducted.” 158 Cong. Rec. at S5954; *see* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011); *id.* at S8789 (Dec. 23, 2011).

A valid exercise of the recess-appointment power cannot depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess. Indeed, the Senate ordinarily retains the potential to conduct business before the end of recesses effectuated by concurrent resolutions of adjournment.¹⁹ Such resolutions typically provide—even for adjournments *sine die*—that the congressional leadership may require either or both Houses to resume business during the recess if the public interest warrants; those are, in legislative parlance, “conditional adjournment resolutions.”²⁰ In addition, the President may always require the Senate to terminate its recess and resume regular business “on extraordinary Occasions.” U.S. Const. Art II, § 3. But the mere possibility that congressional leadership or the President might require the Senate to resume business cannot mean that the Senate is not in recess, for then it could *never* be in recess.

The traditional and established understanding of the Recess Appointments Clause applies with equal force in this setting. The Senate here had unequivocally ordered a cessation of business between January 3 and January 23. To the extent

¹⁹ See, e.g., H.R. Con. Res. 225, 109th Cong. (July 28, 2005) (providing for adjournment between July 29 and September 6, 2005, but allowing for early recall); 151 Cong. Rec. 19,417 (2005) (reconvening early from intra-session recess after Hurricane Katrina); *Riddick’s Senate Procedure* at 1082-1083 (listing instances when “[b]y order, adopted by unanimous consent, the Senate has transacted * * * business during recess”).

²⁰ See H.R. Doc. No. 111-157, John V. Sullivan, *Constitution, Jefferson’s Manual & Rules of the House of Representatives*, § 84, at 38 (2011).

the Senate had the ability to conduct emergency business during its break, it was not because the Senate expressed any intent to do so, or because of anything distinctive about the *pro forma* sessions. Rather, that result was merely a function of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent. The December 17 order thus created a state of affairs in the Senate identical to those produced by a conditional adjournment resolution: the Senate was in recess, but might have resumed business if the public interest required.²¹ In practice, a Senator need not even be in the Senate chamber to block a proposed unanimous-consent agreement.²² That attribute of the December 17 order was likely essential for its adoption, because it gave Senators some assurance that they could leave Washington, D.C., without concern that any business would be conducted without their consent.

²¹ Indeed, resuming business under unanimous-consent orders is likely to be more difficult than doing so under the usual terms of a conditional adjournment resolution. The latter can be done by congressional leadership, despite objecting members, while the former could be blocked by a single Senator. See Martin B. Gold, *Senate Procedure & Practice* 24 (2d ed. 2008).

²² Before a bill, resolution, or nomination is presented on the Senate floor for unanimous consent, it customarily passes through an extensive clearance process. See Christopher M. Davis, Cong. Res. Serv., *Memorandum re: Calling Up Measures on the Senate Floor* (2011); Gold, *supra*, at 15 & 236 n.12. Among other things, the Majority Leader contacts each Senator's office through "a special alert line called 'the hotline' that provides information on [the measure] the leader is seeking to pass through unanimous consent." Sen. Tom Coburn, *Holding Spending*, www.coburn.senate.gov/public/index.cfm/holdingspending. A Senator can invoke "his unilateral ability to object to unanimous consent requests" by imposing a "hold" on a measure or matter "in advance and without having to do so in person on the floor." Gold, *supra*, at 84-85 (citation omitted).

4. Even assuming the *pro forma* sessions could satisfy the Senate's other constitutional obligations, they impermissibly disrupt the balance struck by Article II

There is prior history of the Senate's using *pro forma* sessions for short periods in an attempt to avoid adjourning for more than three days without the consent of the House of Representatives per the Adjournment Clause (Art. I, § 5, cl. 4), as a means of complying with the Twentieth Amendment's requirement to assemble when a new session begins on January 3, and to achieve other purposes wholly internal to the Legislative Branch. *See, e.g.*, 133 Cong. Rec. 15,445 (1987) (scheduling a single *pro forma* session to allow a cloture vote to ripen).

Since 2007, however, the Senate has often used *pro forma* sessions to paper over substantial breaks in Senate business, including at times (like the winter holidays and August) when, as a matter of traditional practice, there would have been a concurrent resolution of adjournment authorizing the Senate to cease business. *See* 158 Cong. Rec. at S5955 (describing breaks of 31, 34, 43, 46, and 47 days that included *pro forma* sessions); *Congressional Directory* 537-538. In such instances, the *pro forma*-session device has become an alternative means by which the Senate as a body ceases business—including the giving of advice and consent to appointments—for an extended and continuous period, enabling Senators to return to their States without concern that business will be conducted in their absence without their consent. Whatever effect *pro forma* sessions may have vis-

à-vis the Senate’s other constitutional obligations, permitting them to preclude recess appointments would impermissibly disrupt the constitutional balance of powers.

a. The Adjournment Clause furnishes each House of Congress with the power to ensure the simultaneous presence of the other House so that they can together conduct legislative business.²³ Insofar as the matter concerns solely the interaction of the two Houses, we may assume *arguendo* that they have some leeway to determine whether a particular practice comports with the Clause. And in any event each House has the ability as a practical matter to respond to, or overlook, an infringement by the other.²⁴

In the absence of considerable deference to Congress, however, a string of *pro forma* sessions at which no business will be conducted for 20 days cannot be seen as meaningfully compliant with the Adjournment Clause. Indeed, the Senate appears to have concluded as much in December 1876. Senator Henry Anthony proposed to have the Senate meet every three days “[w]ithout the transaction of any business” to permit a nine-day holiday “recess.” 5 Cong. Rec. 333 (1876).

Senator Roscoe Conkling objected, asking “[H]ow can it be that by an indirection

²³ See Jefferson’s Opinion on the Constitutionality of the Residence Bill (July 15, 1790), in 17 *The Papers of Thomas Jefferson* 195-196 (Julian P. Boyd ed., 1965).

²⁴ When the Senate used a unanimous consent resolution to adjourn from a Saturday until a Thursday in 1916, “it was called to the attention of the House membership but nothing further was ever done about it.” *Riddick’s Senate Procedure* at 15.

so slight as that now proposed we can circumvent the [Adjournment Clause]?” *Id.* at 335; *see also id.* at 336 (Sen. Hamlin) (“If that is not in contravention of the plain meaning and intent of the Constitution, then I do not understand the force of language.”). The resolution was altered to avoid Conkling’s objection. *Id.* at 336, 337-338.

b. Of course, even if the Court were to defer to the House and Senate’s belief that a series of *pro forma* sessions may satisfy their obligations to one another under the Adjournment Clause, such deference has no proper bearing on the Recess Appointments Clause’s meaning. Even assuming *arguendo* that the President has no direct interest in whether each House secures the other’s consent for an adjournment, he plainly has a direct interest in the balance that Article II strikes between his need to secure the Senate’s advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is unavailable.

c. The Company’s contrary view—under which the Senate may be absent in fact while present only by virtue of a legal fiction—would upset the balance struck in Article II between the Appointments Clause and the “auxiliary method of appointment” that applies when the Senate is unavailable to provide its advice and consent but there are vacancies “which it might be necessary for the public service to fill without delay.” *Federalist No. 67*, at 455.

As discussed above, since 2007, the Senate has used *pro forma* sessions to string together breaks in business lasting as long as 47 days, *see* 158 Cong. Rec. at S5955, and the Company's position provides no stopping point. *See New Vista*, 719 F.3d at 261 (Greenaway, J., dissenting). The Framers could not have anticipated or desired such a result. Nor is it justified by anything in the first two centuries of practice under the Appointments and Recess Appointments Clauses.

d. The significant separation-of-powers concerns raised by the Company's position are illustrated here. If, as the Company urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, the Board would have been disabled from carrying out significant portions of its statutory mission, thus preventing the execution of a duly passed Act of Congress and the performance of the functions of an office "established by Law," U.S. Const. Art. II, § 2, cl. 2. That result would directly undermine the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3—which necessarily requires the "assistance of subordinates." *Myers*, 272 U.S. at 117.

In contrast, upholding the Board members' appointments will not vitiate the Senate's powers or the ordinary process of advice and consent. The recess appointments were only temporary; the commissions were to "expire at the End of [the Senate's] next Session." Art. II, § 2, cl. 3. The Senate retained authority to

vote on the President’s nominees when it returned. More fundamentally, the Senate retains the choice it has always had: to remain “continually in session for the appointment of officers,” *Federalist No. 67*, at 455, thereby removing the constitutional predicate for the President’s recess appointment power, or to cease temporarily the conduct of business (and potentially leave the capital) knowing that the President may make temporary appointments during that period. Because the Senate cannot choose to do both simultaneously, the Court should reject the Company’s request to “disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted).

C. The President May Fill any Vacancy that Exists During a Senate Recess

The Company errs in relying on the D.C. Circuit’s conclusion that Presidents may only fill those vacancies that first arise during the relevant recess. This Court considered and rejected that interpretation of the Recess Appointments Clause over 50 years ago, and that decision – which the Company fails to acknowledge – controls here. *See Allocco*, 305 F.2d at 709-15.²⁵

²⁵ Two other circuits have agreed with this Court’s conclusion. *See Evans*, 387 F.3d at 1224-27; *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc).

CONCLUSION

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

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September 2013

**Nos. 13-684-ag (L) &
13-1240-ag (XAP)**

ADDENDUM

SPECIAL APPENDIX
OF THE NATIONAL LABOR RELATIONS BOARD

TABLE OF CONTENTS

Document	Page(s)
Decision and Order in <i>833 Central Owners and Local 621, United Workers of America</i> , No. 29-CA-070910, 359 NLRB No. 66 (Feb. 13, 2013)	SA 1-12

National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	Page(s)
Section 7 (29 U.S.C. § 157).....	SA 13
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	SA 13
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	SA 13-14
Section 8(c) (29 U.S.C. § 158(c))	SA 14
Section 10(e) (29 U.S.C. § 160(e))	SA 14-15
Section 10(f) (29 U.S.C. § 160(f)).....	SA 15

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

833 Central Owners Corp. and Local 621, United Workers of America. Case 29–CA–070910

February 13, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 14, 2012, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as amended,² and to adopt the recommended Order as modified and set forth in full below.³

CONCLUSIONS OF LAW

1. The Respondent, 833 Central Owners Corp., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 621, United Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employee Ezra Shikarchy with discharge and unspecified reprisals in order to coerce him into refraining from union activity, the Respondent violated Section 8(a)(1) of the Act.

4. By impliedly promising benefits to Shikarchy on the condition that he refrain from union activity, the Respondent violated Section 8(a)(1) of the Act.

5. By warning, suspending, and discharging Shikarchy because of his union activity, the Respondent violated Section 8(a)(3) and (1) of the Act.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge inadvertently omitted the conclusions of law from his decision. We supply them below.

³ We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012). We shall substitute a new notice to conform to the Order as modified.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, 833 Central Owners Corp., Far Rockaway, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other reprisals if they support the Union or engage in union activities.

(b) Impliedly promising benefits to employees in order to discourage them from supporting the Union or engaging in union activities.

(c) Warning, suspending, discharging, or otherwise discriminating against employees because of their support for and activities on behalf of the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Ezra Shikarchy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ezra Shikarchy whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Ezra Shikarchy for any adverse income tax consequences of receiving his backpay in one lump sum, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings, suspension, and discharge of Ezra Shikarchy, and within 3 days thereafter, notify him in writing that this has been done and that the warnings, suspension, and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic

form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Far Rockaway, New York facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 13, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge or other reprisals if you support the Union or engage in union activities.

WE WILL NOT promise you benefits in order to discourage you from supporting the Union or engaging in union activities.

WE WILL NOT warn, suspend, discharge, or otherwise discriminate against you because you support the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Ezra Shikarchy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ezra Shikarchy whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Ezra Shikarchy for any adverse income tax consequences of receiving his backpay in one lump sum, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to, suspension of, and discharge of

Ezra Shikarchy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warnings, suspension, and discharge will not be used against him in any way.

833 CENTRAL OWNERS CORP.

Michael Berger, Esq., for the Acting General Counsel.¹
Ernest R Stolzer, Esq. and *Hilary L. Moreira, Esq.*, for the Respondent.²
Bryan C. McCarthy, Esq., for the Charging Party.³

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried in Brooklyn, New York, on May 7 and 8, 2012.⁴ The Union filed a charge initiating this matter on January 15, 2012 (thereafter amended), and the Acting General Counsel issued the complaint on February 21, 2012.⁵ The government alleges the Company engaged in various acts of interference with its employees' protected rights. The government also alleges the Company issued four written warnings on the same day to its employee Ezra Shikarchy (Shikarchy), later suspended him for 3 days and thereafter discharged him because of his support for the Union.

The Company contends it warned, suspended, and terminated Shikarchy because he was not effectively and efficiently fulfilling his job duties.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations here. I have studied the whole record,⁶ and based on the detailed findings and analysis below, I conclude and find the Company violated the Act as alleged in the complaint.

¹ I shall refer to counsel for the Acting General Counsel as counsel for the government and to the National Labor Relations Board (Board) as the government.

² I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company or cooperative.

³ I shall refer to counsel for the Charging Party as counsel for the Union and I shall refer to the Charging Party as the Union.

⁴ All dates are 2011, unless otherwise indicated.

⁵ The government amended the complaint at the beginning of the trial to add two additional 8(a)(1) allegations.

⁶ At the conclusion of evidence on May 8, 2012, I adjourned the trial to allow government counsel to review certain documents pursuant to subpoena. I established a resumption date, if necessary, of June 5, 2012. Government counsel filed a Motion on May 25, 2012, moving I close the record subject to accepting a stipulation of the parties resolving the agency status of Walter Berger and the admission of a 3-page document provided by the Company pursuant to subpoena. In an Order dated May 29, 2012, I received in evidence the parties signed stipulation as GC Exh. 27 and the 3-page document as GC Exh. 26 and closed the hearing.

FINDINGS OF FACT

I. JURISDICTION, SUPERVISORY/AGENCY STATUS, AND LABOR ORGANIZATION STATUS

The Company is a domestic corporation with an office and place of business at 833 Central Avenue, Far Rockaway, New York, where it has been, and continues to be, engaged in the operation of a cooperative apartment building. During the past year, a representative period, the Company derived gross revenues in excess of \$500,000; and, purchased and received at its Far Rockaway location goods, products, and materials valued in excess of \$5000 directly from points outside the State of New York. The parties admit and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (Act).

It is admitted that, at all times material herein, Mark Hertzberg was the Company Board president and Steven Friedman was a Board member and that both are agents of the Company. It is admitted Jeffrey Herskovitz, an employee of Benedict Realty Group, LLC (BRG), serves as property manager responsible for the day-to-day operations of the Company. It is admitted Herskovitz is an agent of the Company. The parties, in a posttrial document received in evidence, stipulated Walter Berger was Company Board treasurer and an agent of the Company.

The parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act. It is admitted Steven Sombrotto, at times material here, was president of the Union.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

The cooperative's apartment building has 56 units. A majority of the tenants are senior citizens many of whom are widows. The cooperative operates through a Board of directors elected by the property shareholders. Membership on the Board is voluntary and unpaid. The Board has final authority on all matters pertaining to the cooperative. About 7 years ago, the Board hired BRG to manage the day-to-day operations of the cooperative including payroll, financials (making sure the money comes in, and as appropriate, paid out), preparing monthly and annual budgets, monitoring calls/complaints from the property, and enforcing the bylaws and proprietary leases of the cooperative. The cooperative employs seven staff members and provides 24/7 service that includes porters, doormen, handymen, and a superintendent. All employees, including the superintendent, are represented by the Union and have been since 2003. The parties' most recent collective-bargaining agreement expired November 2010. The parties currently are in negotiations for a successor agreement.

Shikarchy was hired as superintendent at the Company on February 1, 2010, by his friend of 20 years Board Member Friedman. Shikarchy is paid \$17.50 per hour and works a 40-hour week (7 a.m. to 3 p.m.), Monday through Friday schedule. He is available on call at all times. Shikarchy, while employed,

was provided an apartment on the property. Shikarchy was supervised by BRG Manager Herskovitz.

2. Government's evidence

Shikarchy testified that about a month and a half after he was hired Board Member Friedman told him union people were very bad and cost the cooperative a lot of money that otherwise needed to be saved. Friedman told Shikarchy the cooperative was going to install security cameras, fire everyone, and not need the Union anymore. According to Shikarchy, Friedman explained he hated unions because his father had lost a business as a result of a union. Shikarchy testified Friedman also told him Company Treasurer Berger did not like union people either because Berger's father had also lost a business because of a union.

Shikarchy testified, that in December 2010, as he was riding with Board President Hertzberg to BRG Manager Herskovitz's home, Hertzberg told him they had to go meet with the Union regarding the Company's discharge of employees Kenny Boykin and Jason Gomez. Hertzberg said the Union was no good and cost the Company a lot of money. Hertzberg explained the Company was going to install security cameras at its facility and get rid of the Union. Hertzberg told Shikarchy the cooperative could not save money, could not do what they wanted and they did not like the Union and wanted to get rid of it. Shikarchy testified he and Hertzberg actually rode with BRG Manager Herskovitz from his home to the meeting with the Union. During the drive Herskovitz showed Shikarchy his cell phone and explained the Company was going to install security cameras allowing them to observe the facility via telephone and they would not need workers or doormen. According to Shikarchy, Herskovitz told him he did not like Union President Sombrotto and the union people and they were going to get rid of the Union. Shikarchy testified Herskovitz stated that when he had to fire anyone that was very good with him.

The parties did not resolve the status of Boykin and Gomez at the December mediation meeting. Shikarchy testified Board Member Friedman had told him how he could trap employee Boykin into doing something wrong so they could fire him. Shikarchy said Friedman wanted Boykin fired because he was lazy and because of the Union. Shikarchy testified he and Board Member Friedman later pushed to have Friedman's son, Joseph, replace Boykin. Shikarchy said they wanted Joseph hired so he could spy on the Union adding "that's how to get rid of the union." Shikarchy testified that during that time he believed what the cooperative managers were telling him about unions and concluded union people were bad and he hated Union President Sombrotto also. Union President Sombrotto testified he considered Shikarchy to be a "henchman" for the cooperative at that time. He said he always got complaints from employees regarding harassment by Shikarchy.

After some delays an arbitration hearing concerning the discharge of employees Boykin and Gomez was set for June 20. Shikarchy testified that Board Member Friedman's telling him how to trap Boykin into doing wrong so he could be fired bothered him and as of the day of the arbitration he wanted no more of it. Shikarchy testified Board Member Friedman, BRG Manager Herskovitz, and Board President Hertzberg asked him to

prepare for and testify at the arbitration. Shikarchy said he tried to prepare for the arbitration with Herskovitz and the cooperative's lawyer shortly before the June 20 arbitration but added "I was not prepared for it." Shikarchy explained he did not prepare because "all this was wrong" "terrible" "[t]hey put me in a bad position against my will." Shikarchy testified Board Member Friedman told him at the arbitration that he was a bad witness because he didn't prepare and they might have to reinstate Boykin. Friedman blamed Shikarchy for not preparing to testify. Shikarchy said his view of the Union changed on arbitration day. Shikarchy said he even tried to signal to Boykin and the Union he was sorry for what he had done and wanted to apologize but they could not believe him. Union President Sombrotto acknowledged Shikarchy basically gave him a "thumbs up" at the arbitration. The parties settled the Boykin/Gomez grievance with each being paid \$5000 and Boykin reinstated part time and Gomez waiving reinstatement.

Shikarchy testified Board Member Friedman had not harassed him before the June 20 arbitration but afterward began to do so. Shikarchy said BRG Manager Herskovitz had praised his work prior to the June arbitration hearing saying he was the best superintendent he ever had, invited him to a party and gave him a bonus, but, he said all that changed after the arbitration hearing.

Shikarchy testified that during the last week in June Board Treasurer Berger told him they had a Board meeting and Board President Hertzberg and Member Friedman wanted Shikarchy out because he was switching to the Union and could do a lot of damage. Berger told Shikarchy they had a plan and wanted him out. Shikarchy testified Berger told him they felt his switching to the Union brought about Boykin and Gomez being reinstated and paid backpay. Shikarchy testified Board Treasurer Berger also told him they were going to destroy him because he switched to the Union and "they are going to do everything they can and they can do everything they want." Berger advised Shikarchy to "leave quickly . . . for [his] own benefit." Shikarchy testified that about this time Board Member Friedman and his son, Joseph Friedman, began to constantly harass him followed him cursed and yelled at him and interfered with his job duties. Shikarchy testified that on July 6 he suffered a stroke as a result of the harassment.

Shikarchy testified he became very active for the Union after June 20. Shikarchy explained he signed up an employee for the Union, joined the Union's negotiating team and distributed union fliers to employees and shareholders at the cooperative. Union President Sombrotto testified Shikarchy began to attend negotiation sessions as the employees' only representative in early October. Sombrotto explained Shikarchy was responsible for reporting back to the employees what took place at the negotiating table. Sombrotto said he provided Shikarchy with fliers which Shikarchy distributed starting October 6. Shikarchy testified that at various times Board President Hertzberg, BRG Manager Herskovitz, and Board Treasurer Berger told him to stop distributing the fliers with Hertzberg telling Shikarchy he was "so evil" and that what he was doing was "all [a] lie" and he should stop.

Shikarchy testified the harassment continued and on August 14 in the lobby of the facility Board Member Friedman

screamed at him and accused him of “torturing” and “making his son [employee Joseph Friedman] miserable.” Shikarchy testified Board Member Friedman told him he was going to Shikarchy’s ex-wife’s attorney and testify in the Shikarchy child custody matter so Shikarchy would never see his children again. Shikarchy testified Board Treasurer Berger was present and told him to call the Union, which he did. The next day Union President Sombrotto filed a grievance for Shikarchy alleging harassment and a threat to interfere in the Shikarchy custody matter by Friedman. This grievance was still pending as of the trial here.

Shikarchy testified BRG Manager Herskovitz telephoned him “very upset” about the grievance asking how he could do this “terrible” thing. Shikarchy explained Board Member Friedman had said he would destroy him, take away his children, damage his children by testifying against him in his custody proceeding with his ex-wife. Shikarchy told Herskovitz he would, however, telephone Union President Sombrotto and have Herskovitz’s name removed from the grievance. Herskovitz told Shikarchy to drop the grievance and if he did not Herskovitz would get him back. Shikarchy said he thereafter asked Sombrotto to do so but was told Herskovitz was part of management and would remain a part of the grievance. Shikarchy telephoned Herskovitz and told him he had tried but was unsuccessful. Herskovitz responded “you better drop it [the grievance]” or “I [will] get you back” and hung up.

Between mid-August and early December, Shikarchy and Board Treasurer Berger spoke several times about Shikarchy’s employment with the Company. Shikarchy testified Berger told him:

I told you to leave, leave. You’re with the Union now. I hate the Union. They going to destroy you. They going to destroy your reputation. If you go to any job, you want to get the job, you will have a bad record. Leave for your own benefit, leave the job. I worry about you. They going to do something to you. You cannot win. They, no way out with them.

Shikarchy testified Berger told him they had made him sick once, and reminded him of his stroke, and asked if he wanted to be sick again.

Shikarchy testified Board Member Friedman spoke with him about the grievance on three or four occasions in August and September in person and on the telephone. According to Shikarchy, Friedman told him he better drop the grievance or something bad was going to happen to him that he would be fired. Shikarchy testified Board President Hertzberg, in August, asked him how he could do this to his friend Friedman. Hertzberg told Shikarchy he was a bad evil person and told him to drop the grievance against Friedman or something bad was going to happen to him “You’re going to be fired.”

Shikarchy was called on September 7 to a meeting with BRG Manager Herskovitz and BRG Owner Daniel Benedict in Herskovitz’s office. Herskovitz told Shikarchy he had to drop the grievance and he did not want to hear anything about it. Shikarchy testified he tried to respond and was told to be quiet, to drop the grievance, and he did not want to hear anything about it. Shikarchy was handed four written disciplinary warnings. Shikarchy said he was shocked and could not believe it.

Each of the four warnings was a letter signed by Herskovitz, addressed to Shikarchy dated September 7. Benedict explained to Shikarchy that if he became neutral and remained quiet for 3 months he would tear up the warnings.

The first warning asserted Shikarchy had not maintained correct hours of work for the employees. The second warning asserted Shikarchy had missed a meeting with an architect and an engineer at the facility on June 21, at 3:30 p.m. The third warning asserted Shikarchy was insubordinate because he asked Board members for authorization to order equipment, do work, or utilize outside contractors rather than consulting with BRG Manager Herskovitz. The fourth warning, labeled “Final Warning” asserted Shikarchy had falsely accused employee Joseph Friedman of attacking him in the lobby of the facility on August 24. Shikarchy testified he was not asked his position on the four warnings.

On October 27, Shikarchy was given a letter of suspension. The letter advised Shikarchy he was suspended for 3 days without pay starting October 31, to November 2. In the letter Shikarchy was reminded he had been given four warning letters earlier about his job duties. In part the letter stated “you have not handled your basic duties and responsibilities such as arranging for requested repairs on a timely basis, leaving your post without coverage. In addition, your treatment of a number of residents has been insulting and improper. You have ignored or not complied with many directives from management and the Board of Directors.” Shikarchy was told if his performance did not improve there would be additional discipline up to and including discharge.

Shikarchy testified he notified Union President Sombrotto of the October 27 suspension and it was added to his August grievance and the September 7 warnings were also added.

On December 5, Shikarchy telephoned Board Treasurer Berger about his situation with the Company. Shikarchy, without Berger’s knowledge, recorded the conversation. The recording, as well as a certified transcript, was received in evidence. In the conversation Berger told Shikarchy that if he would drop his charges with the Union involving Board Member Friedman and not attend the mediation meeting scheduled for that Wednesday (December 7), the Company would know he was no longer having anything to do with the Union and was on the Company’s side and things could be worked out. Berger said those were two conditions Shikarchy needed to meet in order for things to be worked out. Berger told Shikarchy that if he came back with the Company then the Company would have better bargaining power with the Union to get whatever it wanted. Berger, at various points in the conversation, repeatedly told Shikarchy if the conditions were met “we can work it out” and you “won’t be harassed . . . anymore” and “you’ll have a job.” Shikarchy asked Berger several times what would happen to him if he stayed with the Union’s side. Berger told Shikarchy they will “probably fire you.”

On December 6, BRG Manager Herskovitz emailed Company Treasurer Berger that Shikarchy was going to attend the scheduled mediation the next day. Berger responded Herskovitz would have to do what he had to do.

On December 12, BRG Manager Herskovitz emailed the Board he would be by the cooperative that day to terminate Shikarchy's employment with the Company.

Shikarchy testified he received an email from his ex-wife that since he was no longer going to have a job with the Company he could go to Florida to look for work if he wanted to. Shikarchy immediately telephoned Board Treasurer Berger to find out what was going on. Shikarchy secretly recorded the conversation and the voice, as well as, a transcription thereof was received in evidence. Shikarchy asked Berger how the Company could fire him. Berger was surprised Shikarchy had not already been fired because Berger had received an email from BRG Manager Herskovitz the day before that Herskovitz was going to the cooperative then to personally discharge Shikarchy. Shikarchy asked Berger if what Berger had told him in a previous conversation was correct, that if he did not leave the Union and come over to the Company's side, he would be fired. Berger wanted to know if Shikarchy had attended the December 7 mediation meeting. Shikarchy told Berger he had but that nothing was said about him (Shikarchy) at that meeting. Berger told Shikarchy he was going to write BRG Manager Herskovitz about Herskovitz's termination email concerning Shikarchy to inform him that the building had never looked as clean and nice as it currently did and to inform Herskovitz that if Shikarchy was fired and he sued the Company, he would back up Shikarchy.

Shikarchy testified he received a telephone call from BRG Manager Herskovitz on December 13 requesting a meeting with him in the lobby at the cooperative. When they met Herskovitz handed Shikarchy a termination letter. The letter stated:

I regret I have been asked to inform you that after 4 written warnings including a suspension, 833 Central Owners Corps is hereby giving you this notice of termination of employment.

Upon hand delivery receipt of this notice, you are demanded to vacate the premises within 3 days since your apartment was contingent upon your employment. You are no longer able to work within the property.

3. Company's evidence

The Company called, as its sole witness, BRG Manager Herskovitz and presented some 32 emails of interactions between Herskovitz and Shikarchy in support of its defense that Shikarchy's discharge resulted from his inability to perform his duties in an effective and efficient manner and that he was unable to effectively oversee and operate the facility. Herskovitz, stated that at one point during Shikarchy's employment he believed he was a wonderful and attentive employee as well as a good mechanic also expressed that opinion to Union President Sombrotto.

In as much as the Company contends it based its actions against Shikarchy, including his discharge, on the issues discussed in and the facts surrounding the emails presented in evidence, I have set forth such here. The emails cover July 26, to December 13.

BRG Manager Herskovitz testified that in a July 26 email Shikarchy sought direction on purchasing certain needed materials locally. Herskovitz responded no local purchases were to be made that he had already provided Shikarchy with a list of suppliers from which Shikarchy could make purchases. That same day Herskovitz and Shikarchy exchanged emails regarding whether Shikarchy had received some fire escape plaques to be installed at the facility that were delivered to Company Porter Joseph Friedman. Shikarchy replied he had not received them from Friedman but had instructed Friedman to install the plaques. In the email Herskovitz directed Shikarchy to install the plaques himself that it was the superintendent's job.

BRG Manager Herskovitz received an email from Shikarchy on August 2 asking for a meeting. The two met the next day and discussed keeping correct records for employees regarding vacation and work scheduling. Herskovitz testified Shikarchy was deciding on his own and reporting who worked what hours. He noted Shikarchy would deduct an hour from an employee's time if the employee was up to 20 minutes late for work. Herskovitz explained to Shikarchy he was not entitled to do that, on his own, that everyone was late to work from time to time. In an August 4 email, Shikarchy told Herskovitz an employee had received 2 days of vacation pay but wanted two other paid days. Herskovitz testified Shikarchy had not provided enough information for him to authorize payment and added "[m]y simple response to him was in effect no big deal" just have a form filled out justifying the 2 extra days. Herskovitz said Shikarchy had "stacks of that form in his office."

Herskovitz testified that while Shikarchy was to work a 40-hour week certain accommodations were allowed in his schedule. Shikarchy could vary his starting and quitting hours and the Company allowed him to travel on Fridays to New Jersey to pick up his children for visitation rights without worktime deductions. Herskovitz and Shikarchy exchanged emails on August 9, wherein Shikarchy wanted to take additional time on a particular day and Herskovitz told him he could but he would not be paid for it. Shikarchy asked for clarification about whether he could take the time off. Herskovitz said he could and that Shikarchy knew the procedure for doing so before he asked and took up valuable time doing so.

Herskovitz testified it was Shikarchy's duty to order supplies for the facility from a list of distributors updated and provided and he did not need permission to, for example, order a wall pack floodlight for the exterior of the facility. Notwithstanding that fact Shikarchy on August 16 emailed Herskovitz that he needed a fluorescent light and had even checked with an employee about one. Herskovitz testified this only adds time to getting the job done, confuses employees, and it was Shikarchy's duty to order and install the lights. Herskovitz testified he had already informed Shikarchy about this procedure.

BRG Manager Herskovitz sent Shikarchy an email on August 22 advising him he had received a complaint from a resident at the facility that Shikarchy had not properly fixed a leaking window in the resident's unit. Herskovitz said Shikarchy had told him he had done all he could but could not repair the window. Herskovitz informed Shikarchy his job was never done until the resident said the job was completed to the resi-

dent's satisfaction. Herskovitz then provided Shikarchy the name of a contractor to assist with the repairs. Herskovitz testified it had been Shikarchy's duty all along to arrange for the outside contractor and complete the job.

Herskovitz testified he received telephone calls from property residents and Company Board members about an incident between employee Friedman and Shikarchy in the lobby of the facility on August 26. Shikarchy sent Herskovitz an email indicating he had found himself on the floor of the lobby that Friedman "came after" him as they were discussing the whereabouts of a vacuum cleaner. Herskovitz testified he and the Company board investigated the incident including viewing the lobby security cameras and concluded Shikarchy's version of the incident was totally false. The Company Board directed Herskovitz to include the findings in Shikarchy's personnel file for future reference.

Herskovitz testified he received an email from Shikarchy on September 1 requesting approval to repair a leaking window in one residence and a broken window in another. Herskovitz said he again had to remind Shikarchy he did not need to come to him for approval that the repairs were part of his job duties. Herskovitz said the more a superintendent had to ask him these type questions the more he believed the superintendent did not understand his job-related responsibilities.

BRG Manager Herskovitz testified he received many complaints from employees about their vacation schedules and vacation pay. Herskovitz sent Shikarchy a September 2 email requesting he be provided a log indicating which doormen had requested vacation time and the corresponding request forms otherwise he could not authorize payment for vacation times. Herskovitz testified it was Shikarchy's job to keep him so informed but had not.

Herskovitz testified that on September 7, he and BRG Owner Benedict met with Shikarchy in Herskovitz's office and issued him 4 written warnings. Herskovitz said their discussions centered around Shikarchy's lack of understanding of his position at the property and his misunderstanding of directions given to him by management. Herskovitz testified they told Shikarchy to stop asking Company Board members to order equipment and/or authorize work. Herskovitz acknowledged, on cross-examination, it could at first be confusing for a superintendent to understand what priority to give requests from resident owners some of which are "pushy." Herskovitz even requested Board Member Friedman cease all communications with Shikarchy and acknowledged many other tenants frequently asked Shikarchy to perform repairs for them. Herskovitz said they also explained to Shikarchy it was Shikarchy's duty to keep up with work hours for the employees at the facility but told Shikarchy management would be assuming that task for a while. Herskovitz testified they discussed the fact he had given Shikarchy permission to have lunch with his children at noon on June 21, but that Shikarchy had not told him he had an appointment to meet with an architect, engineer, and a Board member at 3:30 p.m. that afternoon. Herskovitz testified Shikarchy did not attend the meeting and informed the Board member involved that Herskovitz had excused him from the meeting. Herskovitz testified that was not true. Herskovitz, on

cross-examination, stated he had not set up nor did he know about the meeting ahead of time. Herskovitz did not know which Board member had in fact set up the meeting nor how far in advance it was arranged and to his knowledge there was no documentation showing Shikarchy was ever specifically directed to attend the meeting. Herskovitz acknowledged the meeting was set for 3:30 p.m. even though Shikarchy's work day ended at 3 p.m. on that date. Herskovitz said however, that not showing up for a scheduled meeting was a serious offense but acknowledged no report of the incident was made except in the September 7 warning letter. Herskovitz testified they also told Shikarchy they were giving him a final warning because he falsely claimed employee Friedman had knocked him down in the lobby of the facility.

BRG Manager Herskovitz emailed Shikarchy on September 9 directing him to do his job and assign someone to fill in a vacancy that had developed for the porter position. Herskovitz said he had received telephone calls about the situation which required his time on matters Shikarchy should have taken care of.

Herskovitz testified he emailed Shikarchy on September 14 explaining to him that if he had to go for a court appearance in a child custody matter with his ex-wife on September 16, he should go but he would not be paid for that time. Herskovitz testified he and BRG Owner Benedict had previously told Shikarchy he could go but they were having to spend valuable time telling him again.

BRG Manager Herskovitz testified about another incident that contributed to Shikarchy's discharge which involved Shikarchy requesting authorization to fill a pot hole in the parking lot at the facility. Herskovitz emailed Shikarchy on September 15 to fill in the hole. Herskovitz testified he had previously given Shikarchy a contractor to call to repair the hole and Shikarchy did not need further permission and time was lost in his doing so.

Herskovitz emailed Shikarchy on September 16 following up an email from Shikarchy regarding work hours for Company porter Friedman. Herskovitz told Shikarchy he had misunderstood his earlier directions and added, "You have a serious communication problem that has been addressed for months now . . . [s]top making up stories, asking for clarification every day regarding every direction and stop creating controversy where there is none."

Herskovitz sent Shikarchy an email on Wednesday, September 28, asking that he replace a light bulb and said it should have been done on Monday. Shikarchy said he was sick at the time. Herskovitz then responded for Shikarchy to replace the bulb that it should not take 2 days to do so.

On October 4, Shikarchy emailed Herskovitz that he had an appointment on October 6, and would be away from work. Herskovitz replied that he needed more information and informed Shikarchy he would have to arrange for someone to fill in for him. Herskovitz said all these situations were taken into consideration in disciplining Shikarchy.

On October 17, Herskovitz sent Shikarchy 2 emails. The first informed Shikarchy work orders were made up by management not by Shikarchy and that overtime for himself had to

be authorized by the Board or management. Herskovitz testified that in this case Shikarchy had made up his own work order and performed work pursuant to it without approval. The second email advised Shikarchy to fix a slamming door on the side of the facility. Herskovitz said he had examined the door himself and it only needed an armature adjustment at the top of the door and that he had asked Shikarchy “weeks before” to fix it. Herskovitz testified he had been contacted by shareholders complaining the slamming door awakened them at night. Herskovitz could not recall, by name, any of those complaining.

BRG Manager Herskovitz testified Shikarchy was given notice by a Board member on October 27 he was suspended from work for 3 days without pay. The suspension was effective from October 31, through November 3. Herskovitz testified Shikarchy was given the suspension, in part, because of “his absences from the property which follows to items not being fixed or upgraded as needed, schedules not being adhered to.” Herskovitz said he met with Union President Sombrotto and Shikarchy around November because he was “inundated every day” by shareholders and Board members that repairs at the facility were not getting made. Herskovitz testified he told Shikarchy the property was quite literally going to fall apart.

BRG Manager Herskovitz received an email from Shikarchy on November 3 advising he had checked the air valves in one of the properties and was seeking permission to replace them. Herskovitz said if he did not respond Shikarchy would not do the repairs but added Shikarchy did not need further authorization.

Herskovitz testified he emailed Shikarchy on Monday, November 11, to order alarms for the roof top doors and install them the following Monday. Herskovitz said Shikarchy did not install them and he had to be given a direct order to do so even though it was the type work to be performed by the superintendent.

BRG Manager Herskovitz said there were some broken benches at the back of the property but the Board had not made a decision regarding what to do with them. Herskovitz testified Shikarchy took it upon himself to place yellow tape around the benches that created an eye sore at the property. Herskovitz was asked by Board members why he had told Shikarchy to place tape on the benches. Herskovitz told them he had not done so and emailed Shikarchy on November 16 directing he move the benches to a corner of the property and remove the yellow tape. On November 22, Herskovitz emailed Shikarchy asking why he had still not taken care of the matter or removed the tape.

Herskovitz testified that over the evening hours on December 1 he received many voice mails from shareholders and/or tenants complaining Shikarchy was taking out garbage at night. Herskovitz emailed Shikarchy asking why he was making noise taking out the garbage at 9 p.m. Herskovitz said Shikarchy explained he was helping employee Friedman whose job it was to take out the garbage.

Herskovitz testified one of the reasons Shikarchy was interviewed and hired was his claim he was very mechanically inclined. Herskovitz said he asked Shikarchy to fix the leaf blower and lawnmower and to be sure the snow plow, which

Shikarchy had assembled when it was purchased, was in working order. Herskovitz testified he received an email from Company porter Friedman on December 2 stating Shikarchy had instructed him, by Herskovitz’s authority, to fix the lawnmower and leaf blower. Herskovitz emailed Friedman he had not so instructed Shikarchy and emailed Shikarchy that day instructing him to do the jobs.

Herskovitz testified that in an email dated December 5, he directed Shikarchy to cover for the porter in the porter’s absence. Herskovitz testified Shikarchy had, in the past, stated he was capable of doing both his and the porter’s job. Herskovitz said Shikarchy, in a reply email the same day, argued that in the past they had always obtained a fill in for the porter. Herskovitz testified Shikarchy was always arguing with him.

Herskovitz emailed Shikarchy on December 8 advising him not to direct an outside roofing contractor to do interior repairs in an apartment which was well beyond Shikarchy’s authority that Shikarchy was to do inside repairs himself or obtain an interior contractor to perform the work. Herskovitz testified that again on December 11, Shikarchy requested authorization to schedule a fill in porter at the facility even though he did not need further authorization because he had already given him full authorization. Herskovitz testified this troubled him because he feared Shikarchy was not properly and timely scheduling positions to be covered.

BRG Manager Herskovitz testified the Board of Directors voted on December 12 to terminate Shikarchy and he was terminated on December 13. Herskovitz testified Shikarchy was terminated because of his absences from work, his inability to follow instructions, and because “at that point in time [the building] was falling apart.”

Herskovitz testified he had no discussions with Company Treasurer Berger in December regarding the Company being willing to not terminate Shikarchy if Shikarchy stopped supporting the Union. Herskovitz also denied authorizing Berger to offer such a resolution to Shikarchy.

It is appropriate to address the credibility of Shikarchy even though his testimony related to Company Board President Hertzberg and Board Member Friedman was not challenged as neither testified. Further certain critical statements Shikarchy attributed to BRG Manager Herskovitz and Board Treasurer Berger were not specifically responded to or refuted. I credit Shikarchy’s testimony. In arriving at my conclusion on Shikarchy’s credibility I was greatly impacted by impressions I formed as I observed him testify. While Shikarchy frequently answered questions with more, or beyond, what he was asked, a fact I cautioned him about more than once, I nonetheless concluded he attempted to testify truthfully. I am persuaded his extended answers were an attempt to tell what he perceived to be a full account of what had transpired rather than to exaggerate or misspeak facts. It was clear observing Shikarchy testify he has strong feelings as to the correctness of his cause and he sometimes expressed himself loudly and with gesticulations. I did not find such to indicate an attempt to misspeak the truth but rather to convey emphasis. On the other hand, I am persuaded, after observing Company Treasurer Berger testify, he did so with a self-imposed and deliberate failure to recall certain facts and dates. Nonetheless, I rely on certain portions of

Berger's overall testimony, namely the recorded conversations between he and Shikarchy. To the extent, if any, there are conflicts, real or perceived, between Shikarchy's testimony and that of Berger or Herskovitz I credit Shikarchy. Furthermore, I am specifically unwilling to credit Herskovitz's denial he had no discussions with Berger in December about any willingness on the part of the Company not to discharge Shikarchy if he disavowed his support for the Union or Herskovitz's denial he ever authorized Berger to convey such an offer to Shikarchy. I have not commented on but I have considered all testimony and exhibits in deciding the facts herein.

III. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. The 8(a)(1) Issues

It is alleged that around August or September, Company Board President Hertzberg, at the facility, threatened an employee with discharge and unspecified reprisals if he continued to engage in union activities.

Shikarchy credibly testified, without contradiction [Hertzberg was not called to testify], that after he filed a grievance in August against Board Member Friedman for harassment that Hertzberg asked Shikarchy how he could do this to his friend Friedman, and told Shikarchy he was a bad evil person and directed Shikarchy to drop his grievance against Friedman or something bad was going to happen to him that he was going to be fired. First, I note Shikarchy's filing a grievance constituted concerted protected activity. *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984). Hertzberg's threatening Shikarchy that bad things would happen to him if he did not withdraw his grievance constitutes a threat of unspecified reprisals for engaging in protected conduct and Hertzberg's telling Shikarchy he would be fired if he did not withdraw his grievance constitutes an unlawful threat of discharge and I so find.

It is alleged that about August or September, Company Board Member Friedman, at the facility, threatened an employee with discharge if he continued to engage in union activities.

Shikarchy credibly testified, without contradiction [Friedman was not called to testify], that Friedman on three or four occasions told him either in person or on the telephone he better drop his grievance against Friedman or something bad was going to happen to him he would be fired. It is clear and I find that Friedman, on these occasions, unlawfully threatened Shikarchy with discharge if he did not withdraw his grievance against Friedman.

It is alleged that about August or September BRG Manager Herskovitz in a telephone conversation, and at the offices of BRG, threatened an employee with discharge if he continued to engage in union activities.

Shikarchy credibly testified [Herskovitz did not specifically deny], that Herskovitz telephoned him shortly after he filed the August grievance against Board Member Friedman and asked how he could do such a terrible thing. Shikarchy explained Friedman had said he would destroy Shikarchy, take away his children by testifying against Shikarchy in custody proceedings with his ex-wife. Herskovitz told Shikarchy to drop the grievance and if he did not he would get him back. Shikarchy told

Herskovitz he would try to get his name removed from the grievance. Shikarchy telephoned Union President Sombrotto but was unable to get Herskovitz's name removed and telephoned Herskovitz telling him he could not. Herskovitz again told Shikarchy to drop the grievance and if he did not he would get him back and hung up the telephone. On September 7, at a meeting in Herskovitz's office, Herskovitz yet again told Shikarchy he had to drop the grievance and added he did not want to hear anything more about it. While the comments of Herskovitz may not actually constitute threats to discharge Shikarchy for his protected activity I find the comments constitute threats of unspecified reprisals against Shikarchy.

It is alleged that about September or October Company Treasurer Berger, in a telephone conversation, and at the Company facility, threatened an employee with unspecified reprisals because of his support for, and activities on behalf of, the Union.

Shikarchy testified, without contradiction [Berger testified but did not address these matters], that between mid-August and early December, Berger spoke with him several times about his employment with the Company. Berger told Shikarchy to leave his employment that he was now with the Union and he hated the Union. Berger told Shikarchy the Company was going to destroy him and his reputation and if he wanted a job elsewhere he would have a bad record. Berger implored Shikarchy to leave for his own benefit that he worried about him and his health. Berger told Shikarchy they had made him sick once and reminded him of his stroke and asked if Shikarchy wanted to be sick again. Berger told Shikarchy they were going to do something to him that he could not win that there was no way out for him. By telling Shikarchy the Company was going to destroy him and do something to him that he could not win and had no way out Berger clearly threatened Shikarchy with unspecified reprisals in violation of the Act and I so find.

It is alleged that about December 5 Company Treasurer Berger, in a telephone conversation, threatened an employee with discharge and unspecified reprisals because of his support for the Union and impliedly promised the employee benefits to discourage him from supporting the Union.

It is undisputed that Shikarchy telephoned Berger and recorded their December 5 conversation. In the exchange Berger told Shikarchy if he would drop his charge with the Union against Board Member Friedman and not attend a mediation on the matter scheduled for December 7, they would know he no longer was having anything to do with the Union but rather was back on the Company's side and things could then be worked out for him. Berger explained that with Shikarchy back on the side of the Company the Company would have better bargaining power with the Union to get whatever it wanted. Berger told Shikarchy, more than once, that if he did as they asked "we can work it out," he would not "be harassed . . . anymore," and would "have a job." When Shikarchy asked what would happen if he stayed with the Union Berger responded the Company would probably fire him. It is clear Berger threatened Shikarchy with discharge if he did not abandon his support for the Union. Berger also specifically promised employee benefits to

Shikarchy if he dropped his support for the Union namely he would no longer be harassed, everything would be worked out, and he would continue to have a job. Berger's promises and threats violate the Act and I so find.

B. The Warnings, Suspension, and Discharge of Shikarchy

In cases alleging violations of Section 8(a)(3) and (1) of the Act where the employer's motive is in issue, as is the case here, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the Acting General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision. Once the Acting General Counsel makes that showing by proving the employee's union or protected activity, employer knowledge of the union or protected activity, and employer animus against the employee's protected conduct, the burden of persuasion shifts to the employer to demonstrate it would have taken the same action even in the absence of the protected conduct. See *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). If, however, "the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails, by definition, to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Rood Trucking Co.*, 342 NLRB 895, 897–898 (2004) (citations omitted); see also *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 2 (2010) (if proffered reason for discharge is pretextual, employer necessarily fails to establish *Wright Line* defense).

Applying the above, I address each element of the government's burden of proof as to whether Shikarchy's union activities was a motivating factor in the Company's decision to warn, suspend, and discharge him. The evidence establishes Shikarchy supported the Union. Although Shikarchy, early in his employment with the Company, supported the Company's position related to the Union, he later changed to supporting the Union. Shikarchy's first support for the Union, established here, began when Shikarchy did not prepare for his anticipated testimony on behalf of the Company at an arbitration hearing on June 20 involving the discharge of employees Boykin and Gomez. Shikarchy not only did not testify but openly displayed his support for the Union's position by giving a thumb's up to the Union. On August 14, Shikarchy claimed harassment by Board Member Friedman because he supported the Union. A grievance was filed for Shikarchy the next day against Friedman asserting harassment by Friedman including Friedman threatening to interfere in a custody matter involving Shikarchy and his ex-wife. The filing of a grievance constitutes conduct protected by the Act *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). After June 20, Shikarchy signed up an employee for the Union, joined the Union's negotiating team around October, and distributed various union flyers to employees and shareholders of the Company regarding negotiations and employee concerns.

The Company was aware of Shikarchy's union activities. Shikarchy's lack of preparation for the June 20 arbitration indicated to the Company Shikarchy no longer supported the Company's position. Board Member Friedman told Shikarchy, at the arbitration, that his not preparing to testify might result in the Board having to reinstate Boykin. Board Treasurer Berger told Shikarchy during the week of June 20 that at the Board's most recent meeting Board President Hertzberg and Board Member Friedman had stated they wanted Shikarchy out because he was switching his support to the Union and could do a lot of damage to the Company. Berger also told Shikarchy they felt his switching to the Union's side brought about employees Boykin and Gomez being offered reinstatement with backpay. The Company was fully aware Shikarchy distributed flyers for the Union to its employees and shareholders. Company Board President Hertzberg, BRG Manager Herskovitz, and Board Treasurer Berger told Shikarchy to stop distributing the flyers with Hertzberg telling Shikarchy it was evil for him to distribute union flyers. The Company clearly knew Shikarchy was participating at the negotiation sessions on behalf of the Union's committee. The Company was given a copy of the Shikarchy grievance.

The government established the Company harbored animus specifically against Shikarchy's protected activities and against the Union in general. Starting in mid-March 2010, Board Member Friedman told Shikarchy union people were very bad and cost the Company lots of money and the Company was going to install security cameras, fire everyone, and no longer need the Union. Friedman also told Shikarchy he hated unions. In December 2010, Board President Hertzberg told Shikarchy the Union was no good, cost the Company money, prevented them from doing what they wanted, they did not like the Union and wanted to get rid of it. On that same occasion BRG Manager Herskovitz told Shikarchy he did not like Union President Sombrotto and the union people and they were going to get rid of the Union. Board Treasurer Berger told Shikarchy, between June and September, the Board was going to destroy him because he switched to the Union and told him the Board could do anything they wanted. Berger urged Shikarchy to leave the Company for his own benefit because he was with the Union and told Shikarchy he hated the Union. Berger also told Shikarchy the Board was going to do something to him that there was no way out for him and he could not win. Board Member Friedman repeatedly told Shikarchy in August and September he should drop his grievance against Friedman or something bad would happen to him that he would be fired. Board President Hertzberg told Shikarchy in August he was evil for filing the grievance against Friedman and to drop it or something bad would happen to him he would be fired. When Shikarchy was given four written warnings on September 7, he was told by BRG Manager Herskovitz he had to drop the grievance against Friedman and he did not want to hear anything more about it.

Board Treasurer Berger told Shikarchy on December 5 that if he would drop his grievance against Board Member Friedman and not attend a mediation session on the matter scheduled for 2 days later the Company would know he was no longer with the Union and on the Company's side and things could be worked out. Berger told Shikarchy the Company would have

better bargaining power with Shikarchy on their side and the Company could get what ever it wanted in the negotiations and Shikarchy could have a job, but, if he stayed with the Union he would probably be fired. Shikarchy attended the mediation session and approximately a week later was fired.

Based on all the above, I find the record amply demonstrates government counsel has sustained his initial *Wright Line* burden of showing that Shikarchy's involvement in the union and protected activities was a motivating factor in the Company's decisions to warn, suspend, and discharge him.

I find the Company failed to meet its *Wright Line* burden of showing Shikarchy would have been warned, suspended, and discharged for legitimate business reasons even if he had not engaged in union and/or protected activities. The credited evidence clearly establishes the Company's proffered reasons for warning, suspending, and discharging Shikarchy were pretextual—that is, they were not in fact relied upon. Rather, the evidence shows, as clearly stated by Board Member Berger, the discipline against Shikarchy and his discharge was based on his union and protected activities. Berger told Shikarchy that everything involving him could be worked out, the harassment against him stopped and he could have his job, but, he had to make a choice and drop his support for the Union and be on the Company's side or be unemployed.

Further evidence demonstrates the pretextual nature of the Company's defense. Shikarchy's record was that of an attentive employee without discipline until he engaged in protected activities and shifted his support to the Union. All of the email evidence proffered by the Company to support its defense involved incidents that occurred after Shikarchy's support for the Union was known to the Company. The Company advanced no justifiable explanation for issuing four written warnings to Shikarchy on 1 day, September 7, for events dating back to June 21, 1 day after Shikarchy made his support for the Union known. In early October, Shikarchy took on a greater role for the Union becoming the sole employee member on the Union's negotiating committee and the one responsible for keeping employees informed of the status of negotiations through fliers and other means. On October 27, Shikarchy was suspended for 3 days without pay for not properly handling his job duties and mistreating residents. Again the timing of the Company's action is suspicious and the Company failed to satisfactorily establish sufficient details regarding complaints of residents being improperly treated or how Shikarchy's job performance declined quickly. I find it unnecessary to address, in detail, each of the asserted defenses raised by the Company because the evidence is compelling Shikarchy was warned, suspended, and discharged for his union activities and that the reasons advanced by the Company were pretextual. I find the Company violated Section 8(a)(3) and (1) of the Act by warning, suspending, and discharging its employee Shikarchy.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the unlawful conduct toward Ezra Shikarchy, the Company must, within 14 days

of the Board's Order, offer him reinstatement to his former job, or if his former job no longer exists, to a substantially equivalent job without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any lost wages and benefits as a result of his October, 27, 2011 suspension, and December 13, 2011 discharge, with interest. Backpay will be computed as outlined in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) (backpay computed on quarterly basis). Determining the applicable rate of interest will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employee shall be compounded on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I also recommend the Company, within 14 days of the Board's Order, be ordered to remove from its files any reference to its October 27, 2011 suspension and December 13, 2011 discharge of Ezra Shikarchy and, within 3 days thereafter, notify Ezra Shikarchy in writing it has done so and his suspension and discharge will not be used against him in any manner. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Company, 833 Central Owners Corp., Far Rockaway, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning, suspending, discharging, or otherwise discriminating against employees for engaging in union activity protected by the Act.

(b) Threatening employees with discharge or unspecified reprisals because of their support for and activities on behalf of a union.

(c) Impliedly promising employees benefits to discourage them from supporting and/or engaging in activities on behalf of a union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Ezra Shikarchy full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ezra Shikarchy whole for any loss of earnings and other benefits suffered as a result of the discrimination against

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warnings, suspension, and discharge of Ezra Shikarchy, and within 3 days thereafter, notify him in writing that this has been done and that the warnings given him and his suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Far Rockaway, New York facility, copies of the notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since September 2011.

Dated at Washington, D.C. September 14, 2012

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for engaging in union activity protected by the Act.

WE WILL NOT threaten any of you with discharge or unspecified reprisals for engaging in union activity protected by the Act.

WE WILL NOT impliedly or otherwise promise any of you benefits to discourage you from supporting and engaging in union activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ezra Shikarchy full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ezra Shikarchy whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Ezra Shikarchy, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

833 CENTRAL OWNERS CORP.

National Labor Relations Act, as amended

Sec. 7 [29 U.S.C. § 157].

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8 [29 U.S.C. § 158].

(a) **[Unfair labor practices by employer]** It shall be an unfair labor practice for an employer--

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

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided

further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

...

- (c) **[Expression of views without threat of reprisal or force or promise of benefit]** The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Sec. 10 [29 U.S.C. § 160].

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

leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

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

NATIONAL LABOR RELATIONS BOARD,)	
)	
Petitioner – Cross Respondent)	Nos. 13-684-ag (L)
)	13-1240-ag (XAP)
v.)	
)	Board Case No.
833 CENTRAL OWNERS CORP.,)	29-CA-070910
)	
Respondent – Cross Petitioner)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,368 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, is identical to the hard copy of the Board’s brief filed with the Court and served on the petitioner. Board counsel further certifies that the CD-ROM has been scanned for viruses.

/s/ Linda Dreeben

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National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570-0001
(202) 273-1714

Dated at Washington, D.C.
this 27th day of September, 2013

**UNITED STATES COURT OF APPEALS
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)	29-CA-070910
)	
Respondent – Cross Petitioner)	
<hr/>)	

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system, and that this document was served on all parties or their counsel of record through the CM/ECF system.

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

Dated at Washington, D.C.
this 27th day of September, 2013