

Nos. 12-3054-ag (L) & 12-3462-ag (XAP)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVENFLOW TRANSPORTATION, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STUART F. DELERY
Acting Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

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

LAFE E. SOLOMON
Acting General Counsel

CELESTE J. MATTINA
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

ROBERT J. ENGLEHART
Supervisory Attorney

JARED D. CANTOR
Attorney

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

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

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues	2
Statement of the case.....	3
I. The Board’s findings of fact.....	4
A. Background: the Company’s organization and operations	4
B. The Union resumes its organizational campaign	5
C. Contemporaneous with the renewed campaign, the Company interrogates employees about their own or their coworkers’ union activities and threatens an employee with unspecified reprisals if he supported the Union.....	6
D. The Company permanently lays off drivers Rodriguez, Castro and Smidth, and helpers Correa and Wallace.....	7
II. The Board’s conclusions and order	8
Summary of argument.....	9
Standard of review	11
Argument.....	13
I. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their own and their coworkers’ union activities and threatening an employee with unspecified reprisals if he supported the Union.....	13
A. Applicable principles	13

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Board reasonably found that the Company interrogated employees about their own and their coworkers' union activities and threatened an employee with unspecified reprisals if he supported the Union.....	14
II. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) of the Act by permanently laying off five employees because they or their coworkers engaged in union activities	19
A. Applicable principles	19
B. The Board reasonably found that the Company unlawfully permanently laid off Rodriguez, Castro, Smith, Correa and Wallace due to their or their coworkers' protected union activity	22
III. By failing to adequately brief the issue, the Company has waived its contention that various Board members were unconstitutionally appointed.....	35
Conclusion	38

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Abbey's Transp. Servs., Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988)	11,20,21,32,33
<i>Alpo Petfoods, Inc. v. NLRB</i> , 126 F.3d 246 (4th Cir. 1997).....	26
<i>BMD Sportswear Corp.</i> , 283 NLRB 142 (1987), <i>enforced</i> , 847 F.2d 835 (2d Cir. 1988).....	25
<i>Bourne v. NLRB</i> , 332 F.2d 47 (2d Cir. 1964)	14
<i>Coalition on W. Valley Nuclear Waste v. Chu</i> , 592 F.3d 306 (2d Cir. 2009)	36
<i>Cibao Meat Prods., Inc. v. NLRB</i> , 547 F.3d 336 (2d Cir. 2008)	12
<i>Cuoco v. Moritsugu</i> , 222 F.3d 99 (2d Cir. 2000)	36
<i>Davis Supermarkets, Inc. v. NLRB</i> , 2 F.3d 1162 (D.C. Cir. 1993).....	26,31
<i>Demco NY Corp.</i> , 337 NLRB 850 (2002).....	15
<i>Desert Toyota</i> , 346 NLRB 118 (2005)	32
<i>Edward Fields, Inc. v. NLRB</i> , 325 F.2d 754 (2d Cir. 1963)	17
<i>Elec. Contractors, Inc. v. NLRB</i> , 245 F.3d 109 (2d Cir. 2001)	32

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>FiveCap, Inc. v. NLRB</i> , 294 F.3d 768 (6th Cir. 2002)	32
<i>Flat Rate Movers, Ltd. v. NLRB</i> , 2011 WL 5592863 (2011), <i>enforced</i> , 488 F. App'x 524 (2d Cir. 2012)	18, 23, 26,30,33, 34
<i>HarperCollins S.F., a Div. of HarperCollins Publishers, Inc. v. NLRB</i> , 79 F.3d 1324 (2d Cir. 1996)	18
<i>Hosp. Cristo Redentor, Inc. v. NLRB</i> , 488 F.3d 513 (1st Cir. 2007)	13
<i>Hotel & Rest. Emps. Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985)	14
<i>Huck Store Fixture Co. v. NLRB</i> , 327 F.3d 528 (7th Cir. 2003)	33
<i>Ingram Book Co., Div. of Ingram Indus., Inc.</i> , 315 NLRB 515 (1994)	16
<i>Intersweet, Inc.</i> , 321 NLRB 1 (1996), <i>enforced</i> , 125 F.3d 1064 (7th Cir. 1997)	25
<i>Jamaica Towing, Inc.</i> , 236 NLRB 1700 (1979), <i>enforced in relevant part</i> , 602 F.2d 1100 (2d Cir. 1979).....	15
<i>Kachalsky v. County of Westchester</i> , 701 F.3d 81 (2d Cir. 2012)	36
<i>K-Mart Corp.</i> , 336 NLRB 455 (2001).....	15,16
<i>Local One, Amalgamated Lithographers v. NLRB</i> , 729 F.2d 172 (2d Cir. 1984)	23

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Majestic Molded Prods., Inc. v. NLRB</i> , 330 F.2d 603 (2d Cir. 1964)	26,30,34
<i>Multi-Ad Servs., Inc.</i> , 331 NLRB 1226 (2000), <i>enforced</i> , 255 F.3d 363 (7th Cir. 2001)	17
<i>Niagra Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.</i> , 673 F.3d 84, 107 (2d Cir. 2012)	36
<i>NLRB v. Am. Geri-Care, Inc.</i> , 697 F.2d 56 (2d Cir. 1982)	12, 21,29
<i>NLRB v. Caval Tool Div.</i> , 262 F.3d 184 (2d Cir. 2001)	12
<i>NLRB v. Ferguson Elec. Co.</i> , 242 F.3d 426 (2d Cir. 2001)	31
<i>NLRB v. Future Ambulette, Inc.</i> , 903 F.2d 140 (2d Cir. 1990)	32
<i>NLRB v. G & T Terminal Packaging Co.</i> , 246 F.3d 103 (2d Cir. 2001)	11
<i>NLRB v. Great E. Color Lithographic Corp.</i> , 309 F.2d 352 (2d Cir. 1962)	16
<i>NLRB v. J. Coty Messenger Serv., Inc.</i> , 763 F.2d 92 (2d Cir. 1985)	14,18,23
<i>NLRB v. Katz's Delicatessen of Houston St., Inc.</i> , 80 F.3d 755 (2d Cir. 1996)	11
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941)	21

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>NLRB v. Long Island Airport Limousine Serv. Corp.</i> , 468 F.2d 292 (2d Cir. 1972)	21, 33
<i>NLRB v. Lorben Corp.</i> , 345 F.2d 346 (2d Cir. 1965)	17
<i>NLRB v. Midwest Hanger Co.</i> , 474 F.2d 1155 (8th Cir. 1973)	34
<i>NLRB v. Porta Sys. Corp.</i> , 625 F.2d 399 (2d Cir. 1980)	23
<i>NLRB v. Rubin</i> , 424 F.2d 748 (2d Cir. 1970)	15,16
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988)	22
<i>NLRB v. Syracuse Color Press</i> , 209 F.2d 596 (2d Cir. 1954)	13,16
<i>NLRB v. Town & Country Elec., Inc.</i> , 516 U.S. 85 (1995)	12
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983)	20,21
<i>N. Atl. Med. Servs.</i> , 329 NLRB 85 (1999)	24
<i>Norton Audubon Hosp.</i> , 338 NLRB 320 n.6 (2002)	17
<i>NY Univ. Med. Ctr. v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998)	19

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Office & Prof'l Emps. Int'l Union v. NLRB</i> , 981 F.2d 76 (2d Cir. 1992)	12, 20
<i>Pergament United Sales, Inc. v. NLRB</i> , 920 F.2d 130 (2d Cir. 1990)	31
<i>Power, Inc. v. NLRB</i> , 40 F.3d 409 (D.C. Cir. 1994).....	33
<i>Retired Persons Pharmacy v. NLRB</i> , 519 F.2d 486 (2d Cir. 1975)	13,14,18
<i>Rossmore House</i> , 269 NLRB 1176 n.20 (1984).....	14
<i>Timsco Inc. v. NLRB</i> , 819 F.2d 1173 (D.C. Cir. 1987).....	16
<i>Tolbert v. Queens College</i> , 242 F.3d 58, 75 (2d Cir. 2001)	36
<i>Torrington Extend-A-Care Emp. Ass'n v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994)	21
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	11
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	31
<i>Wright Line, a Div. of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced</i> , 662 F.2d 89 (1st Cir. 1981), <i>cert. denied</i> , 455 U.S. 989 (1982).....	20, 21,22,25,27,30

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)	8,13,29
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	1,3,8,9,13,14,17,18,20,23,29,32
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3,8,9,19,20,25,26,29
Section 8(c) (29 U.S.C. § 158(c))	14
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,11,31,32
Section 10(f) (29 U.S.C. § 160(f)).....	2

Additional Authorities:	Page(s)
Fed. R. App. P. 28(a)(9)(A).....	36
<i>Members of the NLRB Since 1935</i> , http://www.nlr.gov/members-nlr-1935 (last visited Apr. 10, 2013).....	36
<i>President Obama Announces Recess Appointments to Key Administration Posts</i> , http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts (January 4, 2012).....	36

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

Nos. 12-3054-ag (L) & 12-3462-ag (XAP)

EVENFLOW TRANSPORTATION, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on a petition for review filed by Evenflow Transportation, Inc. (“the Company”), and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of the Board’s Order finding that the Company committed unfair labor practices when it interrogated employees about their own or their coworkers’ union activities, threatened an employee with unspecified reprisals if he supported Local 713, International Brotherhood of Trade Unions (“the Union”), and permanently laid off five

employees because they or their coworkers engaged in union activities. The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. The Board’s Decision and Order issued on July 3, 2012, and is reported at 358 NLRB No. 82. (A 944-55.)¹

The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties, and the unfair labor practices occurred in New York. The Company’s petition for review, filed on August 2, 2012, and the Board’s cross-application for enforcement, filed on August 31, 2012, were timely because the Act places no time limit on the initiation of enforcement or review proceedings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their own or their coworkers’ union activities and threatening an employee with unspecified reprisals if he supported the Union.

¹ “A” references are to the joint appendix. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by permanently laying off five employees because they or their coworkers engaged in union activities.

3. Whether the Company waived its constitutional objection to the President's recess appointments to the Board, by failing to explain in its brief the reasoning for its objection.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed various unfair labor practices in violation of the Act. (A 715-23.) After a hearing, an administrative law judge found that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), when it interrogated employees about their own and their coworkers' union activities and threatened an employee with unspecified reprisals if he supported the Union, and violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), when it permanently laid off five employees because they or their coworkers engaged in union activities. (A 952.) On review, the Board modified some of the judge's reasoning and affirmed the judge's conclusions, as amended. (A 944-48.) The Board issued its own Order modifying the appropriate remedy. (A 948.)

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Organization and Operations

The Company provides nonemergency transportation services to patients traveling between their homes and a variety of healthcare facilities. (A 944; A 73.) The Company charges the healthcare facilities for its services, and the facilities in turn bill Medicare, Medicaid and private insurance companies. (A 944; A 352.) John Bizzarro serves as general manager and oversees the Company's day-to-day operations. (A 944; A 260, 267.) Bizzarro is assisted by two dispatchers, Antonio Cabrera and Leandro Da Silva. (A 950; A 504, 658.)

In March 2009, the Company merged with Oasis, another provider of nonemergency medical transportation services, and acquired 12 of Oasis' employees and its client accounts, including one with Comprehensive Care Management ("CCM"). (A 950; A 284-86, 373.) Following the merger, the Company went from 12 to 24 employees, which remained the number of employees until the September 23 layoffs. (*Id.*) The Company's employees include drivers, as well as "helpers," who are paired with those drivers that transport patients with special needs, such as wheelchairs. (A 944; A 74, 168, 287.) The Company's drivers included Nelson Rodriguez, Julio Castro and Anthony Smidth (A 944; A 74, 115, 188), each of whom primarily transported patients to and from CCM's facilities. (A 944; A 79-80, 115, 187, 196.) Luis

Correa was Rodriguez's helper (A 149), Lindbregh Wallace was Smidth's helper (A 169), and Reginald "Cuba" was Castro's helper. (A 116.)

B. The Union Resumes Its Organizational Campaign

The Union had commenced its original organizational drive among the Company's employees in March and April 2009. (A 950.) The Union had filed a petition on May 14, 2009 (A 950; A 790), and the regional director scheduled an election on June 25. (A 950; A 464, 791-73.) Before the election was held, however, the Union filed an unfair labor practice charge. (A 950; A 464, 794-97.) More than a year later, on July 14, 2010, the Company settled the charge through an informal settlement agreement. (*Id.*) Among other things, the settlement provided for the posting of a remedial notice for 60 days. (A 950; A 464, 796-98.) The posting began on or about August 10, 2010. (*Id.*)

Around that same time, in July and August 2010, union organizer Carlos Rodriguez renewed the Union's organizing efforts. (A 944; A 81-82, 84, 120-22.) He separately approached drivers Rodriguez and Castro while they were at CCM's facilities and discussed unionization with them. (*Id.*) Rodriguez and Castro in turn discussed a union campaign with Smidth (A 93, 122, 194-98), whom Carlos Rodriguez had approached during the prior campaign and who had signed a membership card at that time. (A 944; A 190-92, 803.)

From July through September, Rodriguez, Castro and Smidth regularly discussed the Union amongst themselves, with fellow employees, and with helpers Correa and Wallace. (A 84, 93-94, 122-25, 151-52, 170-72, 194-97.) In early September, the group contacted Carlos Rodriguez and requested that he schedule a meeting in order for the Company's employees to discuss a campaign. (A 95, 125, 152, 197.) Carlos Rodriguez scheduled the meeting for September 24. (A 95, 125, 153, 198.) In the days leading up to September 24, Rodriguez, Castro, Smidth and Wallace worked to organize the meeting and solicit other employees to attend. (A 95, 126, 171-73, 198.)

C. Contemporaneous with the Renewed Campaign, the Company Interrogates Employees About Their Own or Their Coworkers' Union Activities and Threatens an Employee with Unspecified Reprisals if He Supported the Union

Contemporaneous with the Union's renewed campaign, general manager Bizzarro questioned Rodriguez, Castro and Smidth about their own and their coworkers' union activities, and threatened Castro with unspecified reprisals if he supported the Union. (A 944.) In a conversation in June or July, Bizzarro told Castro to report to him if any employees were talking to the Union. (A 944; A 128.) Bizzarro also told Castro that he did not want his company unionized and threatened that "if he had to he'd bring his dogs out to get the Union out." (*Id.*) Over the next several weeks, Bizzarro had two additional conversations with Castro, including one in his private office, during which he again told Castro to

report to him if employees were speaking to the Union and repeated his threat to “call his dogs out from the street to come and get the Union out.” (A 944; A 129-30.)

Sometime in August, Bizzarro called Smidth to his office and told him that the Union was again preparing to organize the Company and that Smidth should tell other employees not to sign any petition supporting the Union. (A 944; A 199.) Bizzarro also told Smidth to report to him if any employees signed the petition. (*Id.*) Also in August, Bizzarro questioned Rodriguez whether he had spoken to the Union’s organizer, and Rodriguez admitted that he had. (A 944; A 86.) Bizzarro told Rodriguez to stay away from him. (*Id.*) Bizzarro also told Rodriguez to report to him if any employees were speaking to the Union. (*Id.*) In the following weeks, Bizzarro again spoke with Rodriguez about the Union, twice asking if Rodriguez had spoken with the organizer and if he had seen any other employees talking to the organizer. (A 944; A 88-89.)

D. The Company Permanently Lays Off Drivers Rodriguez, Castro and Smidth, and Helpers Correa and Wallace

On September 23, Rodriguez, Castro and Smidth arrived together at the Company to report for work. (A 95, 130, 201.) Standing outside were Bizzarro and Jack Mahanian, a co-owner of the Company. (A 95-96, 131, 201, 263-67.) Bizzarro and Mahanian told the drivers that they were being laid off because of financial problems the Company was experiencing. (A 944-45; A 96-97, 132, 202-

04, 491.) That same day, the Company also laid off helpers Correa and Wallace. (A 944-45; A 153-54, 174.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hayes, Griffin and Block) affirmed the judge's findings that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating and threatening employees and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by permanently laying off five employees. (A 944-47.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (A 948.)

Affirmatively, the Order requires the Company to offer Rodriguez, Castro, Smidth, Correa, and Wallace, full reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent positions. (A 948.) The Board's Order further requires the Company to make the discriminatees whole for any loss of earnings and other benefits suffered as a result of the unlawful discharges; to remove from their files any reference to the unlawful discharges, and to notify them in writing that the discharges will not be used against them in any way; to preserve and make available all records necessary to determine the amount

of backpay due to them; and to post and electronically distribute a remedial notice, if the Company customarily communicates with its employees by such means.

(Id.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Company unlawfully interrogated and threatened its employees in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). Specifically, contemporaneous with the Union's resumption of its organizational drive among the Company's employees, the Company interrogated employees about their own and their coworkers' union activities and threatened an employee with unspecified reprisals if he supported the Union. For instance, the Company's general manager repeatedly asked employees to report to him if any employees talked to the Union, told an employee that he did not want his company unionized and threatened several times to use his "dogs" to keep the Union out, and repeatedly questioned an employee whether he or any of his coworkers had spoken to a union organizer.

Substantial evidence also supports the Board's finding that, within weeks of interrogating and threatening its employees, the Company permanently laid off five employees in retaliation for their or their coworkers' union activities in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). Utilizing the Board's framework for establishing motive, the Board reasonably found that

Company was unlawfully motivated by union animus when it engaged in the layoff. This finding is supported by the Company's knowledge of the employees' union activity, the Company's expressed hostility towards the Union, and the timing of the layoff. Although the Company sought to justify its decision based on financial problems, the Company failed to support its assertion and, tellingly, it hired two new workers despite the financial problems that it claimed warranted laying off the five. The Board therefore found the Company's justification pretextual and further evidence of animus.

Finally, the Company summarily contends that several Board members were unconstitutionally appointed. Under this Court's clear case law, however, the Company has waived the argument by failing to articulate any reasoning or explanation behind its assertion, and there is no need for the Court to examine the issue further.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); accord *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; accord *G & T Terminal Packaging*, 246 F.3d at 114. The Board's reasonable factual 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*; as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988).

Accordingly, this Court will reverse the Board based on a factual determination—such as a determination of employer motive—only if 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)). In addition, this Court has long had a policy of deferring to the Board's adoption of the administrative law judge's credibility determinations, which "will not be overturned unless they are hopelessly incredible or they flatly contradict either the

law of nature or undisputed documentary testimony.” *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982).

The Court’s review of the Board’s legal conclusions is deferential: “This [C]ourt reviews the Board’s legal conclusions to ensure that they have a reasonable basis in law. In so doing, [the Court] afford[s] the Board ‘a degree of legal leeway.’” *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995)); *see also Office & Prof’l Emps. Int’l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992) (“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). The Court therefore will only reverse the Board’s legal determinations if they are arbitrary and capricious. *See Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR OWN AND THEIR COWORKERS' UNION ACTIVITIES AND THREATENING AN EMPLOYEE WITH UNSPECIFIED REPRISALS IF HE SUPPORTED THE UNION

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees the right of employees “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” Employers violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if they “interfere with, restrain, or coerce employees in the exercise of [those] rights”

An employer violates Section 8(a)(1) when it interrogates employees about their own or their coworkers' union activities or sympathies if the interrogation is coercive in light of the surrounding circumstances. *See Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975); *NLRB v. Syracuse Color Press*, 209 F.2d 596, 599 (2d Cir. 1954); *see also Hosp. Cristo Redentor, Inc. v. NLRB*, 488 F.3d 513, 517 (1st Cir. 2007) (an employer violates 8(a)(1) by “coercively interrogating employees about their union activities or sentiments, or about the activities or sentiments of others”). Likewise, it is unlawful for an employer to

threaten an employee with reprisals for engaging in union activities or supporting a union. *See NLRB v. J. Coty Messenger Serv., Inc.*, 763 F.2d 92, 97-98 (2d Cir. 1985); *accord* 29 U.S.C. § 158(c) (expressions by employer containing threats of reprisal not protected).

B. The Board Reasonably Found that the Company Interrogated Employees About Their Own and Their Coworkers' Union Activities and Threatened an Employee with Unspecified Reprisals if He Supported the Union

The Board reasonably found (A 945) that the Company violated Section 8(a)(1) of the Act when Bizzarro interrogated Rodriguez, Castro and Smidth about their own and their coworkers' union activities and threatened Castro with unspecified reprisals if he supported the Union.

First, substantial evidence supports the Board's finding that the totality of the circumstances, including those factors set forth by this Court in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964) (per curiam),² demonstrate that the Company unlawfully interrogated Rodriguez, Castro and Smidth. Evidence shows that

² The totality of the circumstances, including those factors listed by this Court in *Bourne*, include: 1) the history of the employer's hostility towards or discrimination against union supporters; 2) the nature of the information sought or related; 3) the rank of the questioner in the employer's hierarchy; 4) the place and manner of the interview; and 5) the truthfulness of the employee's reply. 332 F.2d at 48; *see also Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984) (setting forth Board's substantially similar totality of circumstances test), *enforced sub nom. Hotel & Rest. Emps. Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The *Bourne* factors are neither exhaustive, definitive, nor determinative, and the absence of any one of the factors does not exonerate the employer. *See Retired Persons Pharmacy*, 519 F.2d at 492.

Bizzarro's expression of the Company's open hostility to the Union and its employees' union activities heightened the coerciveness of his questioning. Specifically, evidence shows that when questioning employee Castro on three separate occasions (A 128-30), Bizzarro repeatedly threatened that, if necessary, "he'd bring his dogs out to get the Union out" and that he would "call his dogs out from the street to come and get the Union out." Threats made by an employer during the course of an interrogation are accepted evidence of coerciveness. *See, e.g., Demco NY Corp.*, 337 NLRB 850, 851 (2002) (implicit threat to link job assignments to union support during questioning evidence of coerciveness); *K-Mart Corp.*, 336 NLRB 455, 455, 469 (2001) (implicit threat to prevent employees working at new facility unless union lost election during questioning evidence of coerciveness); *Jamaica Towing, Inc.*, 236 NLRB 1700, 1700 (1979) (threat to use "muscle" if employees continued organizing during questioning evidence of coerciveness), *enforced in relevant part*, 602 F.2d 1100 (2d Cir. 1979).

Ample evidence (A 86, 88-89, 128-30, 199) also demonstrates that the nature of the information Bizzarro sought was highly coercive, as Bizzarro repeatedly questioned employees about their own union activities and the union activities of their coworkers while also instructing them to surveil other employees' union activities and then report back to him. *See, e.g., NLRB v. Rubin*, 424 F.2d 748, 750-51 (2d Cir. 1970) (questioning employees about their and their

coworkers' union activities coercive interrogation); *NLRB v. Great E. Color Lithographic Corp.*, 309 F.2d 352, 353 (2d Cir. 1962) (same); *Syracuse Color Press*, 209 F.2d at 598-600 (same).

Further, Bizzarro's position in the Company's hierarchy is, as the Board found (A 945), "significant" and contributed to the coercive nature of the questioning. As general manager, Bizzarro was in charge of the Company's day-to-day operations (A 260, 266-67) and, moreover, was married to a co-owner of the Company. (A 267.) The Board consistently has found as coercive questioning by such a high-ranking official. *See, e.g., K-Mart Corp.*, 336 NLRB at 469 (questioning by general manager, highest ranking official onsite, evidence of coerciveness); *Ingram Book Co., Div. of Ingram Indus., Inc.*, 315 NLRB 515, 516 (1994) (questioning by vice president of human resources evidence of coerciveness); *see also Rubin*, 424 F.2d at 751 (questioning by managing partner, lead officer at plant, evidence of coerciveness).

The coercive nature of Bizzarro's questioning is further shown by Bizzarro holding several of the conversations with the employee alone and in his private office (A 87, 129, 199-200), a locus of managerial authority. *See e.g., Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987) (interrogation coercive when manager questioned employee about union in manager's office with door closed);

Syracuse Color Press, 209 F.2d at 599 (interrogation coercive when superintendent and manager questioned employees “in the office of authority”).

Finally, Bizzarro’s failure to convey a legitimate purpose for his questioning or offer assurances against retribution is relevant evidence of coercion. *See, e.g., Norton Audubon Hosp.*, 338 NLRB 320, 321 n.6 (2002); *Multi-Ad Servs., Inc.*, 331 NLRB 1226, 1227 (2000), *enforced*, 255 F.3d 363 (7th Cir. 2001); *see also NLRB v. Lorben Corp.*, 345 F.2d 346, 348 (2d Cir. 1965) (failure to offer assurances against retribution during questioning may, inter alia, be coercive); *Edward Fields, Inc. v. NLRB*, 325 F.2d 754, 758-59 (2d Cir. 1963) (failure to convey legitimate purpose for questioning may, inter alia, be coercive). Based on these facts, and consistent with decisions of the Board and this Court, the Board reasonably found (A 945) that the Company violated Section 8(a)(1) of the Act by interrogating Rodriguez, Castro and Smidth about their own and their coworkers’ union activities.

Second, substantial evidence supports the Board’s finding (A 945) that the Company violated Section 8(a)(1) when Bizzarro threatened Castro with unspecified reprisals if he supported the Union. As discussed, in the course of interrogating Castro, Bizzarro stated that he did not want his company unionized and he warned Castro that “if he had to he’d bring his dogs out to get the Union

out.” (A 128.) In later conversations, Bizzarro again warned Castro that he would “call his dogs out from the street to come and get the Union out.” (A 129.)

Based on these facts, the Board reasonably found (A 945) that Bizzarro’s statements to Castro conveyed a threat of unspecified reprisals if he or other employees supported the Union. *See, e.g., Flat Rate Movers, Ltd. v. NLRB*, 488 F. App’x 524, 525 (2d Cir. 2012) (summary order) (unlawful to threaten pro-union employees with unspecified reprisals); *HarperCollins S.F., a Div. of HarperCollins Publishers, Inc. v. NLRB*, 79 F.3d 1324, 1329 (2d Cir. 1996) (unlawful to implicitly threaten employees because of loyalty to union); *J. Coty Messenger Serv.*, 763 F.2d at 97-98 (unlawful to threaten to discharge employee or close company because of union support).

In its brief, the Company repeatedly asserts (Br. 18-19, 22-23) that the Board and judge erred in finding that the General Counsel met its burden of proving that the Company knew of the employees’ union activity and was motivated by animus when it interrogated Rodriguez, Castro and Smith, and threatened Castro. The Board, however, did not use those findings when finding that the Company violated Section 8(a)(1); indeed, they are not elements of a Section 8(a)(1) violation. *See, e.g., J. Coty Messenger Serv.*, 763 F.2d at 97-98; *Retired Persons Pharmacy*, 519 F.2d at 492. The Company’s claim is therefore misplaced.

The Company's next assertion (Br. 19-20, 25), that no evidence supports the judge's finding that Bizzarro threatened Castro with physical harm, is irrelevant because the Board did not rely (A 945 n.5) on this finding. Instead, the Board specifically found (*id.*) that Bizzarro's statements reasonably conveyed threats of unspecified reprisals. Also unfounded is the Company's assertion (Br. 24) that the discriminatees admitted that they did not feel threatened by Bizzarro's statements. The Board's finding of unlawful threats concerns only Bizzarro's statements to Castro (A 945), and, contrary to the Company's claim, Castro did not testify that he did not feel threatened. (A 127-30, 139-40.) In any event, the test for whether an employer's threats violate this section of the Act is not whether any particular employee felt threatened but an objective standard that asks whether employees in general would reasonably feel threatened. *See NY Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998).

Accordingly, substantial evidence shows that the Company unlawfully interrogated Rodriguez, Castro and Smidth, and threatened Castro.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) OF THE ACT BY PERMANENTLY LAYING OFF FIVE EMPLOYEES BECAUSE THEY OR THEIR COWORKERS ENGAGED IN UNION ACTIVITIES

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer "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.” An employer violates Section 8(a)(3) and (1) by permanently laying off or taking other adverse employment actions against employees for engaging in union activity or in order to discourage such activity among other employees.³ See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

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. The Board utilizes the framework initially established in *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 89 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to determine the employer’s motivation for its actions.

Under *Wright Line*, the Board’s General Counsel must make an initial showing that protected conduct was “a motivating factor” in the employer’s actions. *Transp. Mgmt. Corp.*, 462 U.S. at 295, 397-403; *Abbey’s Transp. Servs.*, 837 F.2d at 579. If substantial evidence supports the Board’s finding that antiunion considerations were “a motivating factor” in the employer’s adverse action, the Board’s finding of a violation must be affirmed, unless the record

³ An employer’s action that violates Section 8(a)(3) also derivatively violates Section 8(a)(1). See *Office & Prof’l Emps. Int’l Union*, 981 F.2d at 81 n.4.

compels the conclusion that the employer would have taken the same action even in the absence of the protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 295, 397-403; *Abbey's Transp. Servs.*, 837 F.2d at 579. An employer fails to prove that it would have taken the same action even absent an employee's union activity when, for example, the record shows that the employer's justification for the action is pretextual. *See Am. Geri-Care*, 697 F.2d at 63-64; *Wright Line*, 251 NLRB at 1084.

The Board may properly rely on direct and circumstantial evidence to infer unlawful motivation. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey's Transp. Servs.*, 837 F.2d at 579. Evidence supporting a finding of unlawful motivation includes the employer's hostility toward employees' union activities, as shown by its other unfair labor practices, the employer's knowledge of those union activities, the questionable timing of the adverse action, and the shifting, contrived or implausible nature of the employer's proffered reason for its action. *See Torrington Extend-A-Care Emp. Ass'n v. NLRB*, 17 F.3d 580, 591 (2d Cir. 1994); *Abbey's Transp. Servs.*, 837 F.2d at 579-82; *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 294-96 (2d Cir. 1972). An employer's knowledge of an employee's union activity likewise may be inferred from circumstantial evidence. *See Abbey's Transp. Servs.*, 837 F.2d at 579; *Long Island Airport Limousine*, 468 F.2d at 295. 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).

B. The Board Reasonably Found that the Company Unlawfully Permanently Laid Off Rodriguez, Castro, Smidth, Correa and Wallace Due to Their or Their Coworkers' Protected Union Activity

Applying the established *Wright Line* test, the Board reasonably found (A 945-47) that the Company permanently laid off drivers Rodriguez, Castro, Smidth and helpers Correa and Wallace due to their or their coworkers' protected union activity.⁴ Substantial evidence supports the Board's findings (A 946) that the discriminatees engaged in union activity, that the Company had animus toward union activity, and that it either knew of their union activity or intended their layoffs to discourage union activity generally.

First, substantial evidence shows that the discriminatees engaged in various forms of protected union activity. Specifically, the discriminatees discussed an organizational campaign with organizer Carlos Rodriguez (A 81-82, 84, 120-22, 151, 190-92), talked about the Union among themselves and with fellow employees (A 84, 93-94, 122-25, 151-52, 170-72, 194-98), requested that Carlos Rodriguez schedule an organizational meeting for the Company's employees (A

⁴ Although the Company uniformly laid off the driver-helper teams of Rodriguez and Correa and Smidth and Wallace, it only laid off Castro and not his helper Cuba, who had not engaged in union activities. (A 144.)

95, 125, 152, 197), and solicited other employees to attend the September 24 meeting. (A 95, 126, 171-73, 198.)

Second, substantial evidence shows that the Company had animus toward that union activity. Bizzarro's repeated interrogations of several of the discriminatees about their own and their coworkers' union activities and his threatening of one discriminatee with unspecified reprisals if he supported the Union are independent violations of Section 8(a)(1) and they amply demonstrate this animus. *See J. Coty Messenger Serv.*, 763 F.2d at 98-99 (violations of Section 8(a)(1) evidence of animus). Furthermore, the timing of the Company's decision to permanently lay off the discriminatees also supports the existence of animus. Specifically, the Company's layoff of the five CCM-based employees on September 23 occurred only weeks after the Union had resumed its organizational campaign and after Bizzarro had unlawfully interrogated and threatened the CCM-based drivers. *See Local One, Amalgamated Lithographers v. NLRB*, 729 F.2d 172, 184 (2d Cir. 1984) ("[T]he occurrence of other unfair labor practices, in proximity to employee discharges, allows an inference to be drawn that an employer was motivated by anti-union animus."); *NLRB v. Porta Sys. Corp.*, 625 F.2d 399, 404 (2d Cir. 1980) (timing evidence of animus when company engaged in mass discharge of employees one month before union election); *Flat Rate Movers, Ltd.*, 357 NLRB No. 112, 2011 WL 5592863, at *8-12 (2011) (timing

evidence of animus when employer discharged 40 employees within weeks of learning of union campaign), *enforced*, 488 F. App'x. 524 (2d Cir. 2012).

Third, substantial evidence demonstrates that the Company was aware of the discriminatees' union activities. As shown, contemporaneous with the Union's renewed effort to organize the Company, general manager Bizzarro repeatedly interrogated employees about their own and their coworkers' union activities and threatened an employee if he supported the Union. As the Board found (A 946), "the [Company] knew, or at least suspected, that the renewed campaign had taken root [specifically] among the CCM-based drivers and helpers [that it ultimately laid off] is evidenced by the fact that the [Company] subjected that same contingent of employees to its interrogations and threats."

Based on this evidence, the Board reasoned (A 946) that it was not a coincidence that the Company began to unlawfully interrogate and threaten several of the discriminatees shortly after they began to engage in union activities. Instead, the Board found (*id.*) that Bizzarro's unlawful conduct targeting CCM-based employees is reasonably explained by the inference that the Company knew of the Union's resumed campaign and knew, or at least suspected, that some of the CCM-based employees were engaging in union activities. *See N. Atl. Med. Servs.*, 329 NLRB 85, 85-86 (1999) (Board may infer knowledge based on circumstantial evidence such as employer's knowledge of general union activity, its union

animus, timing of adverse action, and pretextual reasons for adverse action), *enforced*, 237 F.3d 62 (1st Cir. 2001); *BMD Sportswear Corp.*, 283 NLRB 142, 143 (1987) (same), *enforced*, 847 F.2d 835 (2d Cir. 1988).

With regard to Correa and Wallace, although Bizzarro did not interrogate or threaten them, as helpers they worked side-by-side with their assigned drivers Rodriguez and Smidth, respectively, and they serviced CCM's facilities, which the Company knew or suspected were the origin of the Union's renewed campaign. The Board therefore found (A 946) that it was reasonable to infer that the Company also suspected Correa and Wallace of engaging in union activities because they worked at CCM's facilities and associated with drivers that it believed were engaging in union activities.

While the Board reasonably inferred that the Company knew of the discriminatees' union activities, the Board also found (A 946) that, even if it did not, the General Counsel nonetheless had met his burden under *Wright Line*. In cases involving the mass discharge of employees, the Board's General Counsel need not establish a correlation between each discriminatee's union activity and his or her discharge in order to make out a violation of Section 8(a)(3), but can instead establish that the mass discharge was motivated to discourage union activity generally. *See Intersweet, Inc.*, 321 NLRB 1, 15 (1996), *enforced*, 125 F.3d 1064 (7th Cir. 1997). As this Court reasoned, "[a] power display in the form of a mass

lay-off, where it is demonstrated that a significant motive and a desired effect were to ‘discourage membership in any labor organization,’ satisfies the requirements of Section 8(a)(3) to the letter even if some white sheep suffer along with the black.” *Majestic Molded Prods., Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964); accord *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 255 (4th Cir. 1997); *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993); *Flat Rate Movers*, 2011 WL 5592863 at *14, *enforced*, 488 F. App’x. 524 (2d Cir. 2012).

Here, the Board reasonably found (A 947) that the Company’s mass discharge also was intended to discourage union activity altogether, thus obviating the need for individualized findings regarding knowledge. The Board’s finding is supported by the foregoing evidence that the Company focused its unlawful conduct on the CCM-based employees most actively supporting the Union, including Bizzarro’s repeated interrogation of CCM-based drivers about their own and their coworkers’ union activities and requests that they report their coworkers’ union activities to him. The Company also explicitly expressed anti-union sentiments to the CCM-based drivers, and it threatened a CCM-based driver with reprisals if he supported the Union. Accordingly, on the basis of either the mass discharge theory or the aforementioned evidence of knowledge, substantial evidence supports the Board’s finding (A 946-47) that the General Counsel

satisfied his burden under *Wright Line* of establishing the Company's knowledge of the employees' union activities.

Once the Board found (A 947) that the General Counsel carried its burden of demonstrating that the motivation for the permanent layoff was unlawful, the burden under *Wright Line* shifted to the Company to show that it would have permanently laid off the five employees even absent its union animus. *See Wright Line*, 251 NLRB at 1083-84. The Company claimed (A 947) that it laid off the five employees because of worsening financial problems, namely, CCM's failure to pay the Company for services rendered and an IRS levy for back taxes on payments to the Company from clients. In rejecting the claim of financial difficulties, the Board found (A 947) that the Company "introduced no financial statements or other financial records showing what effects, if any, the CCM delinquencies and IRS levies were having on its profits, its ability to make payroll, or its overall business health."

Furthermore, rejecting CCM's delinquent payments as a basis for the layoffs, the Board specifically found (A 951; A 383-84) that "this is not a situation where long overdue payments are typically a prelude to nonpayment." Instead, "[w]hen the accounts were reconciled, the [Company] would be paid for any and all trips that it performed on the CCM account. These payments are made by Medicaid and there is no question but that the payments would be made as soon as

CCM confirmed that the services were provided.”⁵ Moreover, despite the outstanding delinquent payments, the Company had continued (A 951; A 375) to service the CCM account, using the same number of employees and two-man driver-helper teams.

The Board also rejected the IRS levies as a reason for the layoff. Specifically, the Board found (A 952) that despite the levy, the Company “continues to provide services to [the levied account] and there is no evidence that any of [the Company’s] other customers, including CCM, were required to pay money owed to the [Company] to the IRS.” And, the Company presented “no evidence to show that this tax levy had any substantial affect on the Company’s business operations.”

The Board also found (A 947) that the Company’s generalized claim of financial difficulty was further undermined by the fact that, despite asserting that it considered the layoff as early as May 2010 (A 452), the Company hired at least two new employees in June 2010.⁶ The Board therefore reasonably found (A 947)

⁵ Cheryl Davenport, transportation manager for CCM (A 372), testified that CCM does not dispute it owes money to the Company (A 383), that Medicaid is not denying payment (A 384), and that CCM actively is working to reimburse the Company and is catching up on payments. (A 382-84, 386.)

⁶ Because the Company failed to fully comply with a subpoena duces tecum issued by the General Counsel requesting payroll records for the period before and after September 2010 (A 951 n.6; A 777), the record does not show whether, in addition to these two known hires, the Company hired any other new employees before or after it laid off the discriminatees.

that the Company failed to carry its burden of establishing a legitimate basis for the layoff and, moreover, that the proffered reasons for the layoff were in fact pretextual (A 946), a finding that reinforces the Board's finding of animus. *See Am. Geri-Care*, 697 F.2d at 62-64.

In support of its claim that it did not violate Section 8(a)(3) of the Act, the Company in its brief puts forward numerous assertions, all of which are without merit. The Company's first claim (Br. 19), that there is no evidence the discriminatees engaged in Section 7 "concerted activity" for their "mutual aid or protection," is irrelevant because the Board did not find that the Company violated Section 8(a)(1), which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1). The Board instead found (A 947) that the Company violated Section 8(a)(3), which separate and distinct from Section 8(a)(1) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment . . . to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Therefore, contrary to the Company's claim, it is irrelevant whether the discriminatees' activities were for their mutual aid or protection.

Further, as the extensive discussion above demonstrated, substantial evidence shows both that the discriminatees engaged in union activities and that

the Company knew or suspected that some or all of the discriminatees were engaged in union activities. In any event, as shown, the Board also reasonably found that, even without knowledge of the individual discriminatees' union activities, the Company's permanent layoff of the five employees was a retaliatory and unlawful mass layoff in response to the renewed union activity at the workplace. The Company's related assertion (Br. 20-22), that the judge erred in finding that dispatcher Cabrera was a supervisor under the Act, is irrelevant because the Board expressly did not rely on the judge's finding when it found that the Company knew of the union activities. (A 947 n.9.)

There is also no merit to the Company's challenge (Br. 11-16) to the Board's use of the mass discharge theory (A 946), which it incorrectly claims is a "novel burden of proof" that "eviscerated" the *Wright Line* requirement of proving knowledge (Br. 12) and improperly shifted onto the Company (Br. 14) an initial burden of proving a legitimate basis for its actions. Contrary to the Company's erroneous characterization, the previously cited cases (pp. 25-26) explicitly demonstrate that the mass discharge theory is an established means of showing unlawful discharge without individualized findings of knowledge of union activity, and substantial evidence supports the Board's application of the theory to this case. *See, e.g., Flat Rate Movers*, 488 F. App'x at 525; *Majestic Molded Prods.*, 330 F.2d at 606.

Also unavailing is the Company's assertion (Br. 15) that the Board should not have applied the mass discharge theory because the General Counsel had not alleged it. First, the Company failed to file a motion for reconsideration challenging the Board's application of the theory and, under the Act, "[n]o objection that has not been urged before the Board ... shall be considered by the [Court of Appeals], unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Section 10(e) deprives the courts of appeals of the power to hear issues first raised by a Board decision unless the party "object[s] to the Board's decision in a petition for reconsideration or rehearing." *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982). As this Court has stated, "[e]ven when the Board itself raises and decides an issue *sua sponte*, an objection must be filed with the Board to preserve the issue for a reviewing court." *NLRB v. Ferguson Elec. Co.*, 242 F.3d 426, 435 (2d Cir. 2001). Because the Company points to no extraordinary circumstances excusing its failure, this Court has no jurisdiction to entertain this claim on appeal.

In any event, the Board, with court approval, previously has applied *sua sponte* the mass discharge theory when, as the Board found here (A 947 n.8), the rights of a party would not be adversely affected. *See Davis Supermarkets*, 2 F.3d at 1168-69 (permissible for Board to *sua sponte* apply mass discharge theory); *see also Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 134-37 (2d Cir. 1990)

(where Board adopted judge's finding of violation of section of Act not contained in charge, employer not prejudiced because it had notice of allegedly violative acts, difference between charges was "minuscule," and it fully and fairly litigated the underlying issue).

The Company's next assertion (Br. 23), that the judge failed to consider the alleged misconduct of some of the discriminatees as another legitimate basis for its conduct, is likewise unavailing because the Company failed to file any exception to this specific alleged error (A 855-97, 898-904) and it does not adduce any extraordinary circumstances to excuse its failure.⁷ Consequently, the Court is deprived of jurisdiction to hear this claim. *See* 29 U.S.C. § 160(e); *Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001). Regardless, even if the Company successfully had preserved this argument, it would only have served to prove that the Company offered shifting and inconsistent explanations of what prompted the need for the layoff. It is well established by both courts and the Board that an employer cannot rely on shifting justifications to rebut a finding of unlawful motivation. *See FiveCap, Inc. v. NLRB*, 294 F.3d 768, 784-85 (6th Cir. 2002); *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 144-45 (2d Cir. 1990); *Abbey's Transp. Servs.*, 837 F.2d at 581; *Desert Toyota*, 346 NLRB 118, 120

⁷ The Company's only reference to the alleged misconduct of some of the discriminatees (A 874-77) is in connection with its challenge to the credibility of some of the discriminatees in regards to the Section 8(a)(1) violations, and in regards to its claim (A 869) that the dispatchers were not supervisors.

(2005). Not only that, but the Company's belated attempt to proffer a misconduct-based and inconsistent justification for its permanent layoff of several of the discriminatees serves to reinforce the Board's finding of animus. *See Abbey's Transp. Servs.*, 837 F.2d at 581; *Long Island Airport Limousine Serv.*, 468 F.2d at 295.

Furthermore, even if the hiring of the two new employees occurred in October as the Company claimed (A 947 n.11), the Board found that an October hiring date still supports its finding that the proffered reason for the layoff was pretextual. Specifically, the Board reasoned (*id.*) that "if they were actually hired in October, the [Company] has failed to explain why it hired them if it was necessary to lay off five employees in September" *See Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 534 (7th Cir. 2003) (employer failed to establish legitimate business justification when, inter alia, in midst of 20 percent reduction in force it hired ten new workers); *Power, Inc. v. NLRB*, 40 F.3d 409, 418-19 (D.C. Cir. 1994) (employer failed to establish legitimate business justification when, 1 month after layoff, it hired group of new workers); *Flat Rate Movers*, 2011 WL 5592863 at *14-15 (employer failed to establish legitimate business justification when, in months preceding discharge of 40 workers, it hired approximately 60 temporary foreign student workers), *enforced*, 488 F. App'x. 524 (2d Cir. 2012). Moreover, the Board continued (A 947 n.11), "if a layoff was necessary, [the

Company failed to explain] why it later hired new employees instead of recalling two of the discriminatees.” *NLRB v. Midwest Hanger Co.*, 474 F.2d 1155, 1159 (8th Cir. 1973) (decision to discharge rather than layoff is evidence of discriminatory motivation); *Majestic Molded Prods.*, 330 F.2d at 606 (employer’s defense that it laid off employees due to decline in business contradicted by decision to hire new employees rather than recall laid-off employees); *Flat Rate Movers*, 2011 WL 5592863 at *14-15 (employer’s legitimate business justification contradicted by fact that, despite historic efforts to retain experienced workers during slow periods, employer discharged rather than laid off 40 workers and then hired 35 new employees 2 to 3 months later while only rehiring 1 discharged worker), *enforced*, 488 F. App’x. 524 (2d Cir. 2012). The Board therefore reasonably rejected the Company’s claim that it would have taken the same action absent its unlawful motive.

Accordingly, substantial evidence shows that the Company unlawfully permanently laid off drivers Rodriguez, Castro and Smidth, and helpers Correa and Wallace, because of their or their coworkers’ union activities.

III. BY FAILING TO ADEQUATELY BRIEF THE ISSUE, THE COMPANY HAS WAIVED ITS CONTENTION THAT VARIOUS BOARD MEMBERS WERE UNCONSTITUTIONALLY APPOINTED

Finally, at the end of its brief, the Company summarily asserts that the Board lacked a quorum when it decided this case because several members had been unconstitutionally appointed. The Company's constitutional "argument" consists of a single sentence, in which the Company asserts without explanation that "the 'recess' appointments of Craig Becker, Brian Hayes, Mark Gaston Pearce, Sharon Block, Terrance Flynn, and Richard Griffin are not constitutional and are invalid as the 'recess' appointments were done when the Senate was not in recess." (Br. 25).

Of the six members of the Board listed by the Company as supposedly unconstitutional recess appointees, two (Pearce and Hayes) were not recess appointees at the time of the Board's decision, but, rather, had been confirmed by the Senate, and a third (Becker) had left the Board long before then.⁸ As for the three remaining members who *were* then recess appointees, the Company does not cite any source or offer any explanation of why the Senate supposedly "was not in recess" when they were appointed.⁹ It is impossible for the Board and the Court to know what is the understanding of the Constitution on which the Company relies,

⁸ See *Members of the NLRB Since 1935*, <http://www.nlr.gov/members-nlr-1935> (last visited Apr. 10, 2013).

⁹ See *President Obama Announces Recess Appointments to Key Administration Posts*, <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts> (January 4, 2012).

or in what respect these recess appointments are supposed to have run afoul of that understanding, because the Company is silent on those questions.

In these circumstances, the Company has waived any constitutional objection. This Court has repeatedly made clear that it is “a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (internal quotation marks omitted); *see also, e.g., Kachalsky v. County of Westchester*, 701 F.3d 81, 101 n.25 (2d Cir. 2012) (party waived constitutional issue by making only “passing references to it”); *Coalition on W. Valley Nuclear Waste v. Chu*, 592 F.3d 306, 314 (2d Cir. 2009) (appellant’s “two-sentence legal analysis” was insufficient to preserve issue for review); *Cuoco v. Moritsugu*, 222 F.3d 99, 112 n. 4 (2d Cir. 2000) (a “single, conclusory, one-sentence argument is insufficient to preserve any issue for appellate review”). That well-settled principle accords with the appellate rules, which require a petitioner not just to state its arguments, but also to include “the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.” Fed. R. App. P. 28(a)(9)(A); *see also Niagra Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.*, 673 F.3d 84, 107 (2d Cir. 2012). Here, the Company’s one-sentence assertion that a half-dozen different past and present members of the Board were unconstitutionally appointed, an assertion

unaccompanied by any argument or explanation, does not permit the Board to respond to the claim or the Court to evaluate it. It is therefore inadequate to preserve the issue.

CONCLUSION

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

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

LAFE E. SOLOMON
Acting General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

CELESTE J. MATTINA
Deputy General Counsel

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

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

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

/s/ Jared D. Cantor
JARED D. CANTOR
Attorney

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

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

April 2013

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

EVENFLOW TRANSPORTATION, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 12-3054-ag (L)
	* 12-3462-ag (XAP)
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 2-CA-40128
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,409 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
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of April, 2013

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

EVENFLOW TRANSPORTATION, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 12-3054-ag (L)
	* 12-3462-ag (XAP)
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 2-CA-40128
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 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.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the address listed below:

Christopher A. Smith, Attorney
Trivella & Forte, LLP
1311 Mamaroneck Avenue, Suite 170
White Plains, NY 10605

/s/ Linda Dreeben

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

Dated at Washington, DC
this 12th day of April, 2013