

Nos. 14-1517, 14-1553

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

INTERTAPE POLYMER CORP.

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**

ELIZABETH A. HEANEY
Supervisory Attorney

NICOLE LANCIA
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-1743
(202) 273-2987

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

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Intertape Polymer Corp. (“the Company”) to review, and the cross-application of the National Labor Relations Board (the “Board”) to enforce, the Board’s Order issued against the Company. The Board’s Decision, Order, and Direction of Second Election issued on May 23,

2014, and is reported at 360 NLRB No. 114. (JA 678-94.)¹ It is a final order with respect to all parties.

The Board had subject matter jurisdiction over this case under Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over the Company’s petition for review and the Board’s cross-application for enforcement pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Columbia, South Carolina. The Company filed its petition for review on May 29, 2014, and the Board cross-applied for enforcement on June 10. Both filings were timely, as the Act places no time limitation on such filings.

STATEMENT OF THE ISSUES PRESENTED

Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by interrogating employee Thames about his union sympathies, confiscating union literature from the employee break room in response to the union campaign, and surveilling employees’ union activities.

¹ “JA” references are to the Joint Appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

This case involves allegations that the Company committed unfair labor practices during the period before a Board-conducted secret-ballot election among the Company's 250 production and maintenance employees at its Columbia, South Carolina facility. After the election was held in late April 2012, and the employees voted against representation by the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("the Union"), the Board's General Counsel issued a complaint based on unfair-labor-practice charges and election objections that were filed by the Union.

After a hearing, the administrative law judge issued a decision and recommended order. The judge found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by: (i) coercively interrogating employee Johnnie Thames regarding his union activities; (ii) confiscating union literature from employee break areas; (iii) surveilling employees' union activities; and (iv) threatening employees that selecting the Union as its collective-bargaining representative would be futile. (JA 690-91.) The judge dismissed allegations that the Company violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), including the allegation that it unlawfully discharged Thames. The judge also sustained nine of the Union's objections to the conduct of the election, finding such conduct

warranted setting aside the election. (JA 691-93.) The Company and the Union filed exceptions with the Board.

On review, the Board issued a decision, affirming, with slight modification, all but one of the judge's findings. The Board reversed the judge's finding of a threat of futility. The Board adopted the judge's recommendation to set aside the election, and remanded the representation proceeding to Subregion 11 for a second election. (JA 678, 678 n.4, 680-81.)

I. THE BOARD'S FINDINGS OF FACT

A. Background and Company Operations; the Union Begins an Organizing Campaign at the Company's Facility

The Company operates a tape manufacturing facility in Columbia, South Carolina. There are about 320 employees at the facility, with approximately 250 hourly production and maintenance workers, who work three different shifts. (JA 678, 683; JA 47-49, 174-75, 264.) Operations Manager Don Hoffman heads the plant, assisted by Human Resources Manager Sandra Rivers. Manager Hoffman reports to Senior Vice President of Administration, Burge Hildreth, who is stationed at the Company's Florida headquarters. (JA 683-84; JA 47-49, 499, 550-51.)

In early 2012, the Union began organizing at the plant, seeking to represent the production and maintenance workers. (JA 678-79, 684; JA 231.) In mid-January, a group of employees met with a union representative about initiating an

organizing campaign. (JA 78-79.) In February, employees began wearing union insignia, passing out flyers, soliciting union authorization cards, and attending union meetings. (JA 78-81, 231-32, 264-65.)

B. The Company Holds Three Captive Audience Meetings in February

After the Company became aware of the union campaign in February, company officials began holding weekly meetings with employees. Supervisors Hoffman and Rivers led three captive audience meetings in February. (JA 684; JA 57-58, 341-45, 409-10, 551-52.) On February 13, Hoffman told employees that he and the Company were opposed to having a union at the plant and expressed disappointment, explaining that he did not feel a third party should interfere with their daily operations. (JA 684; JA 154-55, 551-52, JA 594-601.) On February 21 and 22, Hoffman and Rivers gave PowerPoint presentations in which the Company reiterated to employees its opposition to the Union. (JA 684; JA 553, 602-06.) Hoffman warned that unionization could lead to strikes and lost income and would not guarantee better wages and benefits. (JA 684; JA 603-04.)

C. Supervisor Williams Interrogates Employee Thames About His Union Sympathies

Employee Johnnie Thames worked as a material handler and reported directly to Supervisor Bill Williams. (JA 679, 690; JA 228-29.) Around late February 2012, Supervisor Williams approached employee Thames while he was

working. Williams first asked Thames “what [he] think[s] about the Union,” and then said, “if you don’t think it’s good then, that it can hurt you.” Thames did not respond to him and “just walked away.” (JA 678, 685; JA 233-24.)

Prior to this questioning, on December 21, 2011, Williams had disciplined Thames for creating a work disturbance by arguing with Williams on the production floor. (JA 679 n.6; JA 535-36, 592.)

D. Employees Begin Handbilling at the Plant Gate in March

On March 16, the Union petitioned the Board for a secret-ballot election. (JA 678, 674; JA 8.) Shortly after the Union filed its election petition, employees began distributing union literature at the plant gate. On the evenings of March 22 and 23, employees handbilled at the bottom gate near the lower parking lot where employees enter and leave the facility. Noticing the activity, various supervisors came down to the parking lot and observed them for approximately 10 minutes. (JA 679; JA 87-89, 144-47, 155-57, 164, 168-73, 222-23, 265-66, 593, 641.)

E. Employee Epps Leaves Union Flyers in the Employee Break Room, but Supervisor Williams Repeatedly Discards Them

Employees also began leaving union flyers in the break room. The Company maintains a rule that prohibits solicitation and distribution in working areas and on working time, and that does not include “breaks, meals, before the shift starts, and after the shift ends.” (JA 679, 686; JA 33, 40.) Before the union campaign, employees often placed magazines and newspapers in the break room.

These materials typically remained in the break room for at least few days but, at a minimum, the whole day, so the next shift could read them. During the union campaign, however, supervisors discarded all literature left in the break room shortly after employees finished their breaks. (JA 679, 686-87; JA 268-76, 279, 299-301, 439-40, 532-33.)

Employee and union supporter Faith Epps works on the first shift as a seal operator, and is supervised by Bill Williams. (JA 263-64.) During the Union's campaign, Epps began placing union flyers in the break room, which is located about 35 feet from her workstation. (JA 686; JA 268-76, 293-95.) On March 22, before her break ended, Epps put union flyers on the break room counter. As Epps returned to her workstation, Supervisor Williams entered the break room and stayed there for about 5 minutes. After Williams left, Epps re-entered the break room and noticed that her flyers were missing. (JA 679, 686; JA 269-71.)

On March 23, Epps placed more union flyers on the break room counter. As Epps was returning to work, Williams walked past her into the break room. He gathered her flyers and disposed of them in a trash bin. (JA 679, 686; JA 272-74.)

On March 29, Epps walked into the break room and saw union flyers on the tables. Later, while on her break, Epps went into the break room and noticed that the flyers were in the trashcan. She retrieved them and placed them on the tables before returning to her workstation. Minutes later, Williams went into the break

room and collected the flyers. Shortly after, Epps peeked into the break room and saw her flyers were gone. (JA 679, 686; JA 274-76.) Epps finally stopped putting out flyers “because she got tired of [Williams] throwing them away.” (JA 281.)

F. The Company Holds Captive Audience Meetings in March and April

On March 25 and 26, Senior Vice President of Administration Burge Hildreth traveled to the Company’s facility and held captive audience meetings on the collective bargaining process with each shift of employees. (JA 684-85; JA 607-18.) During those meetings, Hildreth stated that he did not have to negotiate with the Union and could cause a lockout. (JA 684-85; JA 90-92, 157-59, 179-80.) He also discussed the difference between wages in South Carolina and costlier markets such as California, telling employees that if they wanted higher wages, they could get on a bus and go to California. (JA 684-85; JA 90-92, 158, 179-80, 276-78, 349, 506-07.)

Then, on April 9 and 11, Operations Manager Hoffman held meetings with all employees where he discussed the Union’s strike record at another company plant, as well as unfair-labor-practice charges that were filed against the Union by employees at other facilities in South Carolina, North Carolina, and Georgia. Hoffman later held two other meetings in April, where he repeated the Company’s position that strikes could lead to lost wages and benefits. (JA 685, 685 n.5; JA 619-39, 637-38, 643.)

G. Supervisor Becknell Tells Employee Jordan That He Can No Longer Leave Union Materials in the Break Room

On April 23, when employee John Jordan went into the break room for a pre-shift meeting, he left union literature on the counter. (JA 679, 686; JA 201-02, 206.) Supervisor Chuck Becknell entered the room and instructed Jordan not to leave union literature there. When Jordan asked why, Becknell replied that the Company changed the rule. Jordan then retrieved all of his union literature. (JA 679, 686-87, 687 n.10; JA 201-03.)

H. Days Before the Election, Supervisors Leaflet at the Plant Gate While Employees Distribute Union Literature There

Prior to the Union's campaign, supervisors had never stood at the plant gate in the morning or evening. And they never previously distributed leaflets to employees. Instead, supervisors typically discussed personnel matters and shared information with employees in morning communication meetings or shift huddles. (JA 679, 687; JA 93-96, 420-21, 483-84, 486.)

On the mornings and the evenings of April 24 and April 25, supervisors leafleted at the plant gate, where union supporters had previously handbilled in March. (JA 679, 687; 93-96, 395-96.) The union supporters leafleted those days as well, but only during the evenings. On the evening of April 25, the union supporters arrived before the supervisors. (JA 679, 687; JA 93-96, 148-51, 203-05, 214, 397-98.) On both days, the supervisors stood about 5 feet away from the

union supporters as they leafleted at the plant gate. (JA 679, 687; JA 93-96, 148-49, 203-05, 398-401, 640-41.) No employees took any union literature while the supervisors were present at the gate. (JA 679, 687; JA 95-96, 203-05, 214.)

I. The Union Loses the Election; Subsequent Procedural History

The election was held on April 26 and 27. The Union lost by a vote of 142-97. (JA 678, 684; JA 584.) On May 3, the Union filed objections to the election, seeking a rerun election. (JA 678, 692; JA 582-83.) Those objections were then consolidated with the unfair-labor-practice charges that the Union later filed against the Company. A hearing was held on both the unfair labor practice charges and the election objections. (JA 683; JA 21-24.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Members Hirozawa and Schiffer; Miscimarra dissenting in part) found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employee Thames regarding his union sympathies, confiscating union materials from employee break areas, and surveilling employees' union activities.² (JA 678-79.) The Board, in agreement with the judge, dismissed the Section 8(a)(3) allegations. (JA 678 n.4.) However, the Board reversed the judge's finding

² Member Miscimarra would not have found the Company's interrogation of Thames and surveillance of employees' union activities unlawful, and would not have set aside the election. (JA 682.)

that the Company threatened employees with futility if they selected the Union as their collective-bargaining representative. (JA 680.)

To remedy the violations found, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, it requires the Company to post and, if appropriate, electronically distribute, remedial notices.

The Board further ordered that the election be set aside, and severed and remanded the representation proceeding to Subregion 11 to conduct a new election. (JA 678, 680-81.)

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when Supervisor Williams coercively interrogated employee Thames. Analyzing the nature of the information sought, Williams' position over Thames, the preexisting hostility between them, Thames' response to the questioning, and Williams' failure to offer assurances against reprisal, the Board reasonably found the interrogation unlawful. In asking Thames what he thinks about the Union, Williams sought Thames' own views on the Union. Williams' position as Thames' direct supervisor, with the authority to discipline him, heightened the coercive effect of the questioning. Also, Williams previously

disciplined Thames for arguing with him at work, which exemplifies their preexisting hostility. Moreover, Williams offered no assurances against reprisal. Thames' decision not to respond after Williams said "it can hurt you" buttresses the Board's finding of coercion. The Company contends that the evidence does not support a finding of interrogation, but Thames' credited testimony proves otherwise. And though the Company attacks the Board's crediting of Thames over Williams, it has not shown exceptional circumstances warrant overruling that determination.

2. Similarly supported by substantial evidence is the Board's finding that the Company violated Section 8(a)(1) of the Act by confiscating union literature from the employee break room shortly after employees' breaks, which was an unlawful change in policy in response to the union campaign. Before the campaign began, employees placed literature such as magazines and newspapers in the break room, and it remained there until at least the end of the day. After the Union filed its representation petition, Epps distributed union flyers in the break room on three occasions, and each time, Supervisor Williams discarded them immediately after her breaks. The Company disputes that it changed its policy in response to union activity, but its assertions are belied by the credited, corroborated evidence.

Contrary to the Company's contention, the Board's finding of a change in policy

was closely related to the complaint allegation of disparate enforcement, and was fully and fairly litigated.

3. Substantial evidence also supports the Board's finding that company supervisors' leafleting at the plant gate, while union supporters simultaneously leafleted there, constituted unlawful surveillance of employees' union activities in violation of Section 8(a)(1) of the Act. Before the campaign, supervisors had never gathered there or communicated with employees in that manner. But, days before the election, supervisors leafleted at the gate in close proximity to the employees. Standing only five feet away, supervisors could see which employees took union literature and interacted with the union supporters. This out-of-the-ordinary conduct tended to coerce employees in exercising their Section 7 rights and was, therefore, unlawful. As such, the Company's surveillance was not protected by Section 8(c) of the Act, or incidental to a lawful exercise of its free speech rights. The Company's arguments to the contrary have no basis in fact or law.

ARGUMENT**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEE THAMES, CONFISCATING UNION LITERATURE FROM THE EMPLOYEE BREAK ROOM, AND SURVEILLING EMPLOYEES’ UNION ACTIVITIES****A. An Employer Violates Section 8(a)(1) if Its Conduct Reasonably Tends To Coerce or Intimidate Employees in Exercising Their Section 7 Rights**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the “right to self-organization, to form, join, or assist labor organizations.” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) protects these rights by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of these rights guaranteed in [S]ection 7.” An employer’s actions violate Section 8(a)(1) if, “under all of the circumstances, the employer’s conduct may reasonably tend to coerce or intimidate employees” in the exercise of their statutory rights. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1044 (4th Cir. 1997); *accord NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985). Under this objective test, “it makes no difference whether the language or acts were coercive in actual fact,” or “whether the employer acted with anti-union animus.” *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001).

This Court grants “considerable deference” to the Board’s determinations on such matters. *Id.* (citing *Grand Canyon Mining Co.*, 116 F.3d at 1044). The Court

will enforce a Board order if the Board’s factual findings are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Medeco Sec. Locks, Inc. v. NLRB*, 142 F.3d 733, 742 (4th Cir. 1998). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); accord *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 250 (4th Cir. 1997). If such evidence exists, the Court must uphold the Board’s decision “even though [it] might have reached a different result had [it] heard the evidence in the first instance.” *Alpo Petfoods, Inc.*, 126 F.3d at 250 (internal quotation marks omitted). The Court will uphold “the Board’s [legal] interpretations of the [Act] . . . if they are ‘rational and consistent’ with it.” *Consol. Diesel Co.*, 263 F.3d at 352.

This Court accepts factual findings based on credibility determinations and will not disturb the Board’s credibility findings absent “extraordinary circumstances.” *WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001). Such circumstances exist when a credibility determination “is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 69 (4th Cir. 1996) (internal citations omitted). Absent exceptional circumstances, “careful fact-finding . . . is entitled to respect.” *Id.* at 71.

As shown below, substantial evidence supports the Board's findings that the Company's interrogation of employee Thames, confiscation of union literature from the employee break room, and surveillance of employees' union activities reasonably tended to coerce employees in exercising their Section 7 rights.

B. The Company Violated Section 8(a)(1) by Interrogating Employee Thames About His Union Sympathies

1. An employer may not coercively interrogate employees regarding their union sympathies or activities

An employer violates Section 8(a)(1) by interrogating employees regarding their union sentiments or activities if, in the totality of the circumstances, the questioning tends to be coercive. *Nueva Eng'g, Inc.*, 761 F.2d at 965. In evaluating the coerciveness of an interrogation, the Board considers: whether there is a history of employer hostility to or discrimination against protected activity; the nature of the information sought; the identity of the questioner; the place and method of interrogation; and the truthfulness of the employee's reply. *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *affirmed sub nom., Hotel & Restaurant Employees, Local 11 v. NLRB*, 760 F.2d 1006, 1008-09 (9th Cir. 1985); *Nueva Eng'g, Inc.*, 761 F.2d at 966.

In addition to the factors set forth in *Rossmore House*, the Board also assesses whether the questioner explained the purpose of the questioning and gave assurances against reprisal. *See, e.g., Nueva Eng'g, Inc.*, 761 F.2d at 966; *Norton*

Audubon Hosp., 338 NLRB 320, 321 & n.6 (2002). Other factors include the nature of the relationship between the supervisor and employee, and whether the employee was reluctant to respond. See *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1139 (4th Cir. 1982) (“Cutting in the opposite direction [of coerciveness] is the fact that [the questioned employee] displayed little reluctance to discuss the pros and cons of unionization”); *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 812 (4th Cir. 1965) (interrogations made by employees’ close friends who permitted them to argue the union perspective may support finding that no coercion existed); *Phillips 66 (Sweeny Refinery)*, 360 NLRB No. 26, 2014 WL 180523, at *7 (2014) (employee’s effort to remain silent after supervisor sought his opinion of the union favored finding of coercion).

These factors ““are not to be mechanically applied”” and represent ““some areas of inquiry”” the Board uses in evaluating an interrogation’s legality. *Camaco Lorain Mfg.*, 356 NLRB No. 143, 2011 WL 1687418, at *2 (2011) (quoting *Rossmore House*, 269 NLRB at 1178 n. 20). Importantly, as this Court has explained, it is “settled that whether an employer has employed language which is coercive in its effect is a question essentially for the specialized experience of the [Board].” *Daniel Constr. Co.*, 341 F.2d at 811.

2. Supervisor Williams coercively interrogated employee Thames

Substantial evidence supports the Board's finding that Williams, Thames' direct supervisor, unlawfully interrogated Thames. As shown (pp. 5-6), in late February, Williams approached Thames while he was working and asked him what he thought about the Union. Before Thames could answer, Williams commented that "it can hurt you." (JA 678-79; JA 233-34.) Thames opted not to respond and walked away. The Board properly found (JA 678-79) that Williams' questioning of Thames was unlawful, based on the nature of the information Williams sought, Williams' position over Thames and the hostility between them, Thames' reaction to Williams' question, and Williams' failure to provide assurances against reprisal.

The nature of the information Williams sought favors a finding of coercion because, as the Board explained (JA 679), Williams approached Thames and directly asked him to reveal his own views on the Union. *See Winchester Spinning Corp. v. NLRB*, 402 F.2d 299, 302-303 (4th Cir. 1968) (supervisor's question "what do you think about the Union?" constituted unlawful interrogation); *Phillips 66*, 2014 WL 180523, at *5, *8 (interrogation unlawful because question "what's your opinion of this union thing?" was "specific, asking [the employee] his opinion about the Union"). As this Court has explained, "ordinarily management has no legitimate business interest in probing union sentiment." *Winchester Spinning*

Corp., 402 F.2d at 301 n.1. Thus, Williams' inquiry into Thames' union sentiments favors a finding of coercion.

Moreover, as the Board recognized, "although Williams was a low-level supervisor, Williams was Thames' direct supervisor, reasonably tending to make the questioning that much more coercive." (JA 679.) As his direct supervisor, Williams had the authority to discipline Thames. (JA 49, 535-36.) *See Cal. Gas Transp., Inc.*, 347 NLRB 1314, 1314, 1345 (2006) (employee's immediate supervisor coercively interrogated employee by asking him his thoughts about the union as the question "seemed designed to determine [the employee's union] sentiments"), *enforced on other grounds*, 507 F.3d 847 (5th Cir. 2007). In fact, Williams had disciplined Thames just two months earlier for arguing with him on the production floor. (JA 679, 679 n.6; JA 592.) As this Court stated: "It hardly strains credulity to posit . . . that employees would be particularly anxious not to incur the wrath of the one person who, day in and day out, twirls the key to their job security." *American Crane Corp. v. NLRB*, 203 F.3d 819, 2000 WL 51280, at *3 (4th Cir. 2000) (unpublished) (interrogation coercive, where questioner directly supervised employee and was substantially involved in disciplining supervisees).

The Board also reasonably found (JA 679, 679 n.6) that the preexisting hostility between Williams and Thames weighed in favor of finding a violation. Indeed, the previous work-related argument between Williams and Thames, which

resulted in Williams' discipline, added to the coercive nature of the interrogation. *See Phillips 66*, 2014 WL 180523, at *7-*8 (questioning unlawful where questioner was employee's supervisor and they were not friendly).

Furthermore, as the Board noted (JA 679), Williams "offered no justification for his questioning or assurances against reprisals." *See Nueva Eng'g, Inc.*, 761 F.2d at 966 (interrogation was coercive where supervisor did not explain purpose behind questioning); *Norton Audubon Hosp.*, 338 NLRB at 321 (supervisor's failure to give assurances that employee did not need to answer questions and would not face retaliation added to coerciveness of interrogation). Instead, Williams followed his question with the comment that "it can hurt you," which the Board reasonably found "would have exacerbated the already coercive nature of his inquiry into Thames' opinion of the Union." (JA 679.) *See Nueva Eng'g, Inc.*, 761 F.2d at 966 (finding interrogation unlawful, in part, because supervisor expressed negative views on unionization when soliciting employee's opinion).

Lastly, the Board properly found (JA 679) that Thames' unwillingness to answer Williams weighed in favor of finding the interrogation unlawful. Thames did not respond to Williams' questioning and instead walked away. Thames' silence and immediate removal from the conversation demonstrated his discomfort with Williams' questions, further supporting the Board's finding that the questioning was coercive. *See Phillips 66*, 2014 WL 180523, at *7 (employee's

attempt to stay as “closed-mouthed as [he] possibly could” demonstrated that he was “uncomfortable” with supervisor’s inquiry into his opinion of the union); *Camaco Lorain Mfg.*, 2011 WL 1687418, at *2 (employee’s silence or attempts to conceal union support suggest coerciveness). Accordingly, the Board reasonably found that Williams coercively interrogated Thames about his union sentiments.

3. Contrary to the Company’s contention, the Board properly applied the *Rossmore House* factors

The Company contends that the balancing of the *Rossmore House* factors weigh against the Board’s finding of coercive interrogation, but this claim fails. Addressing the nature of Williams’ inquiry, the Company characterizes (Br. 49) Williams’ questioning of Thames as “casual[ly] pos[ing] a rhetorical question.” However, this view lacks factual support and wholly disregards Thames’ credited account of events. As explained above (pp. 17-19), Williams specifically asked Thames what he thinks about the union, seeking information on Thames’ union sentiments. Indeed, Williams’ interrogation occurred shortly after the Company expressed its opposition to the Union at various meetings, which cuts against the Company’s portrayal of the questioning as a mere “rhetorical question.” Given the preexisting hostility between Williams and Thames, it is unlikely that they would engage in any “casual” or “rhetorical” conversation.

The Company also maintains (Br. 50) that Williams’ position as Thames’ direct supervisor weighs against a finding of coercion. In asserting that a front-line

supervisor's questioning is "far less coercive" than that by a manager or owner, the Company implicitly recognizes that questioning by a low-level supervisor may nevertheless be found coercive. Moreover, the Company relies on precedent (Br. 50) that merely affirms that questioning by a high-ranking official favors a finding of coercion. Those cases do not, however, refute the Board's finding that, on these facts, Williams' identity as Thames' direct supervisor increased the coerciveness of the interrogation. In any event, this Court has upheld the Board's finding of an unlawful interrogation, despite the supervisor's "relatively junior position and his apparent lack of success in eliciting information." *Standard-Coosa-Thatcher Carpet Yarn Div., Inc.*, 691 F.2d at 1138-39.

Contrary to the Company's assertion (Br. 49-51), this case is unlike *Louisburg Sportswear Co. v. NLRB*, 462 F.2d 380 (4th Cir. 1972), where the court found questioning by a supervisor "of the lowest rank" to be lawful. *Id.* at 385. There, in responding to the supervisor's question, while the employee indicated some indecision as to how she would vote in the election, "[t]here were no other circumstances suggesting coercion." *Id.* at 385. In contrast, Thames did not indicate any indecision in remaining silent and walking away, and multiple circumstances surrounding the interrogation favor a finding of coercion.

Lastly, the Company suggests (Br. 52) that the lack of any history of hostility to unionization weighs against finding the interrogation unlawful, but that

factor is not dispositive. (JA 679 n.7.) As the Board noted, however, the absence of this factor is far “outweighed by the remaining factors, all of which favor finding a violation.” (JA 679 n.7.) In any event, an absence of a history of hostility to union activities does not diminish the fact that the interrogation occurred after the Company expressed its disappointment that employees wanted a union, and thus occurred “in the context of demonstrated employer hostility to the union.” *Winchester Spinning Corp.*, 402 F.2d at 302.

4. The Company’s invitation to the Court to overrule the Board’s credibility determinations must be rejected

The Company challenges (Br. 41-47) the administrative law judge’s crediting of Thames’ testimony over the conflicting testimony of Williams. However, this Court will not disturb the Board’s credibility findings absent “extraordinary circumstances.” *WXGI, Inc.*, 243 F.3d at 842. Exceptional circumstances exist only “when a credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all.” *Fieldcrest Cannon, Inc.*, 97 F.3d at 69 (internal quotation marks omitted). The Company has not met its heavy burden of showing that such circumstances exist here.

In crediting Thames’ version of the interrogation, the judge did not, as the Company contends (Br. 44-45), merely “assume one set of facts over the other.” Instead, the judge properly considered witness demeanor and the vagueness or

specificity of the testimony. Specifically, the judge noted that Thames offered a “detailed account” with “strong recall” of the incident, in marked contrast to Williams, whose testimony consisted of only a “general denial” and was therefore “not persuasive.” (JA 685-86.) *See Standard-Coosa-Thatcher Carpet Yarn Div., Inc.*, 691 F.2d at 1138 (employee’s specific testimony was more credible than supervisor’s silence on issue); *see also NLRB v. CWI of Md., Inc.*, 127 F.3d 319, 326 (4th Cir. 1997) (accepting judge’s credibility determinations because judge offered specific reasons, including that testimony was “credibly offered” and “uncontradicted”).³

Contrary to the Company’s claim (Br. 43), Thames’ testimony was not “muddled,” nor did he “fail[] to identify who initiated the conversation” or what Williams said. As discussed (pp. 17-20), Thames’ testimony confirms that Williams approached Thames and sought to elicit his views on unionization. Moreover, the Company’s statement that the judge deemed Williams a “trusted employee that lacked an obvious motivation to lie” is inaccurate; rather, Supervisor Rivers, not the judge, offered that characterization of Williams. (JA 688.)

³ Nor did the judge act inconsistently in discrediting Williams’ general denial and, when analyzing a separate unfair-labor-practice allegation, crediting another supervisor’s denial over an employee’s more specific testimony. (Br. 45 n.13.) In making that determination, the judge noted that the employee was “less than candid” and had destroyed probative evidence, which deeply “devalued his testimony.” (JA 686.) Thus, these two separate determinations are not comparable, as Thames’ testimony suffers from no such credibility problems.

The Company also disputes the judge's inference (JA 685) that Williams' question was due to his "curios[ity] about Thames' union sentiments" and that the Union campaign at this stage was "nascent." (Br. 45.) The record, however, supports the judge's inference. The employees began demonstrating their support in February, the Company held its first captive audience meetings a few weeks before the interrogation, and the interrogation occurred over two months before the election. Given this timing, the judge properly inferred that Williams' curiosity about Thames' union sentiments prompted the question. (JA 685.)

Similarly mistaken is the Company's contention (Br. 46) that the judge's presumption that Williams was "curious" about Thames' union sentiment is "inconsistent" with the "later finding that Williams knew" about Thames' union support. (Br. 46.) The Company's claim that Williams knew about Thames' support rests on a misreading of the judge's decision and the record. Indeed, the judge never found that "somewhere in February," Williams knew about Thames' activities; rather, the Company offers that characterization based solely on Epps' testimony. In response to a question about the timing of Williams' comment to Epps and Thames about their relationship, Epps testified that it occurred "somewhere in February." (JA 282.) Moreover, the judge, in addressing the allegation that the Company unlawfully discharged Thames, found that Williams' knowledge of Thames' union views and activity was "debatable." (JA 691 n.36.)

The judge further found that Thames' connection to Epps' known union activities was "tenuous" at best. (JA 692.)

Lastly, the Company asserts (Br. 42 n.11, 45 n.13) that the judge impermissibly credited some, but not all, of Thames' testimony. That claim fails to recognize that such findings are well within the acceptable purview of the judge and the Board. *E.g., Underwriters Labs. Inc. v. NLRB*, 147 F.3d 1048, 1053 (9th Cir. 1998) ("[T]he ALJ could reasonably find some parts of [a witness's] testimony believable and other parts unbelievable.") (internal quotation marks omitted). Indeed, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951).

C. The Company Violated Section 8(a)(1) by Confiscating Union Literature from the Employee Break Room in Response to the Union Campaign

Substantial evidence supports the Board's finding that supervisors' removal of break room literature before the end of the work day, when such literature went untouched prior to the union's campaign, was a "reaction to and countermeasure against the union campaign." (JA 679.) As the credited evidence shows (pp. 6-8), prior to the union campaign, the Company usually left literature in the employee break room at least until the end of the workday, if not for several days. After the Union filed its representation petition, however, the Company began removing

union (and non-union) literature shortly after employees finished their breaks. The Board properly found that this change in policy was unlawful. (JA 679.)

1. An employer may not promulgate or more strictly enforce a workplace rule in response to a union campaign

The Supreme Court has long recognized that “the right of employees to self-organize and bargain collectively [under Section 7] necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). It is well-established that the workplace “is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (internal quotation marks omitted).

Employees’ distribution of union literature “is a core activity protected by [Section] 7.” *Consol. Diesel Co.*, 263 F.3d at 354. And “employees generally have a protected right . . . not only to possess, but also to display, union materials at their place of work.” *Brooklyn Hospital-Caledonian Hospital*, 302 NLRB 785, 785 n.3 (1991). Both the Board and this Court have held that an employer may not interfere with that right by promulgating a workplace rule, or enforcing a rule more stringently, to impede unionization. *See, e.g., Standard-Coosa-Thatcher Carpet Yarn Div., Inc.*, 691 F.2d at 1142 (employer’s intensified enforcement of rule

prohibiting employees from leaving plant against both pro-union and anti-union employees was unlawful); *Gallup, Inc.*, 334 NLRB 366, 366, 374 (2001) (finding restriction on employees' use of copy machine unlawful because "supervisors tended to overlook moderate personal use of the copier until the start of the union organizing campaign"); *Bon Marche*, 308 NLRB 184, 185 (1992) (employer's promulgation and enforcement of rule prohibiting employees from posting non-work materials on lunchroom bulletin board was unlawful, where "before the advent of the Union," the employer allowed such postings).

2. The Company's confiscation of union literature from the break room shortly after employees' breaks, in response to the union campaign, was an unlawful change in policy

The Board reasonably found (JA 679) that the Company changed its policy of removing literature from the break room in response to the union campaign. As discussed (pp. 6-9), before the union campaign, literature such as newspapers and magazines placed in the employee break room remained untouched, at least for the entire workday but usually for a few days. But after the Union filed its petition, "supervisors monitored the break room much more closely" and began removing union (and non-union) literature "shortly after employees finished their breaks." (JA 679.)

In testimony credited by the judge, employee and union supporter Faith Epps detailed this policy change. On March 22 and 23, Epps placed union flyers in

the break room for the next shift to read. Immediately after Epps finished her breaks, Supervisor Williams entered the room and removed the flyers. On March 29, Epps noticed that another employee's union flyers had been discarded, and she replaced them on the counter. Williams then collected the flyers from the break room. As Epps explained: "It was like [Williams] would come right after all [her] breaks." (JA 279.) Some employees even approached Epps for union literature because "every time they tried to get some out of the break room, it was being . . . removed." (JA 278-79.) Ultimately, Epps stopped putting out flyers "because [she] got tired of [Williams] throwing them away." (JA 281.)

Epps was not the only employee who noticed this change in policy regarding materials left in the break room. In April, Supervisor Becknell told employee John Jordan that he could not leave union literature in the break room. Reacting to Becknell's instructions, Jordan retrieved the literature that he had placed there. Therefore, the Board's decision is well-supported by the credited evidence.

3. The Company's claim that it did not change its policy in response to union activity is unsupported

The Company does not dispute that on multiple occasions it removed literature that employees placed in the break room during nonwork time. (Br. 8.) Instead, the Company argues that it did not change its practice at all, let alone in response to union activity. (Br. 13-14, 36-40.) The credited evidence, however, demonstrates otherwise.

The Company asserts that its removal of literature was mere “break room housekeeping.” (Br. 25-29, 31, 33-40.) The judge, however, properly deemed that argument “unbelievable.” (JA 687.) The repeated and immediate removal of the union flyers shows that Williams’ confiscations were not “an accidental byproduct of his commitment to break room tidiness.” (JA 687). Rather, the elimination of materials from the break room, occurring after the representation petition filing and before the election, was part of the Company’s reaction to the union campaign. (JA 687.) *See Consol. Diesel Co.*, 263 F.3d at 354 (confiscation of union literature from employee team rooms was not “merely housekeeping removals” where “the three incidents of confiscation took place within a month or so of one another”). *See also Bon Marche*, 308 NLRB at 185, 185 n.7 (employer’s post-union campaign change in bulletin board policy, allowing postings of only work related literature, was unlawful and “necessarily hindered communications between the voters”).

The Company further claims (Br. 35) that the evidence – in the form of Epps’ “woefully insufficient testimony” – does not support the Board’s changed policy finding. This contention ignores the judge’s well-supported findings to the contrary. First, the judge characterized Epps as “open, candid, and keenly committed to relaying truthful testimony.” (JA 687.) Epps credibly testified that on three separate occasions, she saw Supervisor Williams enter the room right after her breaks and discard union literature. The Company has shown no “exceptional

circumstances” to warrant disturbing this finding in favor of adopting Williams’ “implausibl[e]” characterization of events. (JA 687). *WXGI, Inc.*, 243 F.3d at 842.

Moreover, contrary to the Company’s contentions (Br. 35-36), Epps’ testimony regarding the Company’s practice of disposing break room literature was more than amply corroborated. Employee Jordan provided “credible testimony that Supervisor Becknell banned him” from leaving union literature in the break room. (JA 687.) As the judge noted, Jordan was “believable,” had “strong recall,” and was “consistent.” (JA 687 n.10.) Even Williams and Becknell corroborated Epps’ testimony, as both admitted discarding union literature in the break room during the union campaign. In fact, Williams also testified that, before the campaign, he would usually leave literature there for a few days. (JA 686-87; JA 439-40, 530, 532, 540-41.)

The Company’s claim (Br. 37) that the Board relied solely on Epps’ testimony on redirect examination ignores Epps’ detailed account of Williams’ conduct on March 22, 23, and 29 during direct and cross examination, as well as her testimony about the Company’s change in practice on redirect and re-cross examination. (JA 268-76, 281, 291-95, 299-301.) Thus, the evidence, including Epps’ credited and corroborated testimony, more than suffices to establish that the Company changed its policy of removing literature from the break room in response to union activity.

Furthermore, the Company maintains (Br. 39) that the “lengthy delay” between the Company’s undisputed knowledge of the campaign in February and the March confiscation of literature shows it did not change its policy in reaction to the campaign. As an initial matter, the Company overlooks that Williams discarded Epps’ literature just six days after the Union filed the representation petition and only one month before the election. (JA 678, 686-87.) This temporal proximity undermines the Company’s assertion and supports the Board’s finding. *Portsmouth Ambulance Service*, 323 NLRB 311, 320 (1997) (implementation of no-solicitation policy four days after union meeting “strongly indicate[d] that the policy was in response to union-related occurrences”).

Despite the Company’s attempt to require an immediate temporal link between an employer’s awareness of the campaign and the alleged unlawful conduct, the cases on which it relies do not support that proposition. (Br. 38-39.) In *Gallup*, the Board found unlawful the employer’s promulgation of new solicitation policies days after learning of the organizing drive; however, that decision did not establish a universal principle that to be unlawful, such policy changes must occur immediately following the employer’s awareness of a campaign. 334 NLRB at 366. Indeed, in *Portsmouth Ambulance Service*, the Board found that the employer’s promulgation of a no-solicitation policy four days after a union meeting violated Section 8(a)(1) of the Act, though the employer first

learned of the campaign two months before implementing the policy. 323 NLRB at 313, 320.

Nor does *EZ Park, Inc.* (Br. 38-39) warrant a different outcome. There, the allegedly unlawful discharge occurred one month *after* the union lost the election. 360 NLRB No. 84, 2014 WL 1631391, at *6-7 (2014). Here, the Company began removing union literature from the break room one month *before* the election. In any event, unlike this case, *EZ Park, Inc.* involved a Section 8(a)(3) unlawful discharge allegation that required a multi-faceted analysis of whether the timing of the discharge demonstrated union animus. *Id.* However, as explained above (pp. 13-14), an employer violates Section 8(a)(1) if its conduct has a reasonable tendency to coerce or intimidate employees, irrespective of union animus. *Consol. Diesel Co.*, 263 F.3d at 352.

Citing “common logic,” the Company offers (Br. 40) multiple scenarios which, it contends, would have better demonstrated its “true motivation” to interfere with employees’ Section 7 rights. However, the Board’s finding does not hinge on determining any improper motive. Also, speculating that supervisors could have further interfered with employees’ Section 7 rights by discarding union materials during breaks or in multiple break rooms does not invalidate the Board’s finding that the supervisors’ actual, repeated disposal of literature was unlawful.

Finally, though Company suggests (Br. 27) that its confiscation of union materials was lawful because it removed both union and non-union literature with equal zeal, that argument is unavailing under this Court's precedent. This Court has acknowledged that it is not "fatal to the Board's finding" if a rule is "enforced equally against pro- and anti-union employees during the campaign." *Standard-Coosa-Thatcher Carpet Yarn Div.*, 691 F.2d at 1142. Indeed, as the Court explained, "blanket enforcement would have been the most effective means of hampering the Union's card campaign." *Id.*

4. The Company's change in policy was closely related to the complaint allegation and was fully and fairly litigated

The Company argues (Br. 26-36) that the Board should never have considered whether the Company changed its policy of removing literature from the break room because the complaint did not allege that theory. However, the Board may find and remedy an unfair labor practice not specifically alleged in the complaint "if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enforced*, 920 F.2d 130 (2d Cir. 1990); *see also Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969) ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). The Board properly concluded that "the issue of a change in the [Company's] practice is

closely related to the subject matter of the complaint and has been fully and fairly litigated.” (JA 679 n.8.)

a. The violation found is closely related to the complaint allegation

It is well-settled that the complaint need not “state the legal theory upon which the General Counsel intends to proceed,” but it “must inform the respondent of the acts forming the basis of the complaint.” *Pergament United Sales v. NLRB*, 920 F.2d 130, 134-35 (2d Cir. 1990). Here, the complaint alleged that the Company, “by Bill Williams . . . enforced the [solicitation and distribution] rule . . . selectively and disparately, by prohibiting union distributions in non-work areas, while permitting non-union distributions in non-work areas.” (JA 679 n.8; JA 33-34.) The Board’s finding that the Company changed its break room housekeeping policy as a reaction to the union’s campaign is closely connected to the complaint because both the finding and allegation address the same facts and the same issue.

Both the violation and the complaint concern the same set of facts—Williams’ treatment of union literature in the break room during the union campaign. *See id.* at 135 (violation found is closely related to complaint allegation where complaint allegation provided notice of the acts at issue); *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1199 (D.C. Cir. 2003) (where complaint put employer on notice that that “it could be held accountable for [identified supervisor’s] actions, the violation found was related to allegation); *see also*

Gallup, Inc., 344 NLRB at 366-67 (unlawfulness of memo stating that employer closed facility because of union campaign closely related to complaint alleging unlawful plant closure, as both concerned employer’s “response to the unionization effort”).

Also, the allegation and the violation found both concern Section 8(a)(1) and required the Board to determine the same issue—whether the Company’s treatment of union literature interfered with the employees’ Section 7 right to engage in protected concerted activity. *See Standard- Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1137 (4th Cir. 1982) (employer’s argument that the findings “varied fatally from the complaint is without merit, since the [employer] had ample notice that a [Section] 8(a)(1) violation was alleged”); *see also Casino Ready Mix*, 321 F.3d at 1199 (close connection between violation and allegation where employer knew it was being charged with a Section 8(a)(1) violation).

The Company insists (Br. 29, 31) that the allegation and violation found are not closely related because the record lacks evidence indicating “exactly when” the “new” rule was made. The complaint, however, provided the dates that Williams’ conduct violated the Act. Specifically, the complaint stated that “[i]n or about March 2012, including on March 23 and 29, 2012, . . . Bill Williams . . . prohibit[ed] union distributions in non-work areas . . .” (JA 33-34.) Thus, the

complaint made clear that the alleged unlawful handling of literature occurred during March, after the start of the campaign.

Contrary to the Company's claim (Br. 28-33), this case is more akin to *Enloe Medical Center* and *Pergament United Sales* than *Florida Steel*. In *Enloe Medical Center*, 348 NLRB 991 (2006), the Board found that while the violation (discriminatory enforcement of no-solicitation rule) was "not precisely the same" as the complaint's allegation (overly broad no-solicitation rule), the two were "closely related." *Id.* at 992. The Board noted that the complaint alleged that the rule violated Section 8(a)(1), identified the date of the rule's promulgation, and who promulgated the rule. Accordingly, the complaint "put the lawfulness of the specific rule in issue." *Id.* The Board also found that the issue was fully and fairly litigated as the employer had the opportunity to introduce evidence to defend itself against the discriminatory enforcement finding. *Id.*

Similarly, in *Pergament United Sales*, 920 F.2d 130 (2d Cir. 1990), the complaint alleged that the employer violated Section 8(a)(3) of the Act by refusing to hire the employees because of their union activity. The court determined that this allegation was closely connected to the violation found – that the refusal to hire was due to the employees' role in pending unfair labor practice charges against the employer and therefore violated Section 8(a)(4). The court reasoned that both the allegation and the violation addressed the same issue of the

employer's motivation in not offering the employees jobs. *Id.* at 135. The court further determined that the employer had every opportunity to investigate and defend against the violation found. In fact, the employer "proceeded in exactly the same way it would have been expected to proceed" had the complaint alleged a violation of Section 8(a)(4). *Id.* at 136.

As in *Enloe Medical Center* and *Pergament United Sales*, here the complaint and allegation vary, but concern the same facts and the same issue. The complaint referred to the Company's solicitation and distribution policy and specifically referenced Supervisor Williams' conduct with regard to literature left in the break room on certain dates. The Company, therefore, knew that the manner within which Williams handled the literature in the break room during a specific time period was at issue and was alleged to have violated the employees' Section 7 rights. Like the employers in *Enloe Medical Center* and *Pergament United Sales*, the Company, as shown below (pp. 39-41), also had the opportunity to rebut the evidence against it and, thus, cannot complain that the issue was not fully and fairly litigated.

This case stands in stark contrast to *Florida Steel Corp.*, 224 NLRB 45 (1976). There, the Board found that that the judge erred in ruling that the employer unlawfully promulgated a no-access rule in response to union activity because that finding varied from the complaint, which alleged only discriminatory enforcement

and made no reference to rule promulgation. *Id.* at 45 n.2. The Board also found that only the rule's enforcement and validity were litigated, noting that the record lacked any evidence as to when the employer created the rule. *Id.* The similarity between *Florida Steel* and this case begins and ends with the fact that the complaint varies from the violation found. Unlike that case, the complaint in this case placed the Company's enforcement of its break room policy squarely at issue by noting the Company's written policy, identifying management officials who handled union materials, and specifying the time period of the misconduct. Thus, while the record in *Florida Steel* failed to "specifically address [promulgation]," this record more than adequately raises the Company's policy change, allowing the Company ample opportunity to defend itself. *Id.*

Therefore, given that the violation alleged and the violation found involve the same facts – Williams' removal of literature from the break room during a specified time period – and the same issue – whether the treatment of union literature interfered with employees' Section 7 rights – the Board properly found that the allegation was closely related to the complaint, making the difference between them "a minor distinction without significant legal consequences on the facts of this case." *Pergament United Sales*, 920 F.2d at 135.

b. The policy change was fully and fairly litigated

In addition to being closely connected to the complaint allegation, the violation found must have been fully and fairly litigated. *Pergament United Sales*, 920 F.2d at 134-35. In making that determination, courts have examined whether the parties presented corroborated evidence of the violations, whether the opposing party cross-examined the relevant witnesses, the judge's treatment of the issues in his decision, whether the opposing party objected to the introduction of evidence, and whether the opposing party moved for a continuance. *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1412 (9th Cir. 1985). Whether a charge has been fully and fairly litigated is a "peculiarly fact-bound" determination, and one that must be made "on the record in each case." *Pergament United Sales*, 920 F.2d at 136. A consideration of the above factors and of the record demonstrates that the Company's change in policy was fully and fairly litigated.

As discussed above (pp. 30-31), the testimony of Jordan, Williams, and Becknell supported Epps' testimony that the Company changed its policy in response to the union campaign, rendering meritless the Company's contention (Br. 35) that there is a "complete dearth of corroborative evidence." The Company also had the opportunity to cross-examine Epps following her direct and redirect testimony. Indeed, on cross examination, Epps' testified that she had seen Williams take union flyers and throw them in the trash on multiple occasions. (JA

298.) On redirect examination, Epps testified that before the union's campaign, supervisors usually left magazines and newspapers in the break room for the whole day. (JA 300.) Then, on re-cross, Epps stated that, during the campaign, supervisors started cleaning the break room more frequently and discarding everything. (JA 300-302.) Thus, the Company had ample opportunity to introduce evidence and to defend against Epps' allegations. *See The All Am. Gourmet*, 292 NLRB 1111, 134-35 (1989) (variance between complaint allegations and Board findings are of no consequence if issue was "fully and fairly litigated" by both parties at the hearing).

Additionally, as the Board observed (JA 679 n.8), the Company never argued that lack of notice prevented it from introducing exculpatory evidence, or that it would have altered its litigation strategy had a specific allegation been made. *See Pergament United Sales*, 296 NLRB at 335; *Enloe Med. Ctr.*, 348 NLRB at 992. Thus, the Company "knew from the outset that the thing complained of" was its handling of union materials in the break room. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349-50 (1938) (affirming Board finding that employer unlawfully failed to rehire employees because of union activities, though complaint alleged unlawful discharge). Nor did the Company move for a continuance. *See George C. Foss*, 752 F.2d at 1412 (issue "fully litigated at hearing" where, among

other factors, employer did not move for continuance, issue was central at trial, and employer cross-examined witnesses).

Given the opportunities that the Company had to defend itself against the charge that it unlawfully changed its policy in response to the union campaign, the Board properly found that the issue was fully and fairly litigated.

D. The Company Violated Section 8(a)(1) by Surveilling Employees' Union Activities

Just days before the election, the Company's supervisors distributed leaflets at the plant gate, sometimes simultaneously with union supporters. Substantial evidence demonstrates that the supervisors' behavior was unusual because supervisors had never previously gathered at the gate or communicated with employees through leaflets. The Board properly found (JA 679-80) that this out-of-the-ordinary conduct unlawfully placed employees' union activities under surveillance.

1. An employer may not surveil its employees' union activities

The test for determining whether an employer engages in unlawful surveillance "is an objective one, and involves the determination of whether the employer's conduct, under the circumstances, was such as would tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act." *Parsippany Hotel Mgmt. Co.*, 319 NLRB 114, 126 (1995), *enforced* 99 F.3d 413 (D.C. Cir. 1996). This Court, recognizing the coercive effect

of surveillance, has explained: “When an employer watches off duty employees because he believes they are engaged in union activities, the employees may reasonably fear that participation in union activities will result in their identification by the employer as union supporters” and “may thereafter feel reluctant to participate in union activities.” *Nueva Eng’g, Inc.*, 761 F.2d at 967 (“So long as the employer watches employees believed to be engaged in union activities, the interference with statutory rights will follow.”).

This prohibition against surveillance does not prevent employers from “observing public union activity, particularly where such activity occurs on company premises.” *Arrow Auto. Indus.*, 258 NLRB 860, 860 (1981), *enforced*, 679 F.2d 875 (4th Cir. 1982) (unpublished table). However, in doing so, the employer may not engage in conduct that is so “out of the ordinary” that it creates the impression of surveillance. *Id.*; see *Highgate LTC Mgmt.*, 344 NLRB 1040, 1047 (2005) (mere observation is not a violation as long as the employer does not “do something out of the ordinary”). Out-of-the-ordinary behavior goes beyond unobtrusive observation and is instead “coercive conduct” that “patently tend[s] to discourage employees” from engaging in Section 7 activity. *Parsippany Hotel Mgmt. Co.*, 319 NLRB at 126. Some indicia of coerciveness include the “duration of the observation, the employer’s distance from employees while observing them,

and whether the employer engaged in other coercive behavior during its observation.” *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005).

2. Supervisors’ out-of-the-ordinary leafleting at the plant gate, while employees simultaneously distributed leaflets there, constituted unlawful surveillance

The supervisors’ leafleting of employees and their presence at the gate in the days leading up to the election was “out of the ordinary.” (JA 679.) As discussed (pp. 9-10), the Company had never leafleted its employees or communicated with them at the plant gate before the union campaign. *See Arrow Auto. Indus.*, 258 NLRB at 860 (presence of supervisors unusual, where they stood in parking lot observing employees exiting the property and driving past union handbillers). Instead, supervisors usually discussed personnel matters and shared information with employees in morning meetings or shift huddles.

In addition to the atypical leafleting, it was likewise odd that the supervisors were even stationed at the plant gate, where employees both entered and exited the facility. As the Board observed, “the presence of supervisors at the plant gate where employees arrived and left was itself unusual.” (JA 679.) Further, the supervisors stood only 5 feet away from the union supporters. With such close proximity, they “could see not only the employees distributing leaflets, but also which employees accepted or rejected the leaflets, and any interactions between them.” (JA 679.) *See PartyLite Worldwide, Inc.*, 344 NLRB 1342, 1342 (2005)

(presence of supervisors at parking lot entrances was “unusual occurrence” and supervisors’ “close” positioning to handbillers enabled them to identify which employees took union literature). Indeed, no employees took union literature while the supervisors were there, illustrating the coerciveness of the supervisors’ presence at the gate. (JA 93-96, 203-05.)

Contrary to the Company’s suggestion (Br. 17, 22), the supervisors’ observation of employees’ union activities was not incidental to the Company’s assertedly lawful activity. Rather, company supervisors chose to leaflet at the very location where they observed union supporters handbilling one month earlier, stationing themselves where union activity would likely occur and where they could observe employees’ union activities. (*See* pp. 6, 9-10.) Given the timing of this behavior so close to the election, and at a union-preferred locale, the Board properly concluded “[t]his scenario was unusual” and constituted unlawful surveillance. *See Liberty House Nursing Homes*, 245 NLRB 1194, 1200 (1979) (supervisors’ departure from past practice of taking breaks in private dining room and instead joining employees in their dining area was unlawful surveillance); *Kellwood Co.*, 166 NLRB 251, 251 (1967), *enforced*, 404 F.2d 1205 (8th Cir. 1969) (foreman’s decision to sit at employees’ cafeteria table, instead of his usual spot, was unlawful surveillance, particularly given “timing” of the change in routine, occurring during the union’s campaign).

Likewise, the Company errs in highlighting (Br. 24) that supervisors were occasionally at the gate before union supporters, as it fails to acknowledge that the employees actually arrived first on the evening April 25. In any event, as the Board explained (JA 679, 679 n.9), whether supervisors occasionally arrived first is irrelevant, as their presence and leafleting at the gate was out of the ordinary in the first place. Thus, the timing of their arrival did not render their behavior less coercive.

Under these circumstances, the Board properly found that the supervisors' leafleting at the plant gate in close proximity to the union supporters was out-of-the-ordinary conduct and constituted unlawful surveillance.

3. The Company's challenges are meritless

The Company (Br. 17-25) raises two challenges to the Board's finding of unlawful surveillance. First, it argues that the Board's decision establishes a new and significant limitation on employers' free speech rights under Section 8(c) of the Act (29 U.S.C. § 158(c)). Second, it contends that the Board misread *Arrow-Hart, Inc.*, 203 NLRB 403 (1973). Both claims lack merit.

Section 8(c) provides: "The expressing of any views, argument, or opinion, or the dissemination thereof. . . shall not constitute . . . an unfair labor practice . . ., if such expression contains no threat of reprisal or force or promise of benefit."

29 U.S.C. § 158(c). As the Supreme Court has stated: “[A]n 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) and the proviso to [Section] 8(c).” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Section 8(c) protects an employer’s right to communicate with employees in “noncoercive terms,” and does not extend to coercive conduct. *Americare Pine Lodge & Nursing Rehab. Ctr. v. NLRB*, 164 F.3d 867, 875 (4th Cir. 1999). Thus, an employer loses the protection of Section 8(c) when its conduct “tends to coerce, rather than to inform.” *Belcher Towing Co. v. NLRB*, 726 F.2d 705, 708 (11th Cir. 1984). Accordingly, “an employer’s free speech rights end where a violation of [Section 8(a)(1)] begins.” *Id.* As this Court recognizes, the Section 8(c) “privilege can in no way be construed as a cloak to hide obviously intimidating conduct.” *NLRB v. Williams*, 195 F.2d 669, 672 (4th Cir. 1952).

Contrary to the Company’s argument (Br. 23-24), the Board’s decision did not intimate that, if an employer engages in Section 8(c) speech in a manner or place in which it does not normally communicate with employees, and union activity commences, it “must then immediately stop the speech in those circumstances and leave the area.” As discussed above (pp. 42-46), the Board found that the supervisors’ leafleting and presence at the plant gate was out of the ordinary and therefore coercive. Because the Company’s coercive conduct

violated Section 8(a)(1) of the Act, it was unprotected by Section 8(c). *See Americare Pine Lodge & Nursing Rehab. Ctr.*, 164 F.3d at 875; *Belcher Towing Co.*, 726 F.2d at 708.

The Board's decision does not unduly restrict the Company's Section 8(c) rights by limiting the Company's right to share its views on unionization with its employees. Rather, it simply makes clear that the Company cannot "under the guise of merely exercising [its] right to free speech, pursue a course of conduct designed to restrain and coerce their employees." *NLRB v. Gate City Cotton Mills*, 167 F.2d 647, 649 (5th Cir. 1948). Thus, the Company can communicate with its employees, provided it does so in a noncoercive manner. For example, prior to engaging in the unusual leafleting, the Company had communicated its views to employees through morning meetings and PowerPoint presentations – viable options that remained available to the Company.

The Company also maintains (Br. 19-23) that the Board "misread" *Arrow-Hart*, 203 NLRB 403, 405 (1973), in distinguishing it from this case (JA 679 n.9.), but this claim demonstrates the Company's own misunderstanding of that case. In *Arrow-Hart*, the Board found that the employer did not engage in unlawful surveillance when its supervisors distributed the employer's literature inside the employer's facility, primarily in the hall, while the union supporters distributed outside. 203 NLRB 403, 405 (1973). When passing out the literature, the

supervisors sometimes walked back and forth, from the rear of the hall to the front door. In finding this behavior lawful, the Board reasoned it was “common practice” for the supervisors to be in the hall, usually at a desk located at the hall’s end, during the employees’ morning arrival. *Id.* In fact, the end of the hallway was the place where “in ordinary circumstances,” management’s “clan” would gather. *Id.*

The Board properly distinguished this case from *Arrow-Hart*. (JA 679 n.9.) Unlike the supervisors in that case, no evidence suggests that it was “common practice” for the Company’s supervisors to be at the plant gate, in the morning or evening. Instead, it was out of the ordinary, as the supervisors had not previously been at that location at either time of day. While the officials in *Arrow-Hart* occasionally deviated from their usual locale by strolling up and down the hall, they were already in an expected location at an expected time. That behavior drastically differs from the supervisors’ behavior here, as their very presence at the plant gate “was itself unusual” and “there was no evidence that, prior to the campaign, [the Company] had leafleted its own employees.” (JA 679.) Accordingly, in finding unlawful surveillance, the Board properly differentiated between the supervisors’ “common” behavior in *Arrow-Hart* and the “out of the ordinary” conduct that occurred at the Company’s facility.

In sum, during the Company's vigorous antiunion campaign, the Company unlawfully interrogated employee Thames, confiscated union literature from the employee break room, and placed employees' union activities under surveillance. This conduct reasonably tended to coerce employees in exercising their Section 7 rights. Therefore, the Court should affirm the Board's findings that the Company's conduct violated Section 8(a)(1) of the Act.

CONCLUSION

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

/s/ Elizabeth A. Heaney
ELIZABETH A. HEANEY
Supervisory Attorney

/s/ Nicole Lancia
NICOLE LANCIA
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-1743
(202) 273-2987

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

January 2015

STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to largely undisputed facts and, therefore, that oral argument would not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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

No. _____ **Caption:** _____

14-1553

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

INTERTAPE POLYMER CORP.)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1517
)	14-1553
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	11-CA-077869
)	11-CA-078827
Respondent/Cross-Petitioner)	10-CA-080133

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I hereby certify that on January 9, 2015, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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Michael D. Carrouth
Reyburn Williams Lominack, III
FISHER & PHILLIPS, LLP
P. O. Box 11612, Suite 1400
Columbia, SC 29211-1612

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 9th day of January, 2015