

Nos. 14-1571 & 14-2036

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

**800 RIVER ROAD OPERATING COMPANY LLC,
d/b/a
WOODCREST HEALTH CARE CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST NEW JERSEY REGION**

Intervenor

**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**

KIRA DELLINGER VOL
Supervisory Attorney

JARED D. CANTOR
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-0656
(202) 273-0016

RICHARD F. GRIFFIN, JR.

General Counsel

JENNIFER ABRUZZO

Deputy General Counsel

JOHN H. FERGUSON

Associate General Counsel

LINDA DREEBEN

Deputy Associate General Counsel

National Labor Relations Board

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	2
Statement of the issues	3
Statement of related cases and proceedings.....	3
Statement of the case.....	4
I. Procedural history	4
II. The Board’s findings of fact.....	5
A. Background	5
B. Assistant Director of Nursing Vijayan takes employee Dolcine from her workstation to an empty room to question her about her union activities and sympathies	5
C. Supervisor Lewis tells employee Duggar that the Center believes she is a union supporter and then asks if she is.....	6
D. The Center announces and implements improvements to its healthcare plan for all employees except unit employees	7
E. Center attorney Monica twice questions employee Jimenez about his union activities and those of his coworkers	8
F. Assistant Director of Recreation Guerrero warns employee Jimenez that the Center is upset about his union activities and that he should watch his back.....	11
III. The Board’s conclusions and order	12
Standard of review	13

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
Summary of argument.....	14
Argument.....	16
I. Substantial evidence supports the Board’s finding that the Center violated Section 8(a)(1) of the Act by coercively interrogating employees and by creating the impression that employee’s union activities were under surveillance	16
A. The Center unlawfully interrogated employees Jimenez, Dolcine, and Duggar about their union activities under circumstances tending to coerce, restrain, or interfere with their statutory rights	16
1. Monica coercively questioned Jimenez about his union activities and those of his coworkers.....	20
2. Vijayan coercively questioned Dolcine about her union activities and sympathies.....	22
3. Lewis coercively questioned Duggar by asking if she supported the Union, immediately after informing her that management believed she was a union supporter.....	24
B. Guerrero’s conversations with Jimenez created the impression that employees’ union and other protected concerted activities were under surveillance	25
C. The Center’s free-speech challenge is not properly before the court and is otherwise meritless.....	28

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
II. The Board reasonably found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improved healthcare benefits for all employees except unit employees	32
A. An employer violates the Act by withholding from unit employees benefits granted to all other employees shortly before or after a representation election	32
B. The Center unlawfully announced and implemented improved healthcare benefits for all employees except unit employees because of the election.....	36
C. The Center’s challenges to the Board’s established test and to its application in this case are unavailing	38
Conclusion	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Allegheny Ludlum Corp. v. NLRB</i> , 104 F.3d 1354 (D.C. Cir. 1997).....	18
<i>Allegheny Ludlum Corp. v. NLRB</i> , 301 F.3d 167 (3d Cir. 2002)	13, 14, 21, 29, 30, 31, 32
<i>Armcor Indus., Inc.</i> , 217 NLRB 358 (1975), <i>enforced in relevant part</i> , 535 F.2d 239 (3d Cir. 1976).....	19
<i>Atl. Forest Prods. Inc.</i> , 282 NLRB 855 (1987).....	34, 35
<i>Atl. Limousine, Inc. v. NLRB</i> , 243 F.3d 711 (3d Cir. 2001)	13
<i>AutoZone, Inc.</i> , 315 NLRB 115 (1994), <i>enforced mem.</i> , 83 F.3d 422 (6th Cir. 1996)	35, 38
<i>Bridgestone Firestone S.C.</i> , 350 NLRB 526 (2007)	27
<i>Earthgrains Baking Cos., Inc.</i> , 339 NLRB 24 (2003), <i>enforced mem.</i> , 116 F. App'x 161 (9th Cir. 2004).....	38
<i>Earthgrains Co.</i> , 336 NLRB 1119 (2001), <i>enforced mem.</i> , 61 F. App'x. 1 (4th Cir. 2003)	35
<i>Federated Logistics & Operations</i> , 340 NLRB 255 (2003), <i>enforced</i> , 400 F.3d 920, 927 (D.C. Cir. 2005).....	33, 37
<i>Fla. Steel Corp.</i> , 220 NLRB 1201 (1975).....	34

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Flexsteel Indus.</i> , 311 NLRB 257 (1993).....	26
<i>Frances House, Inc.</i> , 322 NLRB 516 (1996).....	20
<i>Free-Flow Packaging Corp. v. NLRB</i> , 566 F.2d 1124 (9th Cir. 1978).....	39
<i>Golden Stevedoring Co.</i> , 335 NLRB 410 (2001).....	26
<i>Graham Architectural Prods. Corp. v. NLRB</i> , 697 F.2d 534 (3d Cir. 1983)	17, 18, 19, 21, 24, 25, 30, 32
<i>Grouse Mountain Lodge</i> , 333 NLRB 1322 (2001), <i>enforced mem.</i> , 56 F. App'x 811 (9th Cir. 2003).....	35, 41
<i>Hanlon & Wilson Co. v. NLRB</i> , 738 F.2d 606 (3d Cir. 1984)	16, 25, 26
<i>Hedstrom Co. v. NLRB</i> , 629 F.2d 305 (3d Cir. 1980).....	17
<i>Hunter Douglas, Inc. v. NLRB</i> , 804 F.2d 808 (3d Cir. 1986)	17
<i>Ingram Book Co., Div. of Ingram Indus., Inc.</i> , 315 NLRB 515 (1994).....	19
<i>J.J. Newberry Co. v. NLRB</i> , 442 F.2d 897 (2d Cir. 1971).....	39

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Keystone Pretzel Bakery, Inc.</i> , 242 NLRB 492 (1979), <i>enforced</i> , 696 F.2d 257 (3rd Cir. 1982)	17
<i>K-Mart Corp.</i> , 336 NLRB 455 (2001)	19
<i>KMST-TV Channel 46</i> , 302 NLRB 381 (1991)	34, 37
<i>Lampi, LLC</i> , 322 NLRB 502 (1996)	34, 40
<i>Modesto Convalescent Hosp.</i> , 235 NLRB 1059 (1978), <i>enforced mem.</i> , 624 F.2d 192 (9th Cir. 1980)	34
<i>Newport Div. of Wintex Knitting Mills, Inc.</i> , 216 NLRB 1058 (1975)	40
<i>Niblock Excavating, Inc.</i> , 337 NLRB 53 (2001), <i>enforced</i> , 59 F. App'x 882 (9th Cir. 2003)	41
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013)	4
<i>NLRB v. Aluminum Casting & Eng'g Co. Inc.</i> , 230 F.3d 286 (7th Cir. 2000)	35
<i>NLRB v. Armcor Indus., Inc.</i> , 535 F.2d 239 (3d Cir. 1976)	18
<i>NLRB v. Curwood, Inc.</i> , 397 F.3d 548 (7th Cir. 2005)	33, 38, 41

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Dorn's Transp. Co.</i> , 405 F.2d 706 (2d Cir. 1969)	38, 39
<i>NLRB v. Dothan Eagle, Inc.</i> , 434 F.2d 93 (5th Cir. 1970)	40
<i>NLRB v. E. Steel Co.</i> , 671 F.2d 104 (3d Cir. 1982)	18
<i>NLRB v. Eagle Material Handling, Inc.</i> , 558 F.2d 160 (3d Cir. 1977)	40
<i>NLRB v. Exchange Parts Co.</i> , 375 U.S. 405 (1964)	33
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	14, 29, 30, 31
<i>NLRB v. Great Atl. & Pac. Tea Co., Inc.</i> , 166 NLRB 27 (1967), <i>enforced in relevant part</i> , 409 F.2d 296 (5th Cir. 1969)	32
<i>NLRB v. Hendel Mfg. Co.</i> , 483 F.2d 350 (2d Cir. 1973)	39
<i>NLRB v. Indus. Erectors, Inc.</i> , 712 F.2d 1131 (7th Cir. 1983)	40
<i>NLRB v. Konig</i> , 79 F.3d 354 (3d Cir. 1996)	29
<i>NLRB v. Noel Canning</i> , 134 S. Ct. 2550 (2014)	4
<i>NLRB v. Otis Hosp.</i> , 545 F.2d 252 (1st Cir. 1976)	35, 39, 40

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Pizza Crust Co. of Pa., Inc.</i> , 862 F.2d 49 (3d Cir. 1988)	18
<i>NLRB v. Regency Grande Nursing & Rehab. Ctr.</i> , 441 F. App'x 948 (3d Cir. 2011).....	30
<i>NLRB v. Shelby Mem'l Hosp. Ass'n</i> , 1 F.3d 550 (7th Cir. 1993)	35
<i>Noah's Bay Area Bagels, LLC</i> , 331 NLRB 188 (2000).....	32, 33, 34, 35, 40
<i>Noah's NY Bagels, Inc.</i> , 324 NLRB 266 (1997).....	32, 35, 37
<i>Noel Canning v. NLRB</i> , 705 F.3d 490 (D.C. Cir. 2013).....	4
<i>Pa. Gas & Water Co.</i> , 314 NLRB 791 (1994), <i>enforced mem.</i> , 61 F.3d 895 (3rd Cir. 1995).....	33, 34, 37
<i>Pedro's, Inc. v. NLRB</i> , 652 F.2d 1005 (D.C. Cir. 1981).....	39
<i>Perdue Farms, Inc., Cookin' Good Div. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998).....	17, 18, 19, 32, 34
<i>Quick v. NLRB</i> , 245 F.3d 231 (3d Cir. 2001)	14
<i>Register Guard</i> , 344 NLRB 1142 (2005).....	26
<i>Rock-Tenn Co.</i> , 315 NLRB 670 (1994).....	26, 28

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Rossmore House</i> , 269 NLRB 1176 (1984), <i>enforced sub nom.</i> , 760 F.2d 1006 (9th Cir. 1985).....	17, 19, 23
<i>Seton Co.</i> , 332 NLRB 979 (2000).....	26, 28
<i>Sioux Prods., Inc. v. NLRB</i> , 684 F.2d 1251 (7th Cir. 1982).....	25
<i>Skyline Distributors, a Div. of Acme Markets, Inc. v. NLRB</i> , 99 F.3d 403 (D.C. Cir. 1996).....	40
<i>Timsco Inc. v. NLRB</i> , 819 F.2d 1173 (D.C. Cir. 1987).....	19
<i>Treasure Lake, Inc.</i> , 184 NLRB 679 (1970), <i>enforced</i> , 453 F.2d 202 (3d Cir. 1971).....	26
<i>Trover Clinic</i> , 280 NLRB 6, (1986)	28
<i>Uarco, Inc.</i> , 169 NLRB 1153 (1968).....	35
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	13, 14
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	13, 14

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)	13, 16, 25, 26, 29, 30, 31, 33
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 4, 5, 12, 13, 14, 16, 25, 28, 29, 30, 32, 33, 36, 38, 42
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	3, 4, 12, 33, 36, 38, 42
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 4
Section 8(c) (29 U.S.C. § 158(c))	29, 30, 31
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2, 13, 29
Section 10(f) (29 U.S.C. § 160(f)).....	2

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

Nos. 14-1571 & 14-2036

**800 RIVER ROAD OPERATING COMPANY LLC,
d/b/a
WOODCREST HEALTH CARE CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST NEW JERSEY REGION**

Intervenor

**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 800 River Road Operating Company LLC, d/b/a Woodcrest Health Care Center (“the Center”), and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued against the Center on February 27, 2014, and reported at 360 NLRB No. 58. The Board had jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“the Act”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). The Board’s Order is final with respect to all parties, and the unfair labor practices occurred in New Jersey. (A. 21.)¹ The Center’s March 10, 2014 petition and the Board’s April 28, 2014 cross-application were timely because the Act places no time limit on the initiation of enforcement or review proceedings.

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

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's finding that the Center violated Section 8(a)(1) of the Act on multiple occasions by coercively interrogating employees about their union membership, activities, and sympathies, and by creating the impression that employees' union and other protected concerted activities were under surveillance.

2. Whether the Board reasonably found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improvements to its healthcare plan for all employees except unit employees eligible to vote in a representation election on March 9, 2012.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The instant case involves the Board's adjudication of unfair-labor-practice allegations stemming from charges filed by 1199 SEIU United Healthcare Workers East ("the Union") regarding the Center's conduct before and after a representation election on March 9, 2012. In a separate proceeding, the Board is addressing the Center's failure and refusal to bargain with, or provide information to, the Union, which won the election. Previously, the Board certified the Union as the representative of the Center's unit employees pursuant to the March 9 election. *See* Decision and Certification of Representative, 359 NLRB No. 48 (2013). On July 10, 2013, the Board found that the Center violated Section 8(a)(5) of the Act,

29 U.S.C. § 158(a)(5), by failing and refusing to bargain with, or provide information to, the Union. *See* 359 NLRB No. 129. The Center sought review of the Board's unfair-labor-practice decision in the Court of Appeals for the D.C. Circuit, which placed the case in abeyance in light of its decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Following the Supreme Court's recent decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), the Board vacated its July 10 decision and moved the D.C. Circuit to dismiss the Center's petition. The court granted the Board's motion, and the case is currently pending before the Board.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

After an investigation of charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Center had committed various unfair labor practices. (A. 21; A. 258-74.) Following a hearing, an administrative law judge found (A. 21-26) that the Center had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by coercively interrogating employees about their union membership, activities, and sympathies, and had violated (A. 27-29) Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3), by announcing and implementing improvements to its healthcare plan for all employees except unit employees eligible to vote in a representation election. The judge dismissed

allegations that the Center had unlawfully solicited employees' grievances and had created an unlawful impression of surveillance. (A. 22, 25.)

On review, the Board affirmed the judge's unfair-labor-practice findings. (A. 18-20.) Contrary to the judge, the Board found that the Center had also violated Section 8(a)(1) by creating the impression that employees' union and other protected concerted activities were under surveillance. (A. 18-20.)

II. THE BOARD'S FINDINGS OF FACT

A. Background

The Center operates Woodcrest Health Care Center ("Woodcrest"), a rehabilitation and nursing facility in New Milford, New Jersey. (A. 21; A. 283 ¶ 2(a), A. 293 ¶ 2, A. 367 ¶ 1.) On January 23, 2012, the Union filed a petition seeking to represent a unit of approximately 200 of the Center's employees. (A. 21; A. 367 ¶ 1.) The election was set for March 9, 2012. (A. 21; A. 367 ¶ 1.)

B. Assistant Director of Nursing Vijayan Takes Employee Dolcine from Her Workstation to an Empty Room To Question Her About Her Union Activities and Sympathies

Sometime in February 2012, Assistant Director of Nursing Ansel Vijayan approached certified nursing assistant ("CNA") Judith Dolcine while she was at a nursing station and asked to speak with her in a nearby empty patient room. (A. 21; A. 131-32.) Vijayan had hired Dolcine in October 2004 and had subsequently trained her. (A. 21; A. 130, 136.) Once in the room, Vijayan handed her one of

the Center's anti-union flyers, which declared "don't vote union." (A. 21; A. 132, 140.) He then asked Dolcine whether someone from the Union had visited her home. She said no. (A. 21; A. 132, 145.) Vijayan also asked whether anyone from the Union had telephoned her. Dolcine again responded no. (A. 21; A. 132.) When Dolcine said that she supported the Union, Vijayan inquired why she needed representation. (A. 21; A. 132, 134, 141.) Dolcine said that she needed someone to back her up when something happened or if she were discharged. Vijayan told her that was not going to happen. (A. 22; A. 132, 134.) When Dolcine mentioned that she had belonged to a union at a prior job, Vijayan asked how much she had paid that union in dues. Dolcine could not remember. Vijayan then walked away. (A. 22; A. 133-34, 146.)

C. Supervisor Lewis Tells Employee Duggar that the Center Believes She Is a Union Supporter and Then Asks if She Is

In February or early March, new supervisor Janet Lewis attended management meetings that included discussions about the Union and about certain employees' union sentiments. (A. 25-26; A. 171, 174, 328-30.) At one meeting, a company attorney asserted that nurse Donna Duggar supported the Union. Lewis, who was friends with Duggar, doubted that assertion and subsequently sought out Duggar to ascertain whether it was true. (A. 26; A. 174-75, 183.) Lewis reported to Duggar that her name had come up at the management meeting, stating "I heard that you are a member of the—you are in favor of the Union." (A. 26; A. 139.)

She directly asked whether Duggar in fact supported the Union, and Duggar said no. (A. 26; A. 175-76, 183.) Lewis reported Duggar's answer at the next management meeting. (A. 26; A. 183-84.)

D. The Center Announces and Implements Improvements to Its Healthcare Plan for All Employees Except Unit Employees

The Center employs another entity, HealthBridge Management, LLC (“HealthBridge”), to manage Woodcrest. HealthBridge provides the healthcare plan that the Center offers its employees, a common plan that also covers three other, similar facilities in New Jersey. (A. 27; A. 367 ¶¶ 2-3.) On January 1, 2012, HealthBridge had made changes to the common plan, reducing benefits and increasing costs. In response to employee dissatisfaction and complaints, HealthBridge decided to make certain improvements to the plan in March, including reduced premiums and copays, retroactive to January 1. (A. 27; A. 367 ¶¶ 3, 4.)

On March 5, company Administrator Lori Senk issued a memorandum announcing the improvements. The Center distributed the memorandum to all employees except unit employees scheduled to vote in the representation election. (A. 27; A. 366, 367 ¶ 5.) The election was held on March 9, with the Union garnering a majority of votes, and the Center filed objections to the election. (A. 21; A. 367 ¶ 1.) On March 23, the Center implemented the promised improvements to the healthcare plan for all employees except unit employees. (A.

27; A. 366, 367 ¶ 4.) To date, the Center has not implemented the improved benefits for the unit employees. (A. 27; A. 368 ¶ 6.)

Although they were not sent the memorandum, unit employees learned of the improvements. (A. 27; A. 72-74.) For instance, CNA Jeffrey Jimenez found a copy of the memorandum in a break room right before the election. (A. 27; A. 72.) At a general monthly meeting after the election, one of the 40 or 50 assembled employees asked about the memorandum, whether unit employees could have their healthcare plan examined, and if there might be any changes to their plan. Administrator Senk asserted that “we cannot negotiate your contract, your benefits, and your insurance because right now you are in the critical period with the Union.” (A. 27; A. 74.) Similarly, when a unit employee at a communications meeting said that she had heard about the improvements and wanted to know how they would affect her, company lawyer Lisa Crutchfield told the employee and the audience that “we [are] not allowed to discuss that matter at this time.” (A. 27; A. 204, 368 ¶ 7.)

E. Center Attorney Monica Twice Questions Employee Jimenez About His Union Activities and Those of His Coworkers

Approximately two weeks after the election, CNA Jimenez was performing patient-care duties when his supervisor said that the director of nursing wanted to see him in the director’s office. (A. 22; A. 75.) Jimenez finished his task and proceeded to the office, where he found James Monica instead of the director.

Monica explained that he was an attorney for the Center, investigating objectionable conduct by supervisors who may have supported the Union during the election campaign. (A. 22; A. 76.) Monica stated that Jimenez's participation in the investigation was voluntary and provided a document for him read and sign, which he did. (A. 22; A. 76, 356-67.) The document stated, among other things, that Jimenez's decision whether to participate in the investigation would not affect his job or rights as an employee, that the Center was not interested in determining whether Jimenez did or did not support or vote for the Union, that he had the right to join or not join a labor organization without fear of reprisal, and that the Center was only seeking the truth. (A. 22; A. 356.)

After posing background questions, Monica asked Jimenez if he knew several specific supervisors and Jimenez indicated that he did. (A. 23; A. 77-78.) Monica then inquired whether those supervisors were involved with the Union, had passed out authorization cards, or had influenced Jimenez in any way to change his vote during the election. Jimenez answered no to each question. (A. 23; A. 78.)

Monica next asked Jimenez whether any union representative had approached him at home and if he knew of any employees who were involved with the Union, or who were distributing union-authorization cards. Jimenez responded that he did, but could not reveal their names "for confidential reasons." (A. 23; A. 78.) Monica then inquired if Jimenez had signed a card for the Union, which he

had. Jimenez then left the room but, after walking away, returned and asked Monica for the document he had signed. Although Monica initially said he could not give it to Jimenez, he eventually did. Jimenez tore it up and threw it away. (A. 23; A. 78-79.)

Less than a week later, Jimenez was caring for patients when his supervisor said that Monica wanted to see him. Monica met with Jimenez alone, in a conference room. Monica stated that he did not believe Jimenez's earlier answers and that he wanted to give Jimenez a second chance to respond. (A. 23; A. 79.) After repeating some of his prior questions, Monica inquired why Jimenez wanted to form a union. Jimenez identified several reasons, including better benefits, insurance, and wages, a lower patient load, and a voice in the Center. (A. 23; A. 80.) Jimenez also opined that management had successfully conveyed the Center's anti-union position to employees. (A. 23; A. 80-81.) Jimenez further stated that he could earn the same hourly wage working at a fast food restaurant that he earned cleaning up after patients, and that the Center should spend its money helping employees rather than paying for lawyers like Monica. Jimenez also asserted that other businesses paid their CNAs more and that it was hard to support a family on the wages the Center paid. (A. 23; A. 81.)

F. Assistant Director of Recreation Guerrero Warns Employee Jimenez that the Center Is Upset About His Union Activities and that He Should Watch His Back

In late July or early August 2012, Jimenez participated in union rallies, including a march from New York University to the Center's corporate headquarters, and helped a union representative distribute t-shirts outside Woodcrest. (A. 24; A. 81, 88, 94.) Subsequently, Assistant Director of Recreation Vladimir Guerrero – who had a friendly relationship with Jimenez and was not his direct supervisor – commented on Jimenez's union activities during two conversations. (A. 18-19, 24; A. 86-87, 98.) In the first conversation, Jimenez mentioned that the Union was planning several events that month in connection with the organizational drive and stated that if management had listened to its employees, the Union would not have organized the Center's facility. (A. 18, 24; A. 86.) Guerrero warned Jimenez: "I heard your name; your name has been popping out a lot." (A. 18, 24; A. 86-87.) Jimenez responded that he knew his rights and that the Center could not discipline him for exercising them. (A. 24; A. 86, 100-01.)

On August 24, The New Jersey Record published an article about the Union's campaign in which it quoted Jimenez as saying that "the Union can make things better for the workers and for the patients." (A. 18, 24; A. 82-83, 350.) Shortly after the article's publication, Guerrero passed Jimenez in the lunch room

and remarked “oh, it’s the famous boy.” (A. 18, 24; A. 89.) Jimenez followed Guerrero into his office, where Guerrero informed Jimenez that management was “pretty pissed” about the article. (A. 24; A. 89.) He further reported that the director of nursing had removed copies of the newspaper containing the article from the building’s lobby and that the director and the company administrator had distributed a memorandum to management about the article, directed them to Jimenez’s quote, and held a meeting about the article during which they mentioned Jimenez by name a couple times. (A. 18, 24-25; A. 89-90, 102.) Guerrero then cautioned Jimenez, “friend to friend,” to “tone it down a little bit” and to keep his views about the Union “under wraps,” warning: “just watch your back, be careful, careful about what you say . . . do your job and go home.” (A. 18, 24-25; A. 89, 102, 191-92.)

III. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hirozawa and Schiffer; Member Johnson, dissenting in part) affirmed the administrative law judge’s findings that the Center violated Section 8(a)(1) of the Act by interrogating employees about their union membership, activities, and sympathies, and violated Section 8(a)(1) and (3) of the Act by announcing and implementing improved healthcare benefits for all employees except unit employees scheduled to vote in the March 9 representation election. (A. 28.) The Board also found, contrary to

the judge, that the Center violated Section 8(a)(1) of the Act by creating the impression that employees' union and other protected concerted activities were under surveillance. (A. 18-20.)

The Board's Order requires the Center to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. (A. 20, 28-29.) Affirmatively, the Order requires the Center to implement the improved healthcare benefits for the unit employees, effective January 1, 2012, and to make them whole for any losses they may have suffered as a result of the Center's failure to implement the changes for the unit employees. (A. 29.) The Board's Order further requires the Center to post a remedial notice.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 175 (3d Cir. 2002). Its credibility determinations are entitled to "great deference" and must be affirmed unless they are shown to be "inherently incredible or patently unreasonable." *Atl. Limousine, Inc. v. NLRB*, 243 F.3d 711, 718-19 (3d Cir. 2001) (citations and internal quotations omitted). Further, the

Board's factual inferences are not to be disturbed, even if the Court would have made a contrary determination had the matter been before it de novo. *Universal Camera*, 340 U.S. at 488; *Allegheny Ludlum*, 301 F.3d at 175. And whether an employer's conduct is coercive within the meaning of Section 8(a)(1) of the Act is a factual question subject to the specialized expertise of the Board. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969). Finally, the Court "must uphold the 'NLRB's construction of the NLRA . . . if it is reasonably defensible.'" *Allegheny Ludlum*, 301 F.3d at 175 (quoting *Quick v. NLRB*, 245 F.3d 231, 241 (3d Cir. 2001)).

SUMMARY OF ARGUMENT

The Board's findings that the Center committed a number of unfair labor practices in the context of a contested representation election are supported by substantial evidence. Applying well-established principles to the credited facts, the Board reasonably found that the Center violated Section 8(a)(1) of the Act by interrogating three employees about their own, or their coworkers' union affiliation or activities. Those incidents were characterized by factors long recognized as contributing to the tendency of questioning to coerce or restrain, including the involvement of a high-level manager, the removal of employees from their work duties and stations to private settings for questioning, legal formality, and reference to management discussion of a questioned employee's position respecting

unionization. Likewise, ample evidence supports the Board's finding that that the Center created an unlawful impression of surveillance when it cautioned an employee that high-level managers were very upset about his union activities, detailed management's response to those activities, and warned the employee to "watch his back" and limit union activities.

The Center's interrogation and surveillance violations are typical examples of an employer's anti-union campaign crossing the line into unlawful interference with employee free choice. The Board specifically found that each incident would reasonably tend to coerce employees in the exercise of their rights, as required by precedent from the Board, this Court, and the Supreme Court. There is thus no merit to the Center's critiques of the Board's application of the governing legal standards to the record evidence. The Center, moreover, disregards the Board's specific findings as to coercion in challenging the violations as inconsistent with its statutory and constitutional free-speech rights. That free-speech challenge – which is not properly before the Court – is simply a reframing of its evidentiary challenge.

Finally, the Board also reasonably found, based on undisputed facts, that the Center's decision to withhold a system-wide benefit from certain employees solely because of their participation in a representation election, constituted an unfair labor practice clearly proscribed under longstanding precedent. There is no merit to the Center's assertion that its legal obligations were unclear, and its protestations of good

faith are undermined by its failure to avail itself of the well-established safe harbor from unfair-labor-practice liability for election-time benefit withholding.

ARGUMENT

I. Substantial Evidence Supports the Board’s Finding that the Center Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees and by Creating the Impression that Employees’ Union Activities Were Under Surveillance

Section 7 of the Act, 29 U.S.C. § 157, grants employees the “right to self organization, to form, join, or assist labor organizations . . . and to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection” In turn, Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), protects that right by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. To determine whether an employer’s conduct violates Section 8(a)(1), the Board examines whether, objectively viewed, that conduct “reasonably tends to interfere” with employees’ rights under the Act. *Hanlon & Wilson Co. v. NLRB*, 738 F.2d 606, 613 (3d Cir. 1984).

A. The Center Unlawfully Interrogated Employees Jimenez, Dolcine, and Duggar about Their Union Activities under Circumstances Tending To Coerce, Restrain, or Interfere with Their Statutory Rights

An employer violates Section 8(a)(1) of the Act by interrogating its employees about their union membership, activities, or sympathies under

circumstances that tend to restrain, coerce, or interfere with their statutory rights. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980) (en banc). Both the Board and this Court have “long recognized that the test of interference, restraint, and coercion . . . does not turn on [the employer’s] motive, courtesy, or gentleness,” or on whether the employee was actually restrained or coerced. *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492, 492 (1979) (quotation marks omitted), *enforced*, 696 F.2d 257 (3rd Cir. 1982) (en banc); *see also Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 816 (3d Cir. 1986) (“The Board need not show that the employer’s interrogation actually had any coercive effect.”). Instead, “the basic test for evaluating whether interrogations violate the Act [is] whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176, 1177 (1984) (setting forth Board’s totality-of-the-circumstances test and noting this Court’s adoption of same approach in *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534 (3d Cir. 1983)), *enforced sub nom.. Hotel Emps. & Rest. Emps. Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

In assessing the totality of the circumstances, the Board and the courts consider the interaction of various factors – no one factor is dispositive in every case, nor is any question, or category of questions, per se unlawful. *Rossmore House*, 269 NLRB at 1177-78 & n.20; *accord Perdue Farms, Inc., Cookin' Good*

Div. v. NLRB, 144 F.3d 830, 835 (D.C. Cir. 1998); *Graham Architectural Prods*, 697 F.2d at 537. An employer's inquiry into an employee's, or his coworkers', union membership, activities, or sympathies "generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his [statutory] rights." *Perdue Farms*, 144 F.3d at 835-36 (quoting *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1358 (D.C. Cir. 1997)); see also *NLRB v. Pizza Crust Co. of Pa., Inc.*, 862 F.2d 49, 51 (3d Cir. 1988) (assistant general manager sought employee's knowledge of union supporters' identities when the employee requested time off); *NLRB v. E. Steel Co.*, 671 F.2d 104, 106 (3d Cir. 1982) (supervisor questioned employees about signing authorization cards); *NLRB v. Armcor Indus., Inc.*, 535 F.2d 239, 242 (3d Cir. 1976) (employer's president asked employees why they wanted union).

But whether such inquiries are unlawful in a particular case will depend on whether the entire context of the interaction demonstrates coercion. That context may comprise factors such as the persistence of the questioning, the location of the conversation, the position of the questioner in the employer's hierarchy, whether or not the questioned employee is an open union supporter, and whether the employer has committed other, contemporaneous unfair labor practices. See, e.g., *Perdue Farms*, 144 F.3d at 835-36 (considering questioner's position, openness of employee's union support); *Graham Architectural Prods*, 697 F.2d at 537-41

(considering location, questioner's contemporaneous demand for union material, persisted questioning, openness of employee's union support); *Rossmore House*, 269 NLRB at 1178 n.20 (factors include "(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.").

For instance, the fact that a high-ranking official perpetrated the questioning serves as accepted evidence of coerciveness. *See, e.g., K-Mart Corp.*, 336 NLRB 455, 469 (2001) (general manager); *Ingram Book Co., Div. of Ingram Indus., Inc.*, 315 NLRB 515, 516 (1994) (vice president of human resources); *Armcor Indus., Inc.*, 217 NLRB 358, 361-62 (1975) (president and vice president), *enforced in relevant part*, 535 F.2d 239 (3d Cir. 1976); *accord Perdue Farms*, 144 F.3d at 835 (top human resources supervisor). A finding of coerciveness may also be supported by factors separating the questioning from run-of-the-mill workplace interactions, such as an employer calling employees away from their work in order to be questioned, questioning in a private setting, or in a formal or directed manner rather than a casual conversation. *See, e.g., Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987) (manager questioned employee in office with door closed); *Graham Architectural Prods.*, 697 F.2d at 538 (supervisor called employee to office, inquiry "not part of ordinary casual conversation"); *id.* at 539 (supervisor

asked employee to leave work post and step outside to talk); *Frances House, Inc.*, 322 NLRB 516, 522 (1996) (employees questioned in office with door closed).

As demonstrated below, ample evidence supports the Board's determination, considering the totality of the circumstances in each instance, that the Center coercively interrogated Jimenez, Dolcine, and Duggar.

1. Monica coercively questioned Jimenez about his union activities and those of his coworkers

Substantial evidence supports the Board's finding (A. 24) that, under the totality of the circumstances, attorney Monica unlawfully interrogated CNA Jimenez about his union activities and those of his coworkers. As an initial matter, the context surrounding Monica's questioning of Jimenez was coercive: Monica twice interrupted Jimenez while he was actively performing patient-care duties, summoning him to private locations to question him formally – first in the director of nursing's office and later in an empty conference room. At each of those interviews, moreover, Monica went well beyond the scope of his ostensibly valid reason for questioning Jimenez (to investigate alleged supervisor misconduct), and persisted after Jimenez had expressed his discomfort with the line of inquiry.

During their first encounter, Monica asked Jimenez if he knew of any coworkers who were involved with the Union or had passed out union authorization cards. When Jimenez indicated that he did but would not reveal their names for "confidential reasons" (A. 23), Monica pressed the point and asked if

Jimenez had signed a card. As the Board found (A. 24), that questioning far exceeded the purpose of the interview described in the document Jimenez had signed at the outset. The pointed interrogation also belied the Center's disclaimer in that same document of any interest in Jimenez's union sentiments. Monica began the second meeting by stating that he did not believe Jimenez's answers at the first meeting, proposing to give Jimenez "a second chance" to respond, presumably in a manner acceptable to Monica. During the meeting, he pointedly asked why Jimenez wanted to form a union.² See pages 8-10.

Because Monica neither supervised nor worked in proximity to Jimenez, their relationship bears no similarity to that of production employees and their supervisors who might, as this Court has observed, be expected to discuss subjects of mutual interest (including unions) over the course of their workday. Compare *Allegheny Ludlum*, 301 F.3d at 177-78, with *Graham Architectural*, 697 F.2d at 541. Monica may have had a legitimate reason to call Jimenez in for an interview, but his probing inquiries into Jimenez's and his coworkers' union activities were unrelated to that reason. In conjunction with other factors, including the repeated mid-shift summons, and the formal setting, complete with a legal disclaimer that

² The Center incorrectly asserts (Br. 52) that the Board's finding that Monica interrogated Jimenez rests "solely" on this question during their second encounter. The Board also explicitly relied (A. 24) on Monica's inquiries into Jimenez's "personal union activities or the union activities of other unit employees" at the first interview in finding the interrogation violation.

the attorney-interviewer proceeded to disregard, those extraneous inquiries support the Board's reasonable determination that Monica coercively interrogated Jimenez in violation of the Act.³

2. Vijayan coercively questioned Dolcine about her union activities and sympathies

Substantial evidence also supports the Board's reasonable finding (A. 22) that Assistant Director of Nursing Vijayan unlawfully interrogated CNA Dolcine. As the Board described (A. 22), Vijayan set an intimidating tone for his questioning of Dolcine by taking her away from her work at the nurses' station in order to question her privately in an empty patient room. Once they were isolated in the empty room, the nature of Vijayan's questions and the information he sought heightened the encounter's coerciveness, as did their respective positions in the company hierarchy.

Thus, as the Board noted (A. 22), Vijayan began by handing Dolcine one of the Center's "don't vote union" flyers before proceeding to question her about her union activities, including whether she had spoken with union organizers on the phone or at her home. In response to Dolcine voicing support for the Union, Vijayan persisted in his questioning, asking why she needed representation. When

³ Contrary to the Center's interpretation (Br. 52-53), the Board's finding that Monica's interrogations of Jimenez violated the Act rests on a determination that the circumstances were coercive, not on a determination that Monica lacked a legitimate reason to discuss the Union with Jimenez.

Dolcine said she wanted help if something bad were to happen, Vijayan was dismissive. *See* pages 5-6.

Contrary to the Center's characterization (Br. 52), those facts do not evidence a casual conversation between close colleagues about the relative merits of unionization. Indeed, the coerciveness of Vijayan's questioning of Dolcine stemmed in part from the fact that they were not peers: Vijayan was, as the Board noted (A. 22), a "high-level manager," whereas Dolcine was a CNA. (A. 130-31, 153.) Vijayan's relative authority was, moreover, magnified by the fact that he was the official who had hired and trained Dolcine. There is also no merit to the Center's assertion (Br. 54) that the Board held that it was irrelevant that the exchange was courteous instead of rude or boisterous. The Board merely explained, in describing the totality-of-the-circumstances test, that the factors in *Rossmore*, 269 NLRB at 1178 n.20, are only a starting point for assessing interrogations. (A. 22.) By way of illustration, the Board noted that even a factor like courtesy, that tends to show lack of coercion, will not alter the finding of a violation where other factors combine to demonstrate a tendency to coerce.

In sum, the Board reasonably found an unfair labor practice where a low-level employee was interrogated by a high-level manager to whom she owed her job after he took her from her work to a private location, told her not to support the

Union, inquired about her union activities and sympathies, and dismissed her reason for wanting union representation.

3. Lewis coercively questioned Duggar by asking if she supported the Union, immediately after informing her that management believed she was a union supporter

Ample evidence also supports the Board's finding (A. 26) that supervisor Lewis' direct question about nurse Duggar's union affiliation was coercive under the totality of the circumstances. Lewis' undisputed testimony reveals that, after hearing at a management meeting that Duggar supported the Union, Lewis sought out Duggar and told her that management had identified her as a union supporter. Having relayed that to Duggar, Lewis then directly asked whether Duggar actually supported the Union, to which Duggar said no. From Duggar's perspective, she was first confronted by a friend-turned-supervisor with news that management had labeled her "union," then was obliged to adopt or reject that label. Her response, moreover, was promptly relayed to the Center. *See* pages 6-7.

Those facts, and particularly that Lewis introduced the subject by asserting management's knowledge of Duggar's union sentiments, distinguish the interrogation from those the Center cites (Br. 50-51) as examples of lawful questioning. *See Graham Architectural Prods.*, 697 F.2d at 539 (lawful for supervisor to ask employee, who advertised her union support by distributing literature and wearing union button, if she supported union); *id.* at 540 (lawful for

official to ask employee why she supported union when employee was his friend, was not his supervisee, and was open union supporter); *see also Sioux Prods., Inc. v. NLRB*, 684 F.2d 1251, 1256 & n.7 (7th Cir. 1982) (questioning about union vote lawful where employees were known union supporters or leaders and questioner was company interpreter). Moreover, *Graham Architectural* also supports the Board's determination that Lewis' "friendly manner" (A. 26) during the interrogation was insufficient to overcome the other indicia of coercion. 697 F.2d at 538-39 (personal friendship between supervisor and employee did not prevent finding of unlawfully coercive interrogation).⁴

Having assessed the totality of the circumstances under well recognized factors, the Board reasonably found (A. 26) that the encounter with Lewis would reasonably tend to interfere with Duggar's free exercise of her statutory right to choose or reject union representation, in violation of the Act.

B. Guerrero's Conversations with Jimenez Created the Impression that Employees' Union and Other Protected Concerted Activities were under Surveillance

An employer violates Section 8(a)(1) of the Act if its statements or conduct create an impression of surveillance that reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Hanlon &*

⁴ The Board did not, contrary to the Center's assertion (Br. 53-54), dismiss Lewis' demeanor during the conversation as "legally irrelevant."

Wilson, 738 F.2d at 613. In evaluating whether a statement creates an unlawful impression of surveillance, the Board examines “whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance.” *Register Guard*, 344 NLRB 1142, 1145 (2005) (quoting *Flexsteel Indus.*, 311 NLRB 257, 257 (1993)). Of particular relevance here, warnings or words of caution reasonably tend to create an unlawful impression of surveillance. See *Golden Stevedoring Co.*, 335 NLRB 410, 416 (2001) (supervisor warned employee to “watch [his] back, to watch it close, that they will be out to get” him); *Seton Co.*, 332 NLRB 979, 980, 993 (2000) (supervisor warned employee to watch himself and be careful at gym that served as union headquarters because employer monitored gym); *Treasure Lake, Inc.*, 184 NLRB 679, 679 (1970) (supervisor warned employees seeking union assistance that employer had guards patrolling worksite because “[u]nion was coming in”), *enforced*, 453 F.2d 202 (3d Cir. 1971). As with interrogation, there is no requirement that, in order to create such an unlawful impression, a statement actually restrain, coerce, or interfere with an employee’s Section 7 rights. *Hanlon & Wilson*, 738 F.2d at 613.

Ample evidence supports the Board’s determination (A. 18-19) that Guerrero’s conversations with Jimenez created an unlawful impression of surveillance by reasonably conveying the message that the Center was closely monitoring his activities, and thus implying that his future participation in union

activities could place him at risk of reprisals. As previously set forth, Assistant Director of Recreation Guerrero cautioned Jimenez: “I heard your name; your name has been popping out a lot.” (A. 86-87.) Following the publication of the newspaper article quoting Jimenez, Guerrero called him “the famous boy” and bluntly remarked that management was “pretty pissed” about the article. (A. 89.) Guerrero then described the lengths to which the director of nursing had gone to keep the rest of the Center’s management abreast of Jimenez’s union activities, and warned Jimenez to “just watch your back, be careful, careful about what you say . . . do your job and go home” and to “tone it down a little bit” and keep his views about the Union “under wraps.” (A. 89, 102, 192.) *See* pages 11-12.

Guerrero’s statements distinguish this case from those the Center cites (Br. 56), which instead involved an employer’s lawful acknowledgment of open union activity or unsolicited reports of union activities from employees. *See, e.g., Bridgestone Firestone S.C.*, 350 NLRB 526, 527 (2007) (employer’s letter informed employees that coworkers had volunteered that union campaign was ongoing); *Rock-Tenn Co.*, 315 NLRB 670, 683 (1994) (employer’s statement that employee had reported that union president, also an employee, would not represent non-union employees in grievance proceedings). The credited evidence, moreover, belies the Center’s claim (Br. 55-56) that Guerrero’s statements merely conveyed routine observation of Jimenez’s activities “by a friend,” or acknowledged the

Center's awareness of Jimenez's overt union support. In any event, the friendship between a supervisor and an employee will not make lawful a statement creating an unlawful impression of surveillance. *See Seton*, 332 NLRB at 993; *Trover Clinic*, 280 NLRB 6, 6 n.1 (1986).

In conclusion, Guerrero's repeated references and detailed account of the Center's monitoring, and his explicit warnings against future overt union activity, support the Board's finding (A. 19) that Jimenez reasonably would understand that the Center was surveilling his union activities, and reasonably would interpret Guerrero's statements as a warning that the Center would now closely monitor the nature and extent of his union activities, open or not, and that Jimenez could face reprisals if he continued to engage in such activities.⁵ Thus, Guerrero's statements violated Section 8(a)(1) of the Act.

C. The Center's Free-Speech Challenge Is Not Properly Before the Court and Is Otherwise Meritless

"Section 10(e) of the [Act] bars an appellate court from reviewing an issue that was not raised in the Board proceeding: 'No objection that has not been urged

⁵ The Center's citation (Br. 55 n.6) to *Rock-Tenn*, 315 NLRB at 683, is inapposite. The Board in *Rock-Tenn* declined to find a violation based on an unalleged threat to impose discipline in retaliation for union activity, after holding that the statement preceding the threat did not, as alleged, create an unlawful impression of surveillance. Here, by contrast, the Board found that the threat of reprisal implicit in Guerrero's warnings to Jimenez contributed to the impression of unlawful surveillance, as alleged in the amended complaint. (A. 284.)

before the Board . . . shall be considered by the court, unless the failure or neglect to urge such exception shall be excused because of extraordinary circumstances.’ 29 U.S.C. § 160(e). The Supreme Court has construed this rule strictly.” *NLRB v. Konig*, 79 F.3d 354, 359 (3d Cir. 1996) (citing *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). The Center failed to raise either a statutory or a constitutional free-speech challenge before the Board (A. 403-08), and has not asserted that extraordinary circumstances excuse its failure. Accordingly, the Center’s free-speech argument is not properly before the Court, and should be summarily rejected on that basis. In any event, the Court should reject it as utterly lacking in merit.

As this Court has explained, Section 8(c) of the Act, 29 U.S.C. § 158(c), which provides that the expression of “any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice” so long as it “contains no threat of reprisal or force or promise of benefit,” implements employers’ free-speech rights pursuant to the First Amendment. *Allegheny Ludlum*, 301 F.3d at 177 (citing *Gissel Packing*, 395 U.S. at 617). At the same time, employees have Section 7 organizational and mutual-protection rights, which Section 8(a)(1) protects from employer interference, restraint, or coercion. And the Supreme Court has made clear that “[a]ny assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting [and] an

employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1)" *Gissel Packing*, 395 U.S. at 617; accord *Allegheny Ludlum*, 301 F.3d at 177.⁶

As described above, Section 8(a)(1) generally, and the Board's jurisprudence implementing that provision to prohibit coercive interrogation and surveillance, accommodate both Section 8(c) and the First Amendment by requiring that employer speech (or conduct) "interfere with, restrain, or coerce employees in the exercise of the[ir Section 7] rights" in order to violate Section 8(a)(1). Consistent with Section 8(c) and the First Amendment, and contrary to the Center's assertions (Br. 42, 46, 49, 53), the Board does not apply a "per se rule" invalidating all employer inquiries or statements touching on employees' union sentiments. Rather, the Board conducts the very inquiry the Center advocates (Br. 46-47), consistent with the Center's cases. *See, e.g., NLRB v. Regency Grande Nursing & Rehab. Ctr.*, 441 F. App'x 948, 951 (3d Cir. 2011) (conduct creating impression of surveillance violates "Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees"); *Graham Architectural Prods.*, 697 F.2d at 537 (Act prohibits

⁶ *Allegheny Ludlum* does not, contrary to the Center's representation (Br. 48), hold that any tension between employers' free-speech rights and employees' organizational rights has been "firmly resolve[d] in favor of protecting free speech."

interrogations tending to restrain or coercive employees in exercise of Section 7 rights).

The Center's constitutional argument is, at bottom, a recharacterization of its true quarrel with the Board's decision, its assertion that substantial evidence does not support the Board's finding of restraint, coercion, or interference with Section 7 rights in each incident the Board found unlawful. As detailed above, however, the Board's unfair-labor-practice findings are amply supported in the record, particularly in light of this Court's and the Supreme Court's recognition that "any balancing of [employer speech and employee organizational] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Allegheny Ludlum*, 301 F.3d at 177 (quoting *Gissel*, 395 U.S. at 617).

Finally, the Center mischaracterizes many of the statements in this case as Section 8(c)- and First Amendment-protected expressions of opinion when the majority are, in fact, questions. As the Court aptly explained in the related context of unlawful employer polling, "[i]t is well established that an employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the [Act], as the

purpose of an inquiry is not to express views but to ascertain those of the person questioned.” *Allegheny Ludlum*, 301 F.3d at 177 (internal quotation omitted); *see also id.* at 177-78 (emphasizing, in distinguishing *Graham Architectural*, that the difference between lawful and unlawful employer statements or inquiries is whether they are coercive).

For the foregoing reasons, the Center’s free-speech concerns are misplaced and the Board properly found that the Center violated Section 8(a)(1) by coercively interrogating employees and by creating an unlawful impression of surveillance.

II. The Board Reasonably Found that the Center Violated Section 8(a)(1) and (3) of the Act by Announcing and Implementing Improved Healthcare Benefits for All Employees Except Unit Employees

A. An Employer Violates the Act by Withholding from Unit Employees Benefits Granted to All Other Employees Shortly Before or After a Representation Election

It is beyond cavil that, in deciding whether to grant a wage or benefit increase prior to an election, an employer must proceed “precisely as it would if the union were not on the scene.” *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998); *accord Noah’s Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000); *Noah’s NY Bagels, Inc.*, 324 NLRB 266, 271 (1997); *Great Atl. & Pac. Tea Co., Inc.*, 166 NLRB 27, 29 n.1 (1967), *enforced in relevant part*, 409 F.2d 296 (5th Cir. 1969). Thus, “[d]uring a union organizing campaign, an employer is to conduct ‘business as usual’ with respect to its benefits

decisions,” which it can defend by demonstrating that “it would have taken the same action in the absence of union activity for some other reason.” *NLRB v. Curwood, Inc.*, 397 F.3d 548, 555 (7th Cir. 2005).

A well-established corollary of this principle is that an employer commits an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act if, in close proximity to a representation election, it withholds from unit employees a benefit increase that it would have granted them but for the existence of a union organizing campaign or election.⁷ See *Federated Logistics & Operations*, 340 NLRB 255, 270 (2003) (unfair labor practice to withhold wage increase from just one of several facilities, blaming organizing campaign), *enforced*, 400 F.3d 920, 927 (D.C. Cir. 2005) (“[A]n employer may not withhold a wage increase that would have been granted but for a union organizing campaign.”); *Noah’s Bay Area*, 331 NLRB at 189-91, 202 (unlawful to withhold system-wide benefit improvement from unit employees before election); *Pa. Gas & Water Co.*, 314 NLRB 791, 793 (1994) (same), *enforced mem.*, 61 F.3d 895 (3rd Cir. 1995);

⁷ An employer’s grant or withholding of benefits at such a time may interfere with its employees’ Section 7-protected freedom of choice for or against union representation, in violation of Section 8(a)(1). See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408-09 (1964); *NLRB v. Great Atl. & Pac. Tea Co.*, 409 F.2d 296, 298 (5th Cir. 1969). In turn, an employer decision to grant or withhold benefits based on union activity, or which applies differently to unit and non-unit employees, violates Section 8(a)(3)’s ban on “discrimination in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).

Modesto Convalescent Hosp., 235 NLRB 1059, 1066 (1978) (same, following disputed election), *enforced mem.*, 624 F.2d 192 (9th Cir. 1980); *Fla. Steel Corp.*, 220 NLRB 1201, 1203 & n.10 (1975) (collecting cases). In applying those established principles, the Board, with court approval, has long inferred that benefit decisions announced or implemented in proximity to a representation campaign are coercive, or intended to impair employees' ability to freely decide questions concerning union representation, unless the employer demonstrates that it acted pursuant to a legitimate reason wholly unrelated to the union campaign. *Perdue Farms*, 144 F.3d at 836; *Noah's Bay Area*, 331 NLRB at 189; *Lampi, LLC*, 322 NLRB 502 (1996); *Pa. Gas & Water*, 314 NLRB at 793.

Should an employer elect to withhold benefits during a union campaign in order to avoid the appearance of trying improperly to influence the election, Board law provides a safe harbor from any risk of unfair-labor-practice liability. Specifically, an employer may lawfully *postpone*, rather than cancel, an adjustment in wages or benefits, so long as it "makes clear" to the affected employees "that the adjustment would occur whether or not they select a union, and that the 'sole purpose' of the adjustment's postponement is to avoid the appearance of influencing the election's outcome." *KMST-TV Channel 46*, 302 NLRB 381, 382 (1991) (quoting *Atl. Forest Prods. Inc.*, 282 NLRB 855, 858 (1987)); *see also Noah's Bay Area*, 331 NLRB at 189 (to avoid liability, employer must tell

employees that implementation of expected benefits will be deferred until after the election, regardless of the outcome); *accord NLRB v. Aluminum Casting & Eng'g Co. Inc.*, 230 F.3d 286, 293 (7th Cir. 2000); *NLRB v. Otis Hosp.*, 545 F.2d 252, 256 (1st Cir. 1976).

An employer fails to qualify for that safe harbor, however, if it attributes “to the union ‘the onus for the postponement of adjustments in wages and benefits’ or ‘disparag[es] and undermin[es] the [union] by creating the impression that it stood in the way of [employees] getting planned wage increases and benefits.’” *Atl. Forest Prods*, 282 NLRB at 858 (quoting *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968)); *see NLRB v. Shelby Mem'l Hosp. Ass'n*, 1 F.3d 550, 558 (7th Cir. 1993) (employer failed to qualify for safe harbor by blaming union); *Earthgrains Co.*, 336 NLRB 1119, 1126-27 (2001) (same), *enforced mem.*, 61 F. App'x. 1 (4th Cir. 2003); *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001) (same), *enforced mem.*, 56 F. App'x 811 (9th Cir. 2003); *Noah's Bay Area*, 331 NLRB at 189 (employer may not attribute delay to union); *Noah's NY*, 324 NLRB at 271 (same); *AutoZone, Inc.*, 315 NLRB 115, 122-23, 131-34 (1994) (employer unlawfully withheld wage increase and blamed union), *enforced mem.*, 83 F.3d 422 (6th Cir. 1996).

B. The Center Unlawfully Announced and Implemented Improved Healthcare Benefits for All Employees Except Unit Employees Because of the Election

Applying those well-established legal principles to the undisputed record evidence, the Board reasonably found that the Center violated Section 8(a)(1) and (3) of the Act by announcing and implementing improved healthcare benefits for all employees except those eligible to vote in the March 9 representation election. (A. 26-28.)

As the parties stipulated and the Board found (A. 27), HealthBridge arranged the improved benefit for several facilities it manages, including the Center's Woodcrest facility, for reasons unrelated to the Union or the election. (A. 367 ¶¶ 2-4.) As the parties further stipulated, and as the Board found (A. 27), the Center purposely excluded unit employees from the announcement of improved healthcare benefits, which it issued just four days before the election, and from its subsequent implementation of those benefits just weeks after the election and during the pendency of election objections. (A. 367 ¶¶ 4-7.) That decision – to withhold a system-wide benefit from certain employees solely because of their participation in a representation election – constitutes an unfair labor practice clearly proscribed by long lines of Board and court precedent. *See* cases cited at pages 33-34. For instance, the Board has held that a multi-facility employer unlawfully withheld a wage increase from employees at one facility because that facility was the locus of

an organizing campaign, *Federated Logistics & Operations*, 340 NLRB at 270, and that another employer unlawfully withheld a system-wide wage increase only from employees eligible to vote in election, *Pa. Gas & Water*, 314 NLRB at 793.

Having elected to withhold the improved benefits from unit employees for reasons related to the imminent representation election, the Center nonetheless could have avoided its unfair-labor-practice liability by availing itself of the safe harbor provided by Board law. It failed to do so. Thus, as the Board found (A.28), the Center did not “make clear” to bargaining unit employees that they ultimately would receive the improvements, whether or not they selected the Union, or that its “sole purpose” for withholding the improvements was to avoid the appearance of influencing the outcome of the election. *KMST-TV*, 302 NLRB at 382.

To the contrary, the Center failed to make clear to unit employees that the withholding of the benefits was temporary and that it was only postponing, not cancelling, their implementation for unit employees. And, to date, the Center still has not implemented the benefits for unit employees. *Cf. Noah’s NY*, 324 NLRB at 271-72 (withholding of benefits not unlawful where employer satisfied safe-harbor requirements and implemented benefits while post-election objections were pending). Moreover, the Center impermissibly placed the culpability for the non-implementation on the Union and the election when it responded to unit employees’ inquiries, stating that “we cannot negotiate your contract, your

benefits, and your insurance because right now you are in the critical period with the Union” and that “we [are] not allowed to discuss that matter.” (A. 74, 204, 368 ¶ 7.) *See, e.g., Curwood*, 397 F.3d at 555 (employer blamed pending election petition for its inability to grant potential new benefits); *Earthgrains Baking Cos., Inc.*, 339 NLRB 24, 28 (2003) (employer placed onus for delayed wage increase on union by indicating its hands were tied and that union prevented it from granting increase), *enforced mem.*, 116 F. App’x. 161 (9th Cir. 2004); *AutoZone*, 315 NLRB at 122-23, 131-34 (same). Accordingly, the Board reasonably found that the Center violated Section 8(a)(1) and (3) by announcing and implementing improved healthcare benefits for all employees except those employees eligible to vote in the March 9 representation election.

C. The Center’s Challenges to the Board’s Established Test and to Its Application in This Case Are Unavailing

There is no merit to the core of the Center’s challenge, its contention that the Board’s rules governing the granting or withholding of benefits during the pendency of an election, which have received court approval, are “incoherent” or “contrary and contradictory” (Br. 26, 32, 34-35, 38-39, 41) and place employers in a “damned-if-you-do-damned-if-you-don’t position.” (Br. 31, 36-37 (quoting *NLRB v. Dorn’s Transp. Co.*, 405 F.2d 706, 715 (2d Cir. 1969).) As shown above (pages 31-33), the Board and the courts have long made clear that an employer must make election-time benefit decisions without regard to the union campaign.

The Board and the courts have also repeatedly rejected the assertion, recycled by the Center (Br. 29-30), that it is not feasible to proceed as if there is no union in the picture. *See, e.g., Pedro's, Inc. v. NLRB*, 652 F.2d 1005, 1008 & n.8 (D.C. Cir. 1981) (even if proceeding as if union is not in picture may be difficult, employer remains obligated to neither unlawfully grant nor withhold benefits); *Otis Hosp.*, 545 F.2d at 255 (although employer must proceed with caution, neither granting nor withholding is per se unlawful and employer may change benefits without fear of liability under well-defined conditions). Moreover, in case of doubt, the Board has not left employers guessing, but has instead provided a blueprint for employers to follow if they elect to withhold benefits.

Unsurprisingly, the often-repeated contention that employers are left without guidance with respect to granting or withholding benefits, which the Center draws principally from dissenting opinions, has been expressly rejected as baseless.⁸ *See,*

⁸ The decades of caselaw since *Dorn's Transportation* have served to clarify the Board's test, which several courts have approved, and to develop a safe harbor. By clarifying the proper method of withholding a benefit during a union campaign, the well-defined safe harbor also negates the Center's argument (Br. 41 (quoting *Dorn's Transp.* and citing *J.J. Newberry Co. v. NLRB*, 442 F.2d 897, 900 (2d Cir. 1971) and *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1130 (9th Cir. 1978)) that an employer's good-faith effort to comply with the law should insulate it from liability for withholding a system-wide benefit from unit employees on the eve of an election. *See also NLRB v. Hendel Mfg. Co.*, 483 F.2d 350, 352-53 (2d Cir. 1973) (Act was not drafted to prohibit only intentional interferences with organizational rights; company violated Act by withholding pre-planned raise upon learning of union campaign despite claim it acted "in good faith to avoid the appearance of a violation of law").

e.g., *NLRB v. Indus. Erectors, Inc.*, 712 F.2d 1131, 1135 (7th Cir. 1983) (“an employer is not put in a ‘damned if you do, damned if you don’t’ position by the rules governing the granting or withholding of new benefits”); *Otis Hosp.*, 545 F.2d at 255 (dismissing claim of “potential confusion and unfairness in rules”); *see also Noah’s Bay Area*, 331 NLRB at 189 (concluding the “law in this area is clear” and describing safe harbor) (citing *Lampi*, 322 NLRB at 502). As the Fifth Circuit concluded, the case law governing employers’ grants or withholding of benefits near an election is “crystal clear” and there is “little merit” to the argument that employers are caught between “the proverbial devil and the deep blue sea.” *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970).

The Center also misses the mark when it argues (Br. 40-41) that the Board erred by failing to find that an “illegal motive” prompted its decision to withhold the benefit increase. That contention ignores analogous precedent in favor of inapposite caselaw. Although it violated the Act by *withholding* a system-wide benefit from employees eligible to vote in a representation election, the Center relies (Br. 26-33, 35, 39) on cases addressing the opposite situation – an employer *granting* a benefit increase to unit employees.⁹ And, it draws the wrong lesson

⁹ *See, e.g., Skyline Distributors, a Div. of Acme Markets, Inc. v. NLRB*, 99 F.3d 403, 407 (D.C. Cir. 1996) (employer unlawfully granted wage increase); *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 165 (3d Cir. 1977) (employer unlawfully conferred benefits); *Newport Div. of Wintex Knitting Mills, Inc.*, 216 NLRB 1058 (1975) (employer unlawfully granted wage increase).

from its cited cases because it disregards the common thread running through both the benefit-grant and the benefit-withholding lines of precedent: the foundational principle that employers must make benefit decisions in proximity to representation elections without regard to the union or the election.¹⁰

Pursuant to that principle, the Board and the courts examine employers' intent in granting benefits during election campaigns so as not to penalize lawful grants of benefits, given for reasons unrelated to the union or the election. No such searching inquiry is required, however, when an employer – like the Center in this case – grants a system-wide benefit improvement but withholds it from unit employees, specifically *because they are eligible to vote in a representation election*. In such a case, the admitted reason for the withholding, evident to employees, is inextricably tied to the union and the election, and thus reasonably tends to interfere with employees' organizational rights. It is, therefore, immaterial whether the employer's ultimate subjective motivation was to avoid the appearance

¹⁰ See, e.g., *Curwood*, 397 F.3d at 554-55 (contrasting unlawful election-time benefit decisions made “in order to discourage employee support of a union” with lawful ones made for “some other union-neutral justification”) (internal quotation omitted); *id.* at 554-56 (assessing both promise and withholding of benefit based on whether employer would have taken same action in absence of union activity); *Niblock Excavating, Inc.*, 337 NLRB 53, 54 (2001) (employer failed to act as if union not in picture when, without legitimate reason, it announced doubling of retirement benefit), *enforced*, 59 F. App'x. 882 (9th Cir. 2003); *Grouse Mountain Lodge*, 333 NLRB at 1323-24 (by unlawfully withholding new benefits, employer failed to act as if union not in picture).

of trying to influence the election, even assuming the employer could prove that to be the case.

In sum, the law governing an employer's election-time benefit decisions is well-established and provides employers not only with clear guidelines, but also with a safe harbor in the event the proper course is uncertain. Ample evidence supports the Board determination that, pursuant to that body of law, the Center violated Section 8(a)(1) and (3) of the Act by announcing, then implementing a system-wide benefit improvement while withholding it from unit employees because they were eligible to vote in the election.

CONCLUSION

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

Respectfully submitted,

/s/ Kira Dellinger Vol
KIRA DELLINGER VOL
Supervisory Attorney

/s/ Jared D. Cantor
JARED D. CANTOR
Attorney
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-0656
(202) 273-0016

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

October 2014

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

800 RIVER ROAD OPERATING COMPANY LLC, d/b/a WOODCREST HEALTH CARE CENTER	* * *	
Petitioner/Cross-Respondent	*	Nos. 14-1571
	*	14-2036
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	22-CA-83628
	*	
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
1199 SEIU UNITED HEALTHCARE WORKERS EAST NEW JERSEY REGION	* * *	
Intervenor	*	

**COMBINED CERTIFICATIONS REGARDING
BAR MEMBERSHIP, WORD COUNT, IDENTICAL
COMPLIANCE OF BRIEFS, AND VIRUS CHECK**

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Jared D. Cantor certifies that he is a member in good standing of the bar of the State of Connecticut. He is not required to be a member of this Court’s bar, as he is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 9,952 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007. The Board further certifies that: the electronic version of the Board’s brief filed with the Court

in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel; and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 11.0.7000.975 and is virus-free according to that program.

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 29th day of October, 2014

Bancroft
1919 M Street N.W.
Suite 470
Washington, DC 20036

William S. Massey, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, NY 10003

/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 29th day of October, 2014