UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 00-1329, 00-1599

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6 WEST LIMITED CORPORATION and LETTUCE ENTERTAIN YOU ENTERPRISES, INC., d/b/a TUCCI MILAN

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The jurisdictional statement of 6 West Limited Corporation and Lettuce Entertain You Enterprises, Inc., d/b/a Tucci Milan ("the Company") is correct, but not complete. This case is before the Court on the Company's petition to review and the application of the National Labor Relation Board ("the Board") to enforce a Board order issued against the Company. The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over the case under Section 10(e) and (f) of the Act

(29 U.S.C. § 160(e) and (f)), the unfair labor practices having occurred in Chicago, Illinois.

The Board's decision and order issued on January 24, 2000, and is reported at 330 NLRB No. 77. (SA 1-14.)[1] That order is final under Section 10(e) and (f) of the Act. The Company filed its petition for review on February 8, 2000, and the Board filed its cross-application for enforcement on March 9, 2000. Both were timely filed; the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by falsely telling employees that the Union had threatened to bomb a house shared by two employees; by coercively expanding its guard force; and by soliciting employee grievances with pledges to remedy those grievances.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Gibson and by disciplining other employees pursuant to the discriminatory application of a no-solicitation rule.

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[1] "SA" references in this brief are to the short appendix filed by the Company with its brief. "Tr" references are to the transcript of hearings before the administrative law judge. "GCX" references are to the exhibits introduced by the General Counsel. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Following investigation of unfair labor practice charges filed by employees of the Company, the Board's General Counsel issued an amended consolidated complaint against the Company, alleging several violations of the Act. Following a hearing, a Board administrative law judge issued a recommended decision finding merit to some of the complaint allegations. (SA 7-21.) The Company and the General Counsel filed exceptions and cross-exceptions. In its decision and order, the Board reversed the judge's dismissal of two complaint allegations, but otherwise affirmed the judge's findings and conclusions with minor modifications. (SA 1-3, & n.2.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; General Manager Kozak Notices Pages Missing from the Managers' Logs; Kozak Initiates an Investigation of Those Managers with Access to the Logs, But Quickly Drops the Investigation; Employees Meet at Employee Gibson's Home To Discuss the Logs and Other Issues; Seven Employees Form a Union Organizing Committee

The Company owns restaurants in the Chicago area, including the Italian restaurant Tucci Milan ("the restaurant"). Prior to the fall of 1994, the Company hired WBE Security, which provided the services of one off-duty Chicago police officer per shift on Friday and Saturday nights as a precaution against disruptive customers and thievery. The officer was stationed on a regular basis at the bar located at the front of the restaurant. (SA 8, 10; 91, 97, 506-07.)

In late summer of 1994, the Company hired Jeff Kozak to replace Steve Schwarz as general manager. Shortly thereafter, Kozak noticed that several pages were missing from the "managers' logs"--that is, company documents that memorialized daily events in the Company's restaurant. The logs also contained criticisms of both employees and customers. Kozak initiated an internal investigation into the missing logs. Because the logs were kept under lock and key in the managers' office, Kozak limited his investigation to those who had access to that office, including former General Manager Schwartz. None of the managers acknowledged knowing anything about the missing pages, and Kozak dropped the investigation. (SA 8; Tr 66-67, 496-502, GCX 2.)

In the late summer of 1994, 19 of the Company's employees met at the house shared by employees Brian Gibson and Jill Ricci to discuss work-related problems. (ALJD 8; Tr 58-70, 118-19.) Gibson showed the group a copy of a document entitled "Constructive Criticism"--a cut-and-paste "pastiche" of management comments about employees that were excerpted from the managers' logs. The group discussed the contents of the pastiche. (SA 8; Tr 70, 118-19, 215-16, 244-45.) By the end of the meeting, the employees agreed to take action concerning several issues, including the manner in which management had distributed tips following a large Christmas party the restaurant had hosted in December 1993. (SA 8; Tr 71, 215-17, 248, 263.) Gibson and employee Greg Calvird agreed to call a union to discuss the possibility of organizing. (SA 8; Tr 71, 217, 262.)

About two weeks later, Gibson and Calvird met with Terry Maloney, an agent of the Hotel Employees and Restaurant Employees Union, AFL-CIO, Local 1 ("the Union"), to discuss the benefits of union representation. (SA 8; Tr 72-73, 217-18.) In September 1994, Maloney and two other union agents held a meeting at the Gibson-Ricci residence with some of the Company's employees, including Gibson, Ricci, Calvird, Gretchen Grant, Elaine Gonzales, and Sarkis Akmakjian. The employees signed union authorization cards, and formed a union organizing committee. (SA 8; Tr 73-74, 188-89, 246-48, 262-63, 314-15, 318.) Thereafter, Gibson and other members of the organizing committee spoke with other employees about the Union, encouraged them to attend union meetings, and distributed authorization cards. (SA 9; Tr 75, 190, 217-19, 248-49, 265, 315.)

B. Gibson Distributes Copies of the Pastiche to Other Employees at a Union Meeting; After Learning about the Union's Organizing Campaign, the Company Increases Security; an Employee Tells Management That Gibson is Distributing the Pastiche; the Company Announces a Police Investigation into the Missing Logs

At another union meeting about October 8, Gibson distributed copies of the pastiche to the employees, stated that management could not be trusted, and urged the employees to support the Union. (SA 9; Tr 75-76, 264, 315-16, GCX 2.) Employee Ken Schrader became upset and said that the pastiche was stolen property. (SA 9; Tr 75-76, 316-18, 434-41, 447, GCX 2.) Gibson explained that the pastiche itself was simply a copy of excerpts from the logs and was not itself stolen property. Schrader was unassuaged. (SA 9; Tr 76-79.)

The following day, Schrader informed Managing Partner Howard Katz and General Manager Kozak that Gibson was distributing copies of the pastiche. Schrader added that other employees also had copies of the pastiche and that the employees were thinking of forming a union. Later that day, Schrader gave his copy of the pastiche to Kozak. (SA 8, 9; Tr 97, 187, 441-46, 448-53, 495, 502-05, 541-43.) Shortly thereafter, Kozak extended the Company's security service to provide for security every day on every shift, not just on Friday and Saturday nights. Kozak and other management officials announced the increased security to the employees, telling them that the increase was designed to ensure their safety and to prevent harassment, and stating that the security guards would be available to escort them to their cars or to give them rides to their homes. Thereafter, the Company told the employees that the increase in security was aimed at preventing union harassment. (SA 2, 10; Tr 101-02, 194-96, 226, 235, 236-37, 249-50, 318-19, 506-11, 536-40, 556-57, 573-74.)

At an employee meeting on October 11, Katz announced that management had learned that parts of the managers' logs had been stolen, and he told the employees that management had notified the police. (SA 9; Tr 82, 118-20.) Katz added that the employees could also expect a visit from the Immigration and Naturalization Service. (SA 9 & n.8; Tr 79-81.)

C. Gibson Relays Employee Complaints to Company Manager Glasby; the Company Suspends Gibson Pending the Outcome of the Police Investigation into the "Stolen" Log Entries; Glasby Blames Gibson for Bringing a Union to the Workplace, and the Company Discharges Gibson

Employee Gibson did not work the following day, October 12, due to an illness. (SA 9; Tr 87.) While he was off work, he called Jacqui Glasby, a company manager who worked as an employee relations specialist in an office in Las Vegas, Nevada. (SA 9; Tr 82-84.) Gibson told Glasby that the Company was threatening employees with an INS raid. (SA 9; Tr 82-83.) Glasby told Gibson that she did not think that was the real reason he was calling. (SA 9; Tr 83.) When Gibson told her that he knew what his rights were, she added that he sounded like he had been in touch with outside sources. (SA 9; Tr 83-84.) Gibson ended the conversation, telephoned union agent Maloney, and relayed his conversation with Glasby. (SA 9; Tr 84-85.) Maloney concluded that the Company knew about Gibson’s union involvement. (SA 9; Tr 85.) Pursuant to Maloney’s advice, Gibson prepared a written statement, admitting his union organizing activities, to present to management when he returned to work. (SA 9; Tr 85.)

On October 15, when Gibson returned to work, Kozak told Gibson to follow him to Katz’s office. (SA 9; Tr 85.) Gibson stated that he wanted to have two witnesses with him, and he went to Kozak's office accompanied by employees Calvird and Grant. (SA 9; Tr 86, 191, 219-20.) Once in the office, Gibson read his prepared statement announcing his role in the union organizing campaign. (SA 1 & n.4, 9; Tr 86-87, 194, 220.) Katz replied

that what they wanted to talk about had nothing to do with the Union. (SA 9; Tr 87, 89-90, 220.)

After briefly discussing two other issues, Katz read from a prepared statement, telling Gibson that he had been seen passing out stolen documents on October 8 and that a police investigation was underway. (SA 10; Tr 86-90, 193, 220-22.) Katz asked Gibson if he had stolen the managers' logs. Gibson stated that he had not. Katz then asked Gibson if he had the managers' logs in his possession, and again Gibson said no. Katz did not ask Gibson--and Gibson did not explain--how he had obtained the pastiche. (SA 10; Tr 88, 191-92.)

Katz left the room to make a phone call to an unidentified person. (SA 1-2 n.4, 10; Tr 88.) He returned and told Gibson that he was suspended, pending a police investigation into the disappearance of the logs. (SA 1, 10; Tr 88, 91, 191.) Katz informed Gibson that if the investigation cleared him of the charges, he would be reinstated with backpay. (SA 10; Tr 88.)

About one week later, Gibson attended a meeting conducted by Company Manager Glasby at the restaurant. At the meeting, Glasby advised the employees of their rights during a union organizing campaign. (SA 11; Tr 97-99.) Immediately after the meeting, Gibson spoke with Glasby. (SA 11; Tr 91-97, 99-101, 102, 266-67.) Glasby told Gibson that he had not been "loyal to the company" and that he was not forthcoming with information about the managers' logs. (SA 11; Tr 101.) Glasby also said that Gibson had lied to Katz when he questioned Gibson about the logs.

(SA 11; Tr 101.) Gibson responded that he had not lied to Katz, explaining that Katz had asked him whether he had stolen the logs and that he had accurately replied that he did not steal them and did not have the logs themselves in his possession. Gibson also explained that he was not forthcoming with additional information because he did not feel comfortable discussing the incident with a manager and because he would feel more comfortable speaking with the police. (SA 11; Tr 101.) At that point, Glasby told Gibson that he was "the instigator of all the trouble," saying to him: "[L]ook at what happened here now; there's security officers here, people are frightened . . . look what you have done." (SA 11; Tr 101-02.) Glasby also stated that she did not know how much Gibson knew about unions, asserting that she herself had had "a lot of experience" with them and that she was "worried for" Gibson. (SA 8, 11; Tr 102-03.)

On November 4, Gibson received a telephone call from employee Ricci, who was at work. Ricci told Gibson that she heard that he had been fired. (SA 11; Tr 103.) Gibson, who had not heard this information, called Glasby, who informed Gibson that he would be receiving his termination letter in the mail. (SA 11; Tr 103-04.) When Gibson asked Glasby why he had been fired, Glasby stated that he had told "too many stories" about the missing managers' logs, that she just could not believe him anymore, and that he was "not loyal to the Company." She then stated that Gibson had "started this" and that she was concerned about Gibson's and Ricci's safety. (SA 11; Tr 104.) Glasby told

him that on one occasion she had exited a casino in Las Vegas shortly before a bomb exploded. She said that "the mob had targeted" the casino, and "that the mob was involved with the Union, the Union wanted to take over, there was a [u]nion drive, and the casino was blown up." (SA 11; Tr 104.)

Gibson thereafter received a letter dated November 3, signed by Kozak, stating

> This is to advise you that your suspension, which commenced on October 15, 1994[,] has been converted to a termination effective as of this date. We have taken this action because we have concluded that your explanation concerning your role in the unauthorized removal of Company records is not credible.

(SA 11; Tr 105, GCX 3.)

D. Employees Ricci, Calvird, and Grant Solicit Employee Attendance at Union Meetings; the Company Disciplines Them for Violating Its No-Solicitation Rule

The Company's handbook contains the following rule governing solicitation and the distribution of materials:

> 1. DISTRIBUTION BY EMPLOYEES AT WORK
> No employee may distribute literature of any kind in work areas at any time before, during or after the work day. This rule does not apply to non-work areas.
>
> No employee may solicit another employee to join or support any endeavor or project during his own work time anywhere on Company property; nor may any employee solicit another employee during that employee's work time. This rule does not apply to non-work (free) time, such as breaks and meal breaks.

Since at least 1993, the Company had permitted working-time solicitation by employees for a variety of purposes. (SA 8, 12; Tr 200-03, 226-31, 273-75, 332-34.)

On November 3, the same day as Gibson's discharge, Ricci asked three employees at the restaurant to attend an upcoming

union meeting. Ricci spoke to the employees for no more than 30 seconds. (SA 11-12; Tr 269-70, 289-90.) Later that same day, Kozak asked Ricci to join him at a table in the restaurant. When Ricci sat down, Kozak gave her a copy of a written warning, stating that some employees had informed him that Ricci had asked them to attend a union meeting. (SA 11; Tr 270-71, 514-16, GCX 6.)

During the organizing campaign, employee Calvird regularly solicited employees to support the Union. (SA 12; Tr 238-40, 245, 516-17.) On November 4, Kozak asked to meet with him at one of the restaurant tables in the presence of Assistant Manager James Westphal. Kozak told Calvird that a couple of employees had complained that Calvird had made them uncomfortable by soliciting them during work, and he said that Calvird was in violation of company policy. (SA 12; Tr 222-23.) Calvird explained that it was never his intention to harass, coerce, or intimidate anyone. (SA 12; Tr 223-24, GCX 7.)

On November 7, Kozak asked employee Grant to speak with him in the presence of Cheryl Baron, another management official. (SA 12; Tr 197-98.) Kozak told Grant that he was compelled to give her a disciplinary warning for solicitation because employees had complained that she was harassing them about the Union. (SA 12; Tr 198, 516-17, GCX 5.) Grant objected, stating that on numerous occasions other employees had solicited for a variety of matters during working time but had never received a

written warning. (SA 12; Tr 198-203, 226-31, 238, 273-75, 332-34.)

E. The Company Calls a Staff Meeting, and Accuses the Union of Wrongdoing; Ricci Defends the Union; She and Gibson Receive a Bomb Threat at their House; Ricci Leaves Town To Visit Her Family; Kozak Tells Employees that Ricci Was Attacked By a Union Official and that She Left Town Because the Union Threatened To Bomb Her Residence

In late December, Company President Melman, Vice President Charles Haskell, and Kozak conducted a mandatory employee meeting. (SA 12; Tr 204, 208-09, 232-33, 276-77.) At the meeting, each employee received a letter purportedly on union stationery and letterhead, allegedly mailed by the Union to the Company's frequent diners. The letter informed the frequent diners of the union organizing drive and told them that they might be subpoenaed to testify at a hearing. (SA 12; Tr 204-05, 277.) Melman asked the employees if anyone knew who wrote the letter. (SA 12; Tr 204-05, 277.) Ricci stated that she did not believe that the employees had written the letter, that the Union would not have written the letter without the employees' approval, and that she did not agree with the letter. (SA 12; Tr 277, 305, 307). After the meeting, Kozak asked Ricci what she thought of the letter. (SA 12; Tr 278-80.) Ricci stated that she would be upset if the letter had come from the Union, and that she would try to call the Union before she left town for the Christmas holidays to determine whether it had sent the letter. (SA 12; Tr 279-80.)

The following evening, Gibson answered the telephone at the house he shared with Ricci. (SA 12; Tr 108-09, 280.) The caller

asked Gibson if he could "fry eggs on [Ricci's] car," said that Gibson would go to jail, and told Gibson that he was going to sodomize and kill him. (SA 12; Tr 109, 280.) A few minutes later, the caller called again, telling Gibson that he knew where Gibson and Ricci lived and that he would kill both of them and blow up their house. (SA 2, 13; Tr 109-11, 123, 281-82.)

The following morning, Ricci told Assistant Manager Westphal about the telephone bomb threat. (SA 13; Tr 282-83.) Westphal asked Ricci if she knew who had made the threat, and Ricci replied that she did not know. Westphal asked if he could inform Vice President Haskell about the threat, and Ricci responded that she did not mind if he told Haskell. (SA 13; Tr 282-83.) Ricci left town to visit her parents for the hoildays, without having contacted the Union to ask about the letter. (SA 12; Tr 282.)

Shortly thereafter, Kozak conducted a staff meeting. (SA 13; Tr 111, 205, 250.) Kozak told the employees that Ricci had confronted union agent Maloney about the frequent-diner letter and that Maloney had admitted responsibility for the mailing. Kozak also stated that Ricci told Maloney that she wanted to withdraw from the organizing campaign, and that Maloney had responded by lunging at her and telling her that it was too late to back out. (SA 13; Tr 111-13, 205-06, 250-51, 559-60.) Kozak also said that Ricci went home and received a bomb threat from the Union later that same evening. (SA 13; Tr 113, 206, 251, 320-22.) Kozak then stated that Ricci had left town in fear for her life. (SA 13; Tr 113, 322.) He further stated that

union agents do such things because they are "mobsters and thugs," and he warned the employees to be "really careful" about the kind of people they get involved with. (SA 2, 13; Tr 251.)

On her return from vacation, Ricci tendered her resignation to Kozak, telling him that he had falsely attributed the bomb threat to the Union, and had falsely described a confrontation with the Union that she did not have. Ricci subsequently authored a letter to all her former coworkers, denying Kozak's statements about her, the Union, and the bomb threat. (SA 13; Tr 262, 283-86, GCX 9.)

F. Days before the Election, Company Managers Solicit, and Promise To Remedy, Employee Grievances; Vice President Haskell Tells One Employee that His Grievance Is Remedied; the Company's Employees Vote against Union Representation

In January 1995, shortly before the scheduled Board election, Melman and Haskell visited the restaurant on almost a daily basis. On one occasion, three days before the election, Melman met with employee Akmakjian, the first time Akmakjian had met Melman in the 13 months Akmakjian had been employed by the Company. Melman asked Akmakjian how he felt about working at the restaurant. Akmakjian raised the issue of management's failure to properly distribute the tips from the December 1993 party, and he complained that he had unfairly received a disciplinary warning for lateness. (SA 3, 13; Tr 253-55.) Melman stated that the tip-distribution issue had been resolved earlier, but that he would ask Haskell to look into it again. He added that he would look into the lateness warning that Akmakjian had received. (SA 13; Tr 255-56.) Melman told Akmakjian to contact him

directly on his private telephone should he have any problems. (SA 13; Tr 255-56.) Less than an hour later, Haskell told Akmakjian that the warning had been purged from his employee file, although, in fact, it had not been removed. (SA 3, 13; Tr 257, 518-22, RX 5.)

On the day before the election, Haskell visited the restaurant and asked employee Gonzales about the tip-distribution issue and about the managers' log entries that were critical of the employees. (SA 3, 13-14; Tr 322-30.) Gonzales replied that the tips had not been distributed properly, and she pointed out that the log entries had erroneously stated that she had demanded that the Company pay $1,000 for medical bills she had incurred from an on-the-job injury. (SA 3, 14; Tr 325-26.) Haskell told Gonzales that he would reopen both of those issues. He ended the conversation by claiming that unions were connected with organized crime. (SA 3, 14; Tr 327, 367, 330-32, 369-70.) The next day, the Union lost the Board-conducted election. (SA 8; Tr 113-14, 207-08.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members Fox and Liebman; Member Hurtgen, dissenting), in partial agreement with the administrative law judge, found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by falsely telling employees that the Union had threatened to blow up a house shared by two employees and that employees were in imminent danger of union violence; by coercively expanding its guard

force; and by soliciting employee grievances, with pledges to remedy those grievances, in order to discourage unionization. (SA 2-3.) The Board also found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging employee Brian Gibson because of his union and other concerted, protected activities, and by disciplining employees Gretchen Grant, Jill Ricci, and Greg Calvird by discriminatorily applying a no-solicitation rule. (SA 1-2.)

The Board's order requires the Company to cease and desist from engaging in those unfair labor practices, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's order requires the Company to offer to reinstate the discharged employee to his former position or, if that job no longer exists, to a substantially equivalent position, making him whole for any lost earnings and benefits; to remove from its files any reference to the unlawful discharge and disciplinary warnings; and to post copies of a remedial notice. (SA 3-4.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by falsely telling employees that the Union had threatened to bomb a house shared by Gibson and Ricci--both members of the Union's organizing committee--and by expanding its

guard force. As the Board found, those actions were part of a coercive strategy calculated to discourage union support during the organizing campaign by imparting to employees that those associated with the Union were in imminent danger of union violence, while simultaneously portraying the Company as the employees' protector. The Board was also fully warranted in finding that, just days before the election, high-ranking management officials unlawfully initiated discussions of employee problems, agreed to reopen previously resolved grievances, and agreed to "look into" other grievances for the first time.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending and discharging employee Gibson for engaging in union activity. In finding that the Company's treatment of Gibson was unlawfully motivated, the Board reasonably relied on the Company's demonstrated union animus and the suspicious timing of its actions. Nor was the Board compelled to accept the Company's asserted reason for the discharge--namely, that Gibson's explanation of his role in the missing logs was not credible. Relying on the Company's shifting explanations and its failure to proffer any evidence that the person who made the decision to discipline Gibson was actually motivated by a lawful reason, the Board reasonably concluded that the Company seized on a convenient excuse for discharging Gibson.

Finally, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) by disciplining three employees for engaging in union solicitation on working time. The Company selectively enforced its no-solicitation rule, disciplining employees who engaged in union solicitation while allowing extensive nonunion solicitation for a variety of purposes.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY FALSELY TELLING EMPLOYEES THAT THE UNION HAD THREATENED TO BOMB A HOUSE SHARED BY TWO EMPLOYEES; BY COERCIVELY EXPANDING ITS GUARD FORCE; AND BY SOLICITING EMPLOYEE GRIEVANCES WITH PLEDGES TO REMEDY THOSE GRIEVANCES

A. Introduction and Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the "right to self-organization [and] to form, join, or assist labor organizations . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157). Accordingly, an employer violates Section 8(a)(1) if it coerces or interferes with its employees in the exercise of their Section 7 rights. NLRB v. Q-1 Motor Express, Inc., 25 F.3d 473, 477 (7th Cir. 1994).

An employer's statements are unlawful "not only when they actually produce a coercive effect, but also when they have a tendency to do so." NLRB v. Gold Standard Enters., Inc., 679

F.2d 673, 676 (7th Cir. 1982). Accord Central Transport, Inc. v. NLRB, 997 F.2d 1180, 1191 (7th Cir. 1993). Thus, the "test of interference with the right of self-organization is not whether an attempt at coercion has succeeded or failed, but whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of their Section 7 rights." NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 689 (7th Cir. 1982). Accord Carry Cos. of Illinois, Inc. v. NLRB, 30 F.3d 922, 934 (7th Cir. 1994).

In applying this standard, the Board properly considers "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Accord NLRB v. Overnite Transp. Co., 938 F.2d 815, 819 n.6 (7th Cir. 1991). Thus, the possibility that a statement contains a threat must be judged from the employee's point of view. NLRB v. Gold Standard Enters., Inc., 679 F.2d 673, 676 (7th Cir. 1982). The critical inquiry, then, is what the listening employee reasonably could have inferred from the employer's statements or actions, and not what the employer claims it intended to imply. NLRB v. Shelby Memorial Hosp. Ass'n, 1 F.3d 550, 559-560 (7th Cir. 1993); C&W Super Mkts., Inc. v. NLRB, 581 F.2d 618, 623 n.5 (7th Cir. 1978).

A reviewing court "must recognize the Board's competence in the first instance to judge the impact of utterances made in the

context of the employer-employee relationship." NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 620 (1969). Accord NLRB v. Roselyn Bakeries, Inc., 471 F.2d 165, 167 (7th Cir. 1972). The court thus reviews the Board's factual findings under the substantial evidence standard set forth in Section 10(e) of the Act (29 U.S.C. § 160(e)). Under that "sharply limited" standard (Livingston Pipe & Tube, Inc. v. NLRB, 987 F.2d 422, 426 (7th Cir. 1993)), those findings are "conclusive" if they are supported by substantial evidence on the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). See NLRB v. Augusta Bakery Corp., 957 F.2d 1467, 1471 (7th Cir. 1992) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate") (citation and internal quotation mark omitted).

In applying that standard, a reviewing court may not "reweigh the evidence or 'displace the Board's choice of two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.'" NLRB v. Advance Transp. Co., 979 F.2d 569, 573 (7th Cir. 1992) (quoting Universal Camera Corp., 340 U.S. at 488). Accord Central Transp., Inc. v. NLRB, 997 F.2d 1180, 1190 (7th Cir. 1993). That standard "is not modified in any way when the Board and the ALJ disagree as to legal issues or derivative inferences made from testimony." Augusta Bakery Corp., 957 F.2d at 1471 (citations and internal quotation marks omitted).

B. The Company Unlawfully Coerced Employees by Falsely Telling Them That the Union Threatened to Bomb a House Shared by Two Employees

Substantial evidence supports the Board's finding (SA 2 & n.8, 19) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when General Manager Kozak falsely told employees that the Union had threatened to bomb the home shared by union activists Ricci and Gibson.

Thus, on the same day that Ricci left town for a planned family holiday, Kozak falsely told employees at a staff meeting that Ricci had confronted union agent Maloney about a letter that the Union allegedly had written and mailed to the Company's frequent diners without employee authorization. Kozak falsely claimed that Maloney admitted writing the letter, that Ricci immediately withdrew from the union campaign in protest, and that Maloney responded by lunging at her and telling her that it was too late to back out. Kozak added--again falsely--that Ricci fled town in fear for her life because, immediately after that incident, the Union had threatened to bomb the house she shared with employee Gibson. (SA 12-13; 108-13, Tr 204-09, 232-33, 250-51, 262, 276-86, 305, 307, 320-22, 559-60, GCX 9.) Kozak then pointedly stated that the union agents were "mobsters and thugs" and that the employees should be "really careful" about getting involved with them. (SA 13; Tr 251.) Ricci, of course, had not visited the Union's office to ask about the letter, and she had told Assistant Manager Westphal that she did not know who made the bomb threat.

There can be no doubt that Kozak's false statements to employees violated Section 8(a)(1) of the Act. As the Board explained (SA 19), those "remarks patently conveyed to the employees that they were in real and immediate danger from union violence," and thus had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. In one fell swoop, Kozak--knowing that Ricci would be out of town and thus unable to counter anything he said--appropriated her credibility and leadership by claiming that she had turned against the Union. By falsely claiming that the Union had threatened to bomb Ricci's house, and by warning the employees that they should be "really careful" about getting involved with such "mobsters and thugs," Kozak portrayed the Union not merely as the hypothetically dangerous bedfellow, but as an active, present, and serious threat to the physical well-being of those who might associate with it. As the Board found (SA 19), he also isolated the Union's employee leaders--who were present when he made his remarks--by making it appear that they were also in imminent physical danger, and he implicitly portrayed the Company as a harbor of safety for all the employees.[2]

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[2] See Sheraton Hotel Waterbury, 312 NLRB 304, 337-38 (1993) (employer, which used incident, where employee misinterpreted union official's remarks, as an opportunity to make a "dramatic" and "inflammatory" speech about saving employees from union "threats and intimidation," violated the Act because speech tended to undermine union support); Kawasaki Motors, 257 NLRB 502, 510-11 (1981) (employer's remarks, falsely linking union to bomb threats and further using those threats to justify employer's unlawful conduct, unlawful).

Indeed, as the record shows, Kozak's remarks echoed a theme that the Company repeated throughout the organizing campaign--namely, that the Union was linked with the violence of organized crime. Thus, at an employee meeting during the height of the organizing campaign, Company Manager Glasby provided employees with copies of newspaper articles alleging that unions were associated with bombings in Las Vegas. (Tr 536-39, 573-75, RX 7.) Glasby also told employee Gibson that on one occasion she had exited a casino in Las Vegas shortly before a bomb exploded. She alleged that "the mob had targeted" the casino, and she explicitly stated "that the mob was involved with the Union, the Union wanted to take over, there was a [u]nion drive, and the casino was blown up." (Tr 104.) Similarly, on the day before the election, Company Vice President Haskell told employee Gonzales that unions were connected with organized crime. (Tr 330-32.) At other times, the Company offered to have security guards take them home to ensure their safety. (Tr 196, 524, 608.)

The Company made all of those statements even though there is no credible evidence that the Union engaged in violence or threatened violence during the organizing campaign in this case. In view of the foregoing, the Board had ample reason to find (SA 19) that "the objective tendency" of Kozak's remarks about Ricci "was to cause fear, confusion and dissension in the ranks of possible prounion voters and solidify antiunion voters in the upcoming election."

The Company does not dispute (Br 32) that Kozak made those remarks or that the remarks were false. It simply contends (Br 32) that its actions were lawful because "[n]o evidence produced at the hearing established that Kozak ever purposely made false statements about the Union's connection to the bomb threat." In short, the Company contends (Br 32-35) that Kozak's remarks were due to a misunderstanding on his part and, therefore, were lawful.

That contention is meritless. As this Court has repeatedly explained, the test for determining whether an employer's statement is coercive is not whether that statement was intended to coerce, but whether the statement had the reasonable tendency to coerce. See NLRB v. Gold Standard Enters., Inc., 679 F.2d 673, 676 (7th Cir. 1982) (employer's statements unlawful "when they have a tendency to [produce a coercive effect]"). Accordingly, Kozak's remarks were unlawful, even assuming that he made them in good faith without intending to coerce the employees.

In any event, there is absolutely no reason to conclude that Kozak made those remarks in good faith. Kozak spoke without any information that it was the Union that had made the bomb threat, and he made no effort to verify that Ricci had even spoken to the Union. As the Board found (SA 19), "Kozak's statement that Ricci fled the city because she had been threatened by the Union was so completely unfounded that if it did not constitute an intentional lie, it was so reckless and irresponsible as to warrant the same

sanction." Moreover, Ricci's failure to correct Kozak's alleged "misunderstanding"--until after she returned from her vacation--does not excuse Kozak's unlawful remarks, contrary to the Company's suggestion (Br 33). The Company neither explains nor cites any cases to support its contention that an employee bears the burden to correct an employer's coercive conduct.

The Company's reliance (Br 32) on Mediaplex of Connecticut, Inc., 319 NLRB 281, 287-89 (1995)--for the proposition that an employer may lawfully inform its employees that the union seeking to represent them has been involved in strike violence--is misplaced. In that case, the Board concluded that there was no violation because the employer's videotaped statements never suggested that the employees "were in imminent danger to their person or property during the election campaign or could be necessarily thereafter." Id. at 289. Here, the Board reasonably found that Kozak's remarks strongly conveyed the message that the employees were in such danger.

Nor does the Company's reliance (Br 32) on Sears, Roebuck and Co., 305 NLRB 193, 193 (1991), advance its case. There, the Board hinged its finding--that the employer lawfully told employees that the union might send someone out to break their legs in order to collect dues--on the fact that, unlike here, there was no additional evidence of coercion. In that case (id. at 193 n.4), moreover, the Board distinguished Kawasaki Motors, 257 NLRB 502, 510-11 (1981), where it had found that an employer violated the Act by falsely linking a union to bomb threats and

by justifying its own unlawful threats of future plant closings on the bomb threats. Here, as in Kawasaki Motors, the Company not only falsely linked the Union to a bomb threat, but, as we show below, it also blamed the Union for its own unlawful behavior--the coercive expansion of its guard force.

C. The Company Expanded Its Guard Force as Part of a Coercive Strategy To Discourage Union Support

Substantial evidence also supports the Board's finding (SA 2) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by expanding its security force in the midst of the organizing campaign. Thus, it is undisputed that, prior to the campaign, the Company contracted for the services of an off-duty policeman to work at the restaurant on Fridays and Saturdays. In early October, however--after the employees launched their campaign--the Company increased its security coverage to seven days a week. Kozak announced the increased security to employees, telling them that it was done to ensure their safety and the safety of customers, and to keep the employees free from "harassment." The Company also told them that the security guards were available to escort them to their cars and transport them home, if necessary. Thereafter, as the Board found (SA 2), the Company repeatedly suggested a link between the increased security coverage and alleged union harassment and violence.

As shown above, however, the only incidents of union misconduct that the Company cited to the employees occurred in Las Vegas, not at the Company's restaurant in Chicago during the

organizing campaign. Accordingly, as the Board pointed out (SA 2), the Company's increase in security appears all the more calculated because there were no reported incidents of harassment or violence by the Union. Indeed, the Board (SA 2) found it impossible to separate the Company's increase in security from its overall strategy in the campaign--a strategy in which "the Company's managers seized on every opportunity to attempt to frighten employees into withdrawing their support from the Union" by conveying the message that "the employees' lives were in impending danger from the Union and that the [Company] was the employees' protector." Under the circumstances, the Board was fully warranted in finding (SA 2) that "the increased security was part of a coercive strategy to discourage support for the Union."

The Company attempts to characterize (Br 36) Kozak's announcement--that the Company increased security to prevent union harassment--as "free speech" protected by Section 8(c) of the Act (29 U.S.C. § 158(c)). The proviso to that section, however, expressly excludes from its protection statements that contain a "'threat of reprisal or force or promise of benefit' in violation of § 8(a)(1)" of the Act. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (citation omitted). Where, as here, an employer's remarks simply announce an unlawful measure, the employer's free speech rights "cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to

§ 8(c)." Id. See Wiljef Transp., Inc. v. NLRB, 946 F.2d 1308, 1310 (7th Cir. 1991).

Equally misguided is the Company's reliance (Br 36) on cases holding that the hiring of security guards does not constitute unlawful surveillance unless the guards engage in actual surveillance. Here, the Board did not find (SA 2) that the Company engaged in unlawful surveillance. Rather, the Board found (SA 2) that the Company's decision to increase security was "part of a coercive strategy to discourage support for the Union." Cf. NLRB v. Q-1 Motor Express, Inc., 25 F.3d 473, 477 (7th Cir. 1994) (employer that made several coercive statements and interrogations violated Section 8(a)(1) not because it engaged in actual surveillance but because its conduct reasonably tended to interfere with employees' right to self-organization).

D. The Company Solicited Employee Grievances with Pledges To Remedy Those Grievances and To Discourage Unionization

It is well settled that an employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when it responds to a union campaign by soliciting employee grievances and by explicitly or implicitly promising to remedy them. See NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570 (7th Cir. 1996); NLRB v. Q-1 Motor Express, Inc., 25 F.3d 473, 478 (7th Cir. 1994); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 691 (7th Cir. 1982). Such conduct has the tendency to "lull[] [employees] into believing that they can obtain benefits without the Union's aid." NLRB v. Windsor Industries, Inc., 730 F.2d 860, 864 (2d Cir. 1984).

Moreover, "the solicitation of grievances at preelection meetings raises an inference that the employer is making [a promise to remedy them]." Uarco, Inc., 216 NLRB 1, 2 (1974). As we now show, the Board reasonably found (SA 3, 13-14) that the Company unlawfully solicited employee grievances and promised to remedy them as an alternative to union representation.

Thus, as the Board found (SA 3, 13-14; Tr 322-32, 367-70), on the evening before the January 1995 election, Company Vice President Haskell visited the restaurant and initiated a conversation with employee Gonzales, a member of the employees' organizing committee. Haskell raised several issues, including the fairness of the tip distribution at a December 1993 party, and the managers' log entries that were critical of employees. Gonzales complained about the tip distribution, and she pointed out that the logs had erroneously stated that she had demanded that the Company pay $1000 for medical bills she incurred for an on-the-job injury. As the Board found (SA 3), Haskell reassured Gonzales that he would reopen both matters. Haskell then ended the conversation by repeating the Company's claim that unions were connected with organized crime.[3]

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[3] In a footnote in its opening brief (Br 38 n.10), the Company asks this Court to strike Gonzales's testimony regarding her conversation with Vice President Haskell because, it claims, without explaining, that the admission of that testimony violates a criminal eavesdropping statute (720 ILCS §§ 5/14-1, 5/14-2). The Company's request is unreviewable because it failed to submit argument to this Court supporting its position on that issue. See Fed. R. App. Proc. 28(a)(9) (party required to raise issues and submit arguments); Mathis v. New York Life Ins. Co., 133 F.3d 546, 548 (7th Cir. 1998) (declining to review issue where

Similarly, as the Board found (SA 3, 13; Tr 252-57, 518-22, RX 5), Company President Melman visited the restaurant just three days before the election and initiated a conversation with employee Akmakjian, another member of the employees' organizing committee. The conversation was the first the two had had in the 13 months Akmakjian had worked for the Company, and Melman asked Akmakjian how he felt about working at the restaurant. Akmakjian questioned the fairness of the tip distribution at the December 1993 party, and he complained about a lateness warning he had received. Melman agreed to ask Haskell to "look into" the tip issue again, added that he himself would "look into" the lateness warning, and invited Akmakjian to contact him on his private telephone should he have any problems. Less than an hour later, Haskell told Akmakjian--erroneously, as it turned out--that the lateness warning had been removed from his file.

In those circumstances, the Board had ample reason to find that the Company acted unlawfully. Melman and Haskell were high-ranking officials who initiated the conversations during rare visits to the restaurant. The conduct of high-ranking officials in such circumstances naturally tends to have a coercive impact, because their conduct "bear[s] the imprint of company policy." Red Oaks Nursing Home, Inc. v. NLRB, 633 F.2d 503, 510 (7th Cir. 1980). Accord Ron Tirapelli Ford, Inc. v. NLRB, 987 F.2d 433, 441 & n.10 (7th Cir. 1993) ("fact that upper-level management

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appellant presents no legal argument); United States v. Watson, 171 F.3d 695, 699 n.2 (D.C. Cir. 1999) (declining to review "'asserted but unanalyzed' argument").

committed the misconduct" is significant); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 694 (7th Cir. 1982) (same); Adams Wholesalers, 322 NLRB 313, 314 (1996); Electro-Voice, Inc., 320 NLRB 1094, 1096 (1996). Melman's request that Akmakjian contact him directly on his private telephone simply underscored the coercion. See NLRB v. Valley Plaza, Inc., 715 F.2d 237, 240 (6th Cir. 1983) (per curiam) (employer unlawfully solicited grievances where general manager asked employees to present their grievances directly to him).

The coercive impact was exacerbated by the timing of the conversations--that is, within days of the election. The employees could hardly miss the clear message that Melman and Haskell were addressing their concerns in order to avoid a union election victory. See NLRB v. Garon, 738 F.2d 140, 143-44 (6th Cir. 1984) (timing of solicitation and implied promise warrants finding of coercion); NLRB v. Rich's of Plymouth, Inc., 578 F.2d 880, 883 (1st Cir. 1978) ("the more imminent a representational election, the greater the presumption that management's expression of concern for employee welfare" is coercive).

As the Board also pointed out (SA 3, 14), Melman and Haskell promised to "look into" the employees' complaints and to revisit "closed cases," such as the fairness of the December 1993 tip distribution. Given all the circumstances, such a commitment shows that the Company acted unlawfully. See NLRB v. Windsor Indus., Inc., 730 F.2d 860, 862-64 (2d Cir. 1984) (employer unlawfully solicited grievances by telling employees that he

would "look into" their complaints). Moreover, by swiftly announcing--even though erroneously--that Akmakjian's warning had been purged from his file, Haskell sought to prove that the Company intended to carry out its promises. See Lawson Co. v. NLRB, 743 F.2d 471, 478-79 (6th Cir. 1985) (employer's implied promise to remedy employee grievances unlawful).

The Company does not dispute (Br 37-38) that Melman agreed to "look into" the employees' grievances, or that Haskell subsequently notified Akmakjian that the disciplinary memorandum in his file had been purged. Nevertheless, the Company defends that conduct by contending (Br 38-39) that Melman and Haskell were acting in accordance with the Company's own grievance procedure and its "MOTO" program for receiving employee suggestions. That contention is disingenuous.

As the Board found (SA 3), and as the Company concedes (Br 38), Melman and Haskell agreed to reconsider the employees' grievance over the December 1993 tip distribution, an issue that the Company had previously resolved against its employees over a year earlier. As the Board also found (SA 3), "neither the grievance procedure nor the MOTO program contemplates that senior management officials will initiate discussions to ferret out problems or to resolve grievances." Here, as shown, Melman and Haskell initiated their conversations with the employees.

The Company is equally misguided in contending (Br 38) that its conduct should be excused because employee Gonzales subjectively believed that Haskell's solicitation attempts were

"meager." As this Court has explained, an employer's actions are unlawful if they "'reasonably tend[] to interfere with or coerce employees in the exercise of their protected rights.'" Carry Cos. of Illinois, Inc., 30 F.3d at 934 (citation omitted). Thus, it is irrelevant "whether an attempt at coercion has succeeded or failed." NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 689 (7th Cir. 1982).

The Company's reliance (Br 39) on Idaho Falls Consolidated Hosps. v. NLRB, 731 F.2d 1384, 1386-87 (9th Cir. 1984)--for the proposition that "[a]n expressed willingness to listen to grievances is not sufficient to constitute a violation"--is misplaced. Here, the Company not only listened to the employees' grievances, but it also made explicit and implicit promises to remedy them.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND DISCHARGING EMPLOYEE GIBSON AND BY DISCIPLINING OTHER EMPLOYEES PURSUANT TO THE DISCRIMINATORY APPLICATION OF A NO-SOLICITATION RULE

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." An employer, therefore, violates Section 8(a)(3) and (1) of the Act by suspending, discharging, or otherwise disciplining employees because of their union activity. See NLRB v. Transportation

Mgmt. Corp., 462 U.S. 393, 400-03 (1983); NLRB v. Joy Recovery Technology Corp., 134 F.3d 1307, 1314-15 (7th Cir. 1998).

In determining whether a discharge or other adverse employment action violates the Act, the Board focuses on the employer's motivation for taking that action, utilizing the test it created in Wright Line, a Div. of Wright Line, Inc., 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), and that the Supreme Court approved in NLRB v. Transportation Mgmt. Corp., 462 U.S. 393 (1983). Under that test, if substantial evidence supports the Board's finding that the employees' protected activity was a motivating factor in the employer's adverse action, that action is unlawful unless the record compels the conclusion that the employer would have taken the same action even in the absence of the protected activity. Transportation Mgmt. Corp., 462 U.S. at 395, 397-403; accord Jet Star, Inc. v. NLRB, 209 F.3d 671, 675 (7th Cir. 2000). Where, however, the employer’s asserted reason for the discipline is a pretext to disguise the discrimination, the Board has no basis for determining that the employer would have disciplined the employee even in the absence of the protected activity, and the analysis is logically at an end. See NLRB v. O’Hare-Midway Limousine Serv., Inc., 924 F.2d 692, 697 (7th Cir. 1991); Wright Line, a Div. of Wright Line, Inc., 251 NLRB 1083, 1084 (1980).

The Board is under no obligation to accept at face value an employer’s asserted explanation for the discipline, "if there is

a reasonable basis for believing it furnished the excuse rather than the reason for [its] retaliatory action." Justak Bros. and Co. v. NLRB, 664 F.2d 1074, 1077 (7th Cir. 1981) (internal quotation marks and citation omitted). Indeed, "the policy and protection of the [Act] does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969), cert. denied, 397 U.S. 935 (1970).

The question of an employer's motivation is a factual matter for the Board to determine in the first instance. See NLRB v. So-White Freight Lines, Inc., 969 F.2d 401, 408 (7th Cir. 1992); U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1315 & n.9 (7th Cir. 1991); NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613, 626 (7th Cir. 1981). The Board may properly rely on circumstantial evidence, and a reviewing court must defer to the Board's reasonable inferences of motive drawn from such evidence. See NLRB v. Link-Belt Co., 311 U.S. 584, 597 (1941); NLRB v. O'Hare-Midway Limousine Serv., 924 F.2d 692, 695-96 (7th Cir. 1991).

Accordingly, the Board may properly consider the timing of the adverse action,[4] the employer's knowledge of employees' union activities,[5] its expressed hostility toward those activities,[6]

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[4] NLRB v. O'Hare-Midway Limousine Serv., 924 F.2d 692, 697 (7th Cir. 1991).

[5] NLRB v. Del Rey Tortilleria, Inc., 787 F.2d 1118, 1124-25 (7th Cir. 1988).

its failure to investigate fully the purported reason for the adverse action,[7] its reliance on pretextual reasons to justify the adverse action,[8] and its disparate treatment of employees.[9] "[T]he Board's conclusion that an employer acted with a discriminatory motive is conclusive if supported by substantial evidence." U.S. Marine Corp., 944 F.2d at 1315.

B. The Company Discriminatorily Suspended and Discharged Employee Gibson

1. Gibson's union activity was a motivating factor in the Company's decisions

Substantial evidence supports the Board's finding (SA 1, 16 & n.24) that the Company violated Section 8(a)(3) and (1) of the Act by suspending, and later discharging, employee Brian Gibson, a known member of the union organizing committee. In finding that the Company's treatment of Gibson was motivated by union animus, the Board relied on the Company's hostility toward the Union, as manifested by its contemporaneous commission of its

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[6] NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1137 (7th Cir. 1983); NLRB v. Sure-Tan, Inc., 672 F.2d 592, 600 (7th Cir. 1982), modified on other grounds, 462 U.S. 883 (1984).

[7] Sioux Prods., Inc. v. NLRB, 684 F.2d 1251, 1259 (7th Cir. 1982).

[8] Union-Tribune Publishing Co. v. NLRB, 1 F.3d 486, 490-91 (7th Cir. 1993). See generally Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (employer's proffer of false explanation permits the Board to infer that the real motive "is one that the employer desires to conceal--an unlawful motive--at least where . . . the surrounding facts tend to reinforce that inference").

[9] NLRB v. Del Rey Tortilleria, Inc., 787 F.2d 1118, 1124-25 (7th Cir. 1988). See generally Turnbull Cone Baking Co. v. NLRB, 778 F.2d 292, 297 (6th Cir. 1985) ("disparate treatment" warrants

other unfair labor practices. Most tellingly, as shown above, the Company falsely claimed that the Union had threatened to bomb the house shared by Ricci and Gibson, a claim that was simply one part of a brazen strategy designed to convince the employees that the Union was linked to the violence of organized crime and that the Union's violence put their lives in imminent danger. That solid evidence of animus strongly supports the Board's finding of an unlawful motive. See NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1137 (7th Cir. 1983) (employer's commission of unfair labor practices supports finding of antiunion animus); Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 252 (D.C. Cir. 1991) (employer's action "must be viewed in the context of [its] other unfair labor practices").

The Board's finding that the Company's treatment of Gibson was unlawfully motivated is further supported by the undisputed content of the conversations between Gibson and Company Manager Glasby. In those conversations, Glasby blamed Gibson for being the "instigator" of the organizing campaign and for not being "loyal to the Company." (Tr 101-04.) She also blamed him for frightening the Company's employees, telling him: "[L]ook at what happened here now; there's security officers here, people are frightened . . . look what you have done." (SA 11; Tr 101-02.)

As the Board also pointed out (SA 16), the Company's animus manifested itself in the suspicious timing of Gibson's

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finding of antiunion motivation), cert. denied, 476 U.S. 1159 (1986).

suspension. Thus, as the Board found (SA 16 & n.24), the Company suspended Gibson only minutes after he announced to Managing Partner Katz that he was a union activist. See NLRB v. Rich's Precision Foundry, Inc., 667 F.2d 613, 626 (7th Cir. 1981) (coincidence in time between employees' union activity and employer's adverse action is evidence of discriminatory motive). Accord NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor.")

The Board also inferred (SA 16) an unlawful motive from General Manager Kozak's cursory investigation into the missing logs. See NLRB v. Advance Transp. Co., 979 F.2d 569, 574 (7th Cir. 1992) (evidence of a cursory investigation can give rise to an inference of unlawful motive). Kozak's investigation targeted Gibson alone and ignored other possible explanations for the missing logs. As the Board observed (SA 16), the logs could have been removed and circulated by "a spiteful manager, the chef, or past managers, all of whom had access to them." Indeed, prior to the organizing campaign, Kozak himself thought that only someone with access to the managers' office could have taken the logs. (SA 8.)

2. The Company's defense was a pretext to disguise its unlawful motive

The Company does not dispute (Br 24) that its union animus was a motivating factor in its decision to suspend and discharge Gibson. Rather, the Company contends (Br 24-30) that the record compels the conclusion that it would have taken those actions

even in the absence of Gibson's union activity, and that, therefore, it did not violate the Act. The Company's contention is meritless, however. As we now show, the Company simply seized upon a convenient excuse to rid itself of an employee who played a central role in the organizing campaign. See NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965) (employer's asserted justification was "the excuse rather than the reason" for its decision to discharge employee).

In the first place, as the Board observed (SA 1-2), the Company does not defend its conduct by making any claim that Gibson actually stole the managers' logs. As the Board pointed out (SA 1-2), Kozak conceded that the Company had no knowledge of the outcome of the police investigation into the missing logs. Indeed, as the Board found (SA 16), the record contains "no conclusive evidence" that Gibson or anyone else stole the logs.

Rather, the Company defends its treatment of Gibson by faulting him for his allegedly insincere explanation of his role, if any, in the removal of the logs from the managers' office. The Board, however, reasonably inferred that the Company's defense was a pretext. Thus, as the Board found (SA 1 & n.4; Tr 88), the Company suspended Gibson pending a police investigation into the missing logs, but it also promised to "reinstate[] [him] with full backpay" if he were "cleared of the charges." Yet, the Company discharged Gibson three weeks later, before learning the outcome of that investigation, purportedly because his explanation of "his role in the unauthorized removal

of Company records [wa]s not credible." (SA 1, 11; Tr 105, GCX 3.)

Simply put, the Company shifted its explanation of what would constitute grounds for Gibson's discharge. After initially telling Gibson that it would await the outcome of an independent criminal investigation, the Company abruptly shifted gears only three weeks later, before that investigation had been completed. At that point, the Company decided to discharge him, claiming that the answers he gave to it in the initial investigation, three weeks earlier, were "not credible."

In light of the convincing and undisputed evidence of union animus, that shifting explanation strongly supports the Board's inference that the Company's purported reason for suspending and discharging Gibson was a pretext to disguise its unlawful motive. See Union-Tribune Publishing Co. v. NLRB, 1 F.3d 486, 490-91 (7th Cir. 1993) (once animus has been established, an employer's shifting explanations for taking an adverse employment action is sufficient to support a finding of pretext); NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984) ("shifting explanations" show an unlawful motive).

As the Board also found (SA 2, 17), that inference is bolstered by the failure of the Company's witnesses to identify the management official who made the decision to discharge Gibson. Indeed, as the Board also observed (SA 2, 17), the officials involved in Gibson's suspension--Managing Partner Katz and another unidentified official--did not testify at all. See

NLRB v. Advance Transportation Co., 979 F.2d at 574-75 (employer undermined its defense by its "failure to produce material witnesses").

As the Board also found (SA 2), the Company failed to present any persuasive evidence that it "would have fired" any other employee in a similar situation--that is, an employee who failed to give credible answers during an investigation into missing property. The absence of such evidence also supports an inference that the Company's proffered reason was pretextual. See Cadbury Beverages, Inc. v. NLRB, 160 F.3d 24, 31 (D.C. Cir. 1998) (to carry its burden under Wright Line, an employer must show that it "would have fired" the employee, not that "it could have done so"). See also NLRB v. Advance Transp. Co., 979 F.2d at 574 (employer must "show that its legitimate reason, standing alone, would have induced it to discharge" the employee).

Nevertheless, the Company claims (Br 25-26) that Gibson "falsely denied having the stolen documents and falsely denied [having] ever seen the documents." The record, however, does not support that claim. As shown above, Gibson consistently told all management officials that he did not steal the logs and that he was not in possession of the stolen logs. There is no evidence that contradicts Gibson's statements--that is, there is no evidence that Gibson stole or possessed the original documents that were missing from the binder in the managers' office. That he and other employees possessed *copies* of the missing logs, in the form of the cut-and-paste pastiche, is undisputed. However,

the Company never asked Gibson whether he possessed the original, or even a copy, of the pastiche, nor did it ask him another significant question--namely, whether he knew who had taken the original logs from the binder. The Company also failed to question other employees who possessed a copy of the pastiche, even though employee Schrader had informed Katz that other employees possessed such copies. Given those circumstances, the Company's decision to view Gibson as insincere reveals more about its mistrust of those associated with unions--and, thus, its union animus--than about Gibson's alleged insincerity.

The Company does not advance its case by pointing (Br 25) to the judge's characterization of Gibson's testimony as "casuistic." See ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 322-25 (1994) (finding that Board did not abuse its discretion by ordering reinstatement and backpay for unlawfully discharged employee, even though employee gave "false testimony" under oath during Board hearing). Indeed, contrary to the Company's suggestion (Br 25-26), and unlike the circumstances in ABF Freight Sys., the judge here never found that Gibson gave "false testimony," and he credited (SA 10, 16) portions of his testimony on the issue of the missing logs.

The Company's reliance (Br 29) on Carry Cos. of Illinois, Inc. v. NLRB, 30 F.3d 922, 929 (7th Cir. 1994), is equally misplaced. There, the employer discharged an employee pursuant to a facially valid work rule. This Court found that the discharge was lawful because there was no evidence that the

employer discriminatorily enforced that rule. Id. Here, the Company does not even contend that it discharged Gibson in accordance with such a rule.

The Company is similarly unpersuasive in citing (Br 27 n.6) Texas Instruments, Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981). There, the court found that an employer lawfully discharged employees for distributing confidential material in violation of the employer's rule against such distribution. Here, the Company presented no evidence of a comparable rule governing its managers' logs. Equally important, the Company has never claimed that it discharged Gibson because he distributed information from the logs in the form of the cut-and-paste pastiche. Rather, its sole defense is that its treatment of him was prompted by his alleged failure to give credible answers concerning his role in the missing logs.

C. The Company Unlawfully Disciplined Employees Ricci, Calvird, and Grant

As shown above, the Company disciplined three members of the organizing committee--employees Ricci, Calvird, and Grant--for engaging in union solicitation on working time. As we show below, the Board was fully warranted in finding that those disciplinary measures violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

The Section 7 right "to self-organization [and] to form, join, or assist labor organizations" includes the right of employees to inform other employees of union activities and to solicit their support at the workplace. See Sears, Roebuck & Co.

v. San Diego County District Council of Carpenters, 436 U.S. 180, 206 n.42 (1978). Accord NLRB v. Town & Country Elec., 516 U.S. 85, 91 (1995). As the Supreme Court recognized long ago, the workplace is "uniquely appropriate" for employees to exchange views regarding issues of organization. Republic Aviation Corp. v. NLRB, 346 U.S. 793, 798 (1945) ("Republic Aviation").[10] Accordingly, absent an overriding business justification, an employer violates Section 8(a)(3) and (1) by disciplining employees for union solicitation at the workplace. Republic Aviation, 346 U.S. at 802-03 & n.10.

Although a rule narrowly forbidding all solicitation in working areas during working time is presumptively grounded on the legitimate business purpose of maintaining production and discipline, Republic Aviation, 346 U.S. at 802-03 & n.10, that presumed legitimate justification evaporates in the absence of a neutrally applied rule. Accordingly, an employer violates Section 8(a)(3) and (1) by disciplining an employee for soliciting for a union during working time, while allowing nonunion, working-time solicitations. See Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1271 (7th Cir. 1980)

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[10] See also Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (1978) (the workplace "is the one place where [employees] . . . traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees") (citation omitted); Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972) (the effectiveness of the right to organize "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization" from union organizers and others who can furnish employees with "information essential to the free exercise" of that right).

(enforcement of no-solicitation rule against union activity while permitting solicitation for charities violates the Act); Restaurant Corp. of America v. NLRB, 827 F.2d 799, 804-05 (D.C. Cir. 1987) (same).

Guided by those principles, the Board reasonably found (SA 19-20) that the Company unlawfully disciplined employees Ricci, Calvird, and Grant for engaging in union solicitation on working time. Thus, in spite of its no-solicitation rule, the Company tolerated a variety of nonunion solicitations during working and nonworking time. As the record shows (Tr 200-03), employee Grant "bought all kinds of things from work from other employees, [including] theater tickets, raffle tickets, [and] girl scout cookies." (Tr 201.) From the winter of 1993 to the spring of 1994, employee Gonzales sold Girl Scout cookies to her coworkers during working time. (Tr 226-27, 332-34.) During the 1993 holiday season, employee Calvird solicited the sale of blown-glass Christmas ornaments during working time with the knowledge of management. (Tr 228-30.) From the spring of 1994 until her resignation in January 1995, employee Ricci solicited the sale of painted bottles, commissioned by the Company, during working time. (Tr 273-75.)

Given the Company's tolerance of nonunion, working-time solicitation, the Board had ample reason to find (SA 20) that the Company's discipline of Ricci, Calvird, and Grant constituted unlawful disparate treatment. Moreover, as the Board found (SA 20), General Manager Kozak issued Ricci and Calvird their

warnings at a table in the restaurant, a public rebuke that was plainly designed to embarrass them for being strong union supporters.

The Company concedes (Br 30-31) that it had tolerated a variety of nonunion solicitation on working time. Nevertheless, the Company defends its disciplinary measures by contending (Br 30-31) that only the employees' union solicitations were disruptive. The Board reasonably rejected that contention, finding (SA 20) that there was no "probative, competent evidence that any of [the union] solicitations were disruptive, or in fact constituted any real harassment" of the employees who were being solicited.

In response, the Company cites (Br 30-31) Kozak's claim that several employees complained to him about the solicitations. As the Board pointed out (SA 20), however, Kozak "failed to testify as to any specifics" about those complaints, claiming vaguely that the employees said they "felt uncomfortable" or "bothered." Moreover, Kozak admitted to Ricci that he actually spoke only to one employee, whom he would not identify. (SA 12; Tr 270-72.) Indeed, as the record shows, only one employee stopped work to listen to the union solicitation, and no union solicitation lasted more than 30 seconds. (SA 11-12; Tr 269-70, 289-90.) See Frazier Indus. Co. v. NLRB, 2000 WL 694333, *5 (D.C. Cir. 2000) (upholding Board determination of disparate treatment, where all solicitations were brief and did not involve any obvious disruption in production).

The Company does not advance its position by citing (Br 32) Board cases that have found that an employer may prohibit union solicitation even though it has tolerated a few isolated incidents of charitable solicitation. Here, unlike those cases, the Company permitted its employees to solicit freely until they began to solicit support for the Union.

Equally misplaced is the Company's reliance (Br 31-32) on Guardian Industries Corp. v. NLRB, 49 F.3d 317, 319 (1995), where this Court held that an employer did not unlawfully discriminate by refusing to allow union postings on its bulletin boards. In that case, as the Court was careful to point out, the employer had strictly prohibited postings for such organizations as "[t]he Boy Scouts, the Kiwanis, the VFW, the Red Cross, the United Way," and others, while permitting only a very narrow exception for the posting of employee "swap-and-shop" notices. Id., at 319-22. As this Court later held in J.C. Penney Co., Inc. v. NLRB, 123 F.3d 988, 997 (1997), the Guardian case is readily distinguishable from cases--like this one--in which an employer has consistently tolerated a wide variety of nonunion solicitation.

CONCLUSION

For the foregoing reasons, the Board requests that the Court enter a judgment fully enforcing the Board's order and denying the petition for review.

FRED CORNNELL
Supervisory Attorney

ANNE MARIE LOFASO
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, D.C.
(202) 273-2993
(202) 273-2985

LEONARD R. PAGE
General Counsel

LINDA SHER
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

National Labor Relations Board

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

6 WEST LIMITED CORPORATION and LETTUCE ENTERTAIN YOU ENTERPRISES, INC., d/b/a TUCCI MILAN	:	
Petitioner/Cross-Respondent	:	
v.	:	Nos. 00-1329 00-1599
NATIONAL LABOR RELATIONS BOARD	:	Board Case No. 13-CA-32908
Respondent/Cross-Petitioner	:	

CERTIFICATE OF COMPLIANCE

The undersigned certifies, based on the word count feature of Microsoft Word 97, that the foregoing brief contains 11,934 words and complies with the type-volume limitation set forth in Fed. R. App. Proc. 32(a)(7)(B)(i) and Circuit Rule 32. The undersigned also submits, pursuant to Circuit Rule 31(e), a copy of its brief on a 3.5" diskette, and certifies that the diskette is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Board's final brief in the above-captioned case, and the above-referenced diskette, have this day been served by first class mail upon the following counsel at the address listed below:

Richard L. Marcus, Esq.
SONNENSCHEIN NATH & ROSENTHAL
233 South Wacker Drive, 8000 Sears Tower
Chicago, IL 60606-6404

_____

Aileen A. Armstrong
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 11th day of July 2000