

Nos. 14-3771 & 15-1049

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CONAGRA FOODS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 75

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

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SUMMARY OF THE CASE

This case involves the Company's unfair labor practices in 2011 and 2012, in response to a union organizing campaign at its Troy, Ohio facility. Before this Court, the Company does not challenge to the Board's findings in regard to the 2011 unfair labor practices. Accordingly, the Board is entitled to summary enforcement of its Order insofar as it provides remedies for those violations.

As to the 2012 violations, the Board reasonably found that the Company unlawfully disciplined employee Janette Haines for union solicitation in September 2012. Under the credited evidence, Haines simply was not involved in "solicitation" within the meaning of the Act: she neither made a request that her co-workers sign union authorization cards, nor did she present any authorization cards for them to sign. Rather, she made a passing comment related to authorization cards. Thus, the Company's argument that this case implicates the contours of solicitation under the Act is both factually untrue and misguided.

The Board also reasonably found that the Company separately violated the Act by suggesting to employees, in April 2012, that their "discussions about unions" were covered by a restrictive solicitation policy, even though the Company permitted other kinds of non-work-related discussion without restriction.

The Board agrees with the Company that oral argument may be useful in this case, and that argument time of 15 minutes per side would be sufficient.

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v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 75**

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 JURISDICTION

This case is before the Court on a petition filed by ConAgra Foods, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued against the

Company. The Board’s Decision and Order issued on November 21, 2014, and is reported at 361 NLRB No. 113. (JA 1-19.)¹ In its decision, the Board found that the Company violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(3) and (1)) (“the Act”), by disciplining employee Janette Haines for her union activities, and violated section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by posting and maintaining an overly broad rule restricting employee discussions about unions. (JA 1-4.) The Board further granted the General Counsel’s motion for default judgment against the Company as to certain uncontested violations of the Act. (JA 4-6.)

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. Although the unfair labor practices here occurred in Troy, Ohio, this Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) and venue is proper because the Company is headquartered in

¹ Record references are to the Joint Appendix (“JA”) filed by the Company with its opening brief, and to the Supplemental Appendix (“SA”) filed by the Board with this brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the Company’s opening brief.

Omaha, Nebraska. (*See* Br. 7.) The Board’s Order is final with respect to all parties.²

The Company filed its petition for review on December 9, 2014. The Board filed its cross-application for enforcement on January 6, 2015. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders. The United Food and Commercial Workers International Union, Local 75 (“the Union”) has intervened on the side of the Board in this proceeding.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order remedying the Company’s 2011 unfair labor practices.

NLRB v. Rockline Indus., Inc., 412 F.3d 962, 966 (8th Cir. 2005).

NLRB v. Bolivar-Tees, Inc., 551 F.3d 722, 727 (8th Cir. 2008).

² The record before the Court in this case consists of the Order issued by the Board, the findings on which it is based, and the related pleadings and evidence. *See* 29 C.F.R. 102.45(b) (defining contents of record in an unfair-labor-practice case); Fed. R. App. P. 16(a) (defining contents of record on review or enforcement of an agency order). Although the Company asserts (Br. 7) that “[t]he Record from the underlying representation proceedings . . . is also before the Court pursuant to Section 9(d) of the Act [29 U.S.C. §159(d)],” the Board notes that there was no representation proceeding related to the unfair labor practices here. Indeed, as of the unfair-labor-practice hearing, the Union had not even filed a petition with the Board seeking to represent the Company’s Troy employees. (JA 174-75.)

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by disciplining employee Haines for making a union-related comment to two fellow employees on the work floor.

Farah Mfg. Co., 187 NLRB 601, 602 (1970).

W. W. Grainger, Inc., 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978).

Wal-Mart Stores, Inc., 340 NLRB 637 (2003), *enforcement denied in part*, 400 F.3d 1093 (8th Cir. 2005).

Cintas Corp. v. NLRB, 589 F.3d 905, 916-17 (8th Cir. 2009).

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by posting and maintaining an overly broad rule restricting employee discussions about unions.

Radisson Plaza Minneapolis, 307 NLRB 94, 94 (1992), *enforced*, 987 F.2d 1376 (8th Cir. 1993).

Lutheran Heritage Village-Livonia, 343 NLRB 646, 646-47 (2004).

Cintas Corp. v. NLRB, 482 F.3d 463, 467-70 (D.C. Cir. 2007).

STATEMENT OF THE CASE

This case came before the Board on two separate complaints alleging that the Company committed unfair labor practices during the Union's campaign to organize employees at its food-processing facility in Troy, Ohio. (JA 1, 14; JA 515-519, SA 18-32.) Acting on charges filed by the Union in 2012, the Board's

General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling employees, at a series of August 2012 meetings, that they were not allowed to talk about the Union during working time. (JA 14; JA 511, 516-17.) The complaint further alleged that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining employee Janette Haines in October 2012 because of her protected union activity. (JA 14; JA 513, 517.)

By virtue of the above conduct, the General Counsel also considered the Company in breach of an earlier settlement agreement it executed in 2011, and issued a second complaint effectively reviving all of the previously settled unfair-labor-practice allegations. (JA 1, 4-5; SA 18-30.) This complaint specifically alleged that, in 2011, the Company violated Section 8(a)(1) of the Act by disparately and selectively enforcing its solicitation and distribution rules to prohibit union activity, and by promulgating an overly broad rule prohibiting all union-related discussions among employees in work areas or during working time. (JA 5-6; SA 20-21.) The complaint further alleged that, again in 2011, the Company violated Section 8(a)(3) and (1) of the Act by disciplining employee Haines for her union activities. (JA 6; SA 21.) Under the non-compliance provision of the settlement agreement, the Company had agreed to waive its right

to contest these allegations if it subsequently engaged in similar conduct. (JA 4; SA 11-12.)

Accordingly, an administrative law judge held a hearing only on the 2012 allegations in the General Counsel's initial complaint described above. (JA 14; JA 85, 519, 524.) At the close of the hearing, the General Counsel moved to amend that complaint to allege that the Company also violated Section 8(a)(1) of the Act by telling employees, in an April 2012 letter, that their union-related discussions would be covered by the Company's solicitation policy. (JA 18; JA 506-08.)

Following the hearing, the judge issued a decision and recommended order in which he granted the General Counsel's motion to amend and found that the Company unlawfully interpreted its solicitation policy to prohibit employees from discussing the Union, and unlawfully conveyed that such discussions were prohibited during working time in its April 30, 2012 letter to employees.³ (JA 18; JA 507-08.) The judge also found that the Company discriminatorily disciplined employee Haines in 2012 because she was a prominent union supporter and to discourage her union activity. (JA 16-17.) The judge found, moreover, that the conduct for which Haines was disciplined did not qualify as "solicitation" within

³ The judge dismissed the Section 8(a)(1) allegation relating to the August 2012 meetings. (JA 1 n.2.) No party took exception to this dismissal, and accordingly it is not before the Court in this case.

the meaning of the Act and therefore the Company was not entitled to discipline Haines for violation of its solicitation policy. (JA 17.)

The Company filed exceptions with the Board to the judge's unfair-labor-practice findings. (JA 1; JA 20-26.) Meanwhile, the General Counsel moved for the Board to enter a default judgment against the Company as to the uncontested Section 8(a)(1) and (3) allegations revived by the Company's asserted settlement breach, and moved to consolidate the proceedings on the Company's exceptions and the motion for default judgment. (JA 1, 4-5; SA 1-54.) The Company opposed the motion for default judgment, but did not oppose consolidation. (JA 1, 5; SA 55-79.)

On November 21, 2014, the Board granted the General Counsel's motion to consolidate and issued a Decision and Order on the consolidated matters. (JA 1.) The Board (with one member dissenting) affirmed the judge's unfair-labor-practice findings regarding the Company's 2012 conduct, and granted the General Counsel's motion for default judgment on the previously settled 2011 allegations. (JA 1-7.) The Board's findings of facts, as well as the Board's Conclusions and Order, are summarized below.

I. THE BOARD'S FINDINGS OF FACTS

A. **Background; the Union Files Charges with the Board Alleging that the Company Unlawfully Suppressed Union Solicitation and Distribution at Its Troy Facility; the Company Enters into a Settlement Agreeing To Refrain from Such Conduct in the Future**

The Company operates a food-processing facility in Troy, Ohio, where it produces Slim Jims and a variety of other prepared foods. (JA 5, 14; JA 92-93, 370, 516, 526.) Around August 2011, the Union began a campaign to organize the Company's employees at the Troy facility. (JA 14; JA 341.) Janette Haines, an employee in the sanitation department, was actively involved in the campaign from its inception. (JA 1, 15, 16; JA 341.)

During the relevant time period, the Company maintained a rule stating that "no solicitation or distribution of non-business related material is allowed during work time or in work areas." (JA 5; JA 546.) Within the first few months of the organizing effort, the Union began to suspect that the Company was using this rule to suppress lawful employee organizing activity at the Troy facility. (JA 5-6; SA 3-10, 20-21.) Specifically, the Union believed that the Company was selectively applying the rule in an overly broad manner, to prohibit union-related solicitation and distribution even *outside* working time and work areas. (JA 5-6; SA 3-10.) The Union accordingly filed unfair-labor-practice charges with the Board. (JA 4; SA 3-10.) Consistent with the allegations in those charges, an investigation by the

Board's Regional Director revealed evidence that, on various dates in 2011, the Company had:

- prohibited employees from signing union authorization cards in the "smoke pad" area;
- removed union literature from the employees' break room, and sometimes threw such literature in the trash;
- confiscated or attempted to confiscate union literature from employees in the break room;
- prohibited employees from reading union literature in the break room;
- told employees that it was against company policy for them to read union literature in the break room;
- told employees, by a posting on company bulletin boards, that they could not discuss union-related issues "in working areas and/or during working time"; and
- issued a verbal warning, and then a written warning, to Janette Haines because of her lawful union activity at the Troy facility.

(JA 5-6; SA 11, 20-21.)

In late 2011, the Company entered into a settlement agreement with the Union, which was approved by the Regional Director. (JA 4; SA 11-17.) As part of the settlement, the Company agreed to post and comply with a notice to employees stating, in relevant part:

- "WE WILL NOT advise our employees that they may not discuss and voice their opinions on union related issues in working areas and/or during work time";

- “WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the [] rights guaranteed you by Section 7 of the Act,” including the right to “[f]orm, join or assist a union”; and
- “WE WILL notify our employees that they have the right under the Act to discuss and voice their opinions on union related issues in working areas and/or during work time.”

(Id.)

The settlement agreement provided that, in the event of the Company’s non-compliance with these commitments, the Regional Director would have the right, upon 14-days’ notice to the Company of its non-compliance, to issue a complaint alleging that the Company violated the Act by its above-described 2011 conduct.

(Id.) The agreement specified that the allegations of any such complaint would be “deemed admitted and [the Company] will have waived its right to file an Answer.” *(Id.)* The Regional Director, accordingly, would have the right to move for default judgment based on the complaint, and in the ensuing default proceeding before the Board, the Company would only have the right to challenge the Regional Director’s determination that the Company had failed to comply with the settlement agreement. *(Id.)*

B. The Company Announces That the Employees’ Union Discussions are “Covered By” Its Restrictive Solicitation Policy

Notwithstanding its commitment in the settlement agreement not to advise employees that they could not discuss the Union during working time, the

Company posted a letter to employees on April 30, 2012, “remind[ing]” them that “discussions about unions are covered by” the Company’s policy prohibiting solicitation during working time. (JA 3; JA 371-72, 557.) The letter remained posted on bulletin boards at the Troy facility through at least the beginning of 2013. (JA 3; JA 383.)

C. The Company Disciplines Employee Haines For Making a Union-Related Remark on Working Time

Sometime in September 2012, employee Haines was in the restroom—a non-work area—with fellow employees Andrea Schipper and Megan Courtaway, both of whom worked on the Slim Jim production line. (JA 1, 16; JA 351.) Haines took the opportunity to ask Schipper and Courtaway if they would “re-sign” union authorization cards, to renew their earlier expressions of interest in union representation. (*Id.*) Schipper and Courtaway agreed to do so. (*Id.*) A few days later, again in the restroom, Schipper gave Haines the number of a locker where she could leave the authorization cards to be signed. (JA 1, 16; JA 352-353.) The locker that Schipper identified was one that she shared with Courtaway. (JA 1, 16; JA 353.)

In keeping with Schipper’s suggestion, Haines placed a few authorization cards in the specified locker. (JA 1, 16; JA 353.) She left one each for Schipper and Courtaway, and another for Courtaway’s husband, who also worked at the Troy facility. (*Id.*) Haines later confirmed what she had done by telling

Courtaway and Schipper, as she passed them on the work floor, “I put those cards in your locker.” (JA 1, 16; JA 354.) After making this passing statement, Haines proceeded with her work. (JA 1, 16; JA 354.)

Schipper and Courtaway, however, promptly received a visit from the leadperson on their production line. (JA 16; JA 444.) Courtaway told the leadperson what Haines had said. (JA 16; JA 434, 444.) The leadperson passed this information on to a supervisor named Ritchie. (*Id.*) Ritchie instructed Schipper to retrieve any authorization cards from her locker and bring them to him. (JA 16; JA 440-41.) Schipper thus visited her locker within 20 minutes of Haines’ comment, found the authorization cards Haines had placed there, and turned them over to Ritchie. (JA 16; JA 439-40.) Schipper and Courtaway then complied with Ritchie’s further request to write statements about what Haines had said on the work floor. (JA 16; JA 434, 440-41.) In their oral and written accounts to management, Schipper and Courtaway never claimed that Haines had asked them, on the production floor, to sign union authorization cards.⁴ (JA 16; JA 433-34, 441.)

Nevertheless, about one week later, on October 2, 2012, Haines’ supervisor summoned her to a meeting with Human Resources Generalist Brad Holmes to

⁴ The written statements that Schipper and Courtaway submitted to management are not in the record. (JA 16.)

give her a warning for violating the Company's solicitation policy. (JA 16; JA 356.) At the meeting, Holmes told Haines that "two girls had complained that [she] had solicited them" on the production floor. (JA 16; JA 357.) Haines responded that this "absolutely did not happen." (*Id.*) Despite this categorical denial, Holmes handed Haines a previously prepared warning for soliciting employees in a work area, which Haines and the relevant company officials then signed. (JA 16; JA 357-58, 416-17, 542.)

D. The Regional Director Notifies the Company that It Is in Breach of the Settlement Agreement, Issues Complaint, and Moves for Default Judgment Consistent with the Non-Compliance Provision of the Settlement Agreement

A few days after the Company issued its warning to Haines, the Union filed a charge with the Board alleging that the warning violated the Act. (JA 14; JA 513.) Following an investigation, the Board's Regional Director determined that the charge had merit and notified the Company of his intention to file a complaint, absent a settlement of this latest unfair-labor-practice allegation. (JA 4; SA 53.) The Regional Director also formally notified the Company that the alleged conduct against Haines constituted non-compliance with the 2011 settlement agreement. (*Id.*) The Regional Director warned that, as a consequence, if the Company did not take steps to resolve the allegation regarding its discipline of Haines, a complaint would issue on all of the previously settled 2011 allegations, and the General Counsel would move for default judgment. (*Id.*) The Company did not respond to

this formal notice of non-compliance with the 2011 settlement agreement. (JA 5.) Accordingly, one month later, a complaint issued on the previously settled 2011 unfair-labor-practice allegations. (JA 5; SA 18-32.) And thereafter, consistent with the terms of the 2011 settlement agreement, the General Counsel filed a motion for default judgment with the Board. (JA 5; SA 1-33.) The Company opposed the General Counsel's motion, and the General Counsel filed a reply. (JA 5; SA 55-84.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing credited facts, the Board (Chairman Pearce and Member Schiffer, Member Miscimarra dissenting) found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining Haines pursuant to its solicitation policy, for conduct that was not "solicitation" within the meaning of the Act.⁵ (JA 1-3.) Likewise, the Board majority affirmed the judge's finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by the overly broad rule stated in its April 30, 2012 letter, because employees would reasonably construe it to prohibit all discussions about unions during working time. (JA 3-4.)

⁵ Only Member Schiffer agreed with the judge's additional finding that the discipline of Haines was discriminatorily motivated by hostility toward Haines' union activity. (JA 2 n.5.)

In regard to the motion for default judgment, the Board agreed with the General Counsel that the discipline of Haines constituted a breach of the parties' earlier settlement of similar violations in 2011, triggering the operation of the noncompliance provisions of that agreement. (JA 4-5.) Consistent with those provisions, the Board deemed all of the allegations relating to the previously settled 2011 violations admitted as true, and granted the General Counsel's motion for default judgment as to those violations. (JA 5-6.)

The Board's Order requires the Company to cease and desist from the 2011 and 2012 unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA 6-7.) Affirmatively, the Board's Order requires the Company to: rescind its September 2011 and April 30, 2012 rules prohibiting employees from discussing union-related issues in working areas and/or during working time, and advise employees in writing that this has been done; remove from its files any reference to the unlawful warnings issued to Janette Haines in 2011 and 2012, and notify her in writing that this has been done and that the warnings will not be used against her in any way; and post a remedial notice. (JA 7.)

SUMMARY OF ARGUMENT

This case involves the Company's unlawfully expansive interpretation of its rules against solicitation and distribution in response to union organizing activity

among employees at its Troy facility in 2011 and 2012, and its repeated discipline of prominent employee organizer Janette Haines for her protected union activity.

1. Before this Court, the Company does not challenge the Board's finding that it breached a settlement agreement that would have resolved the 2011 unfair-labor-practice allegations, all relating to the Company's interference with the employees' lawful distribution of union literature, its suggestion that union-related discussions among employees were prohibited to the same extent as union solicitation, and its discipline of Haines on two occasions in 2011. Nor does the Company challenge the Board's finding that those unfair-labor-practice allegations were properly revived by the Company's settlement breach, and that default judgment was appropriate. Given the absence of any such challenge, the Board is entitled to summary enforcement of its Order insofar as it provides remedies for those 2011 violations.

2. The Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by disciplining Haines for purportedly violating the Company's rule against solicitation during working time. The credited evidence clearly establishes that Haines was not involved in solicitation under the Board's reasonable definition of that term: she neither made a request that her co-workers sign authorization cards on the work floor, nor did she present any authorization cards to them at that time. Instead, she simply told her co-workers that she had put

authorization cards in their locker, in accordance with a prior arrangement. Thus, the Company’s argument that this case implicates questions about the contours of solicitation under the Act is both factually untrue and misguided. In any event, the Board’s definition of solicitation—asking someone to join a union by signing an authorization card at that time—is based on a reasonable construction of the Act and therefore is entitled to deference.

3. The Board also reasonably found that the Company violated Section 8(a)(1) of the Act by posting a letter to employees on April 30, 2012, indicating that their “discussions about unions” were covered by the Company’s solicitation policy, even though the Company permitted other kinds of non-work-related discussion without restriction. Applying its well-settled objective standard to determine whether the letter had a tendency to chill employees’ protected union activity, the Board properly found that employees would reasonably construe the letter as prohibiting their protected union-related discussions on working time.

STANDARD OF REVIEW

As this Court has stated, “[i]t is well established that the NLRB has ‘broad authority to construe provisions of the Act.’” *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001) (quoting *NLRB v. Fin. Inst. Employees*, 475 U.S. 192, 202 (1986)). Accordingly, “if the statute is silent or ambiguous” with respect to the precise question at issue, “the question for the court is whether the agency’s

answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); accord *Minnesota Licensed Practical Nurses Ass’n v. NLRB*, 406 F.3d 1020, 1025 (8th Cir. 2005). Applying this standard, the Court “will uphold a Board rule as long as it is rational and consistent with the Act, even if [the Court] would have formulated a different rule had [it] sat on the Board.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); see *Minnesota Licensed Practical Nurses Ass’n*, 406 F.3d at 1025.

With regard to the Board’s decisions on the facts in specific cases, the Court accords “great deference” to the Board’s affirmation of an administrative law judge’s findings. *Cintas Corp. v. NLRB*, 589 F.3d 905, 912 (8th Cir. 2009). Thus, the Board’s order will be enforced “if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the record as a whole, even if [the Court] might have reached a different decision had the matter been before [it] de novo.” *King Soopers*, 254 F.3d at 742 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951), and other cases); accord *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005). See also 29 U.S.C. § 160(e) (factual findings of the Board are “conclusive” if supported by substantial evidence). The Court reviews determinations about witness credibility under the same deferential standard, but with the additional recognition that “[c]redibility

determinations generally are for the [administrative law judge] to make, and the weight to be given to the testimony of a witness is primarily a question for determination by the trier of facts.” *NLRB v. La-Z-Boy Midwest*, 390 F.3d 1054, 1058 (8th Cir. 2004).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

In its brief to the Court, the Company does not challenge the Board’s ruling on the General Counsel’s motion for default judgment. Specifically, the Company does not claim that the Board erred in finding that its discipline of Haines breached an earlier settlement agreement. Nor does the Company challenge the Board’s application of the non-compliance provisions of the settlement agreement and consequent award of default judgment to the General Counsel on all of the 2011 unfair-labor-practice allegations previously resolved by the settlement agreement.

Thus, the Company has waived any objection to the Board’s finding on default judgment that, in 2011, the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- prohibiting employees from signing union authorization cards in the “smoke pad” area;
- removing union literature from the employees’ break room, and throwing such literature in the trash;

- confiscating or attempting to confiscate union literature from employees in the break room;
- prohibiting employees from reading union literature in the break room;
- telling employees that it was against company policy for them to read union literature in the break room; and
- telling employees, by a posting on company bulletin boards, that they could not discuss union-related issues “in working areas and/or during working time.”

See, e.g., NLRB v. Vought Corp.-MLRS Sys. Div., 788 F.2d 1378, 1381 (8th Cir. 1986) (holding that employer violates Section 8(a)(1) by taking actions that reasonably tend to interfere with employee “right to distribute union literature in a nonworking area on nonworking time”); *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1255-56 (10th Cir. 2005) (recognizing the well-settled principle that “an employer violates Section 8(a)(1) when . . . employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work”); *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 354 (4th Cir. 2001) (reiterating that distribution of union literature is “a core activity protected by Section 7 [of the Act],” and therefore “an employer may not confiscate union literature left for distribution to employees in nonwork areas during nonwork time”).

The Company has similarly waived any objection to the Board’s finding on default judgment that, in 2011, the Company violated Section 8(a)(3) and (1) of the

Act (29 U.S.C. § 158(a)(3) and (1)) by issuing a verbal warning, and then a written warning, to Janette Haines because of her protected union activity. *See, e.g., Cintas Corp. v. NLRB*, 589 F.3d 905, 916-17 (8th Cir. 2009) (holding that employer violates Section 8(a)(3) and (1) by issuing verbal and written warnings to employees because of their union activity).

As the Company has waived any challenge to the portions of the Board's Order corresponding to the above findings, the Board is entitled to summary enforcement of those aspects of the Order. *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008) (finding Board entitled to summary enforcement as to aspects of Board order not challenged on appeal); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005) (same). Nevertheless, the uncontested violations do not disappear simply because they are not preserved for appellate review; rather, they remain in the case, "lending their aroma to the context in which the remaining issues are considered." *See NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCIPLINING EMPLOYEE HAINES FOR MAKING A UNION-RELATED COMMENT ON THE WORK FLOOR

Section 7 of the Act guarantees to employees the right to "self-organization, to form, join, or assist labor organizations," and also "the right to refrain" from

such activities. 29 U.S.C. § 157. Section 8(a)(3) of the Act enforces this dual guarantee by making it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization” 29 U.S.C. § 158(a)(3). It is well settled that an employer violates this provision by taking an adverse employment action against an employee for engaging in union activity protected by Section 7 of the Act. *See, e.g., Cintas Corp.*, 589 F.3d at 916-17 (upholding Board finding that employer violated Section 8(a)(3) by issuing verbal and written warnings to employees because they expressed support for union at work); *Rockline Indus.*, 412 F.3d at 970 (upholding Board finding that employer violated Section 8(a)(3) by suspending and discharging employee because of his protected union activity on company premises). Thus, “employers cannot single out employees who engage in such activities for adverse or disparate treatment.” *Rockline Indus.*, 412 F.3d at 970.⁶

Here, the Company admittedly (Br. 21-22) disciplined Haines for making a remark about union authorization cards to co-workers on the production floor. (JA 1-2; 542.) The fundamental question, therefore, is whether her remark qualified as

⁶ It is equally well settled that a violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7” of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

protected union activity, for which the Company could not have lawfully disciplined her. As shown below, the Board reasonably found that Haines’ comment was a protected statement of fact relating to an ongoing union organizing effort—not solicitation as the Company claims (Br. 21)—and therefore the Company violated Section 8(a)(3) and (1) of the Act by predicating its discipline of Haines on that comment. (JA 2-3.)

A. The Act Gives Employees the Right To Organize a Union; the Right To Organize in the Workplace Is Subject to Limited Employer Regulation

As the Supreme Court has recognized, the “central purpose of the Act [i]s to protect and facilitate employees’ opportunity to organize unions to represent them in collective-bargaining negotiations.” *American Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609 (1991). Consistent with this recognition, the Supreme Court has “long accepted the Board’s view that the [Section 7] right of employees to self-organize . . . 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) (citing *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972)). The jobsite, after all, “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 and citation omitted). *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n.6 (1945) (the workplace is “uniquely appropriate” for exchange of views regarding organization).

The “[e]mployees’ right to self-organization at the jobsite, however, is not unlimited, conflicting as it does with employers’ property rights and managerial interests.” *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337-38 (D.C. Cir. 2003) (internal quotation marks omitted). Accordingly, the Board must “work[] out an adjustment” or accommodation between the employer and employee rights involved. *Republic Aviation Corp.*, 324 U.S. at 797-98.

To this end, the Board has established a series of legal rules permitting limited employer regulation of union solicitation and literature-distribution in the workplace. *See Beth Israel Hosp.*, 437 U.S. at 492-93; *Republic Aviation*, 324 U.S. at 796-97, 801-03. Under those court-approved rules, employer restrictions on solicitation during working time, and on distribution during working time and in work areas, are presumptively lawful.⁷ *See Republic Aviation*, 324 U.S. at 796-97,

⁷ “Working time” refers to the “periods when employees are performing actual job duties, periods which do not include the employees’ own time such as lunch and break periods.” *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *see also Republic Aviation*, 324 U.S. at 803 & n.10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enforced*, 142 F.2d 1009 (5th Cir. 1944), and affirming the Board’s distinction between working time, which is “for work,” and non-working-time, “whether before or after work, or during luncheon or rest periods,” which “is an employee’s time to use as he wishes without unreasonable restraint”).

801-03. Conversely, employer restrictions on solicitation during non-working time, and on distribution during non-working time and in non-work areas, are presumptively unlawful. *Id.*

In applying these presumptions in specific cases, the Board has developed ancillary rules as to what constitutes “solicitation.” Solicitation for a union “usually means asking someone to join the union by signing his name to an authorization card.” *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978); *accord Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1097 (8th Cir. 2005). Under Board law, moreover, the presentation of an authorization card is not a form of literature-distribution “aimed at informing employees about union matters” that would be governed by the rules relating to distribution. *Farah Mfg. Co.*, 187 NLRB 601, 601-02 (1970). Rather, because “the presentation of an authorization card to an employee for signature” is “necessarily an integral and important part of the solicitation process,” the Board considers it a necessary aspect of solicitation. *Id.*; *accord Wal-Mart Stores, Inc.*, 340 NLRB 637, 638 (2003), *enforcement denied in relevant part*, 400 F.3d 1093 (8th Cir. 2005).

Ultimately, the Board’s rules as to how an employer may lawfully regulate solicitation and distribution, and what qualifies as “solicitation” or “distribution,” reflect policy judgments that are informed by the Board’s specialized knowledge of

the Act and its purposes. *See Beth Israel Hosp.*, 437 U.S. at 500-01 (holding that the Board “necessarily must have authority to formulate rules to fill the interstices of the [Act’s] broad statutory provisions” if it is to perform the task entrusted to it by Congress). And as the Supreme Court has recognized, the “function of striking [the] balance” between employer and employee interests “to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” *ABC, Inc. v. Writers Guild*, 437 U.S. 411, 431 (1978) (internal quotation marks and citations omitted).

Accordingly, the Board’s rules are entitled to “considerable deference.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). As relevant here, this means that the Court must uphold the Board’s definition of solicitation “as long as it is rational and consistent with the Act”—even if the Court would have formulated a different definition had it been called upon to do so in a judicial proceeding.⁸ *Id.* at 787; *accord Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 & n.11 (1984) (noting that a court

⁸ Contrary to the Company’s suggestion (Br. 31-32), this Court did not reject the Board’s definition of solicitation and substitute its own interpretation of that term in *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1099-1100 (8th Cir. 2005). *See* below pp. 33-34.

“may not substitute its own construction” of the statute for the reasonable interpretation of the agency charged with administering the statute).

B. Haines Was Not Engaged In Solicitation Subject to Lawful Company Regulation

Substantial evidence supports the Board’s finding that Haines was not engaged in solicitation, as reasonably defined above, when she approached co-workers Courtaway and Schipper on the work floor and made a passing comment about union authorization cards. Specifically, as shown below, the credited evidence establishes that Haines did not ask her co-workers to sign authorization cards, nor did she present authorization cards on the work floor.

1. Haines did not make any request of her co-workers

Preliminarily, as the Board found (JA 2), Haines made no request of Courtaway and Schipper while on the work floor. Instead, the credited evidence shows that she made a simple declarative statement: “I put those cards in your locker.” (JA 354.) There was no need for Haines to say anything more, because Courtaway and Schipper already knew—from earlier conversations with Haines *off* the work floor—what “those cards” were and why Haines had left them in their locker.

Specifically, Haines’ credited testimony shows that, a few days before the work-floor incident at issue, Haines had met Courtaway and Schipper in the restroom and asked whether they would “re-sign” union authorization cards to

show their continuing interest in union representation. They had readily agreed to do so. Critically, Haines later had a follow-up conversation with Schipper in the restroom, and in that conversation Schipper gave Haines the number of the locker that she and Courtaway shared, so that Haines could leave the authorization cards there for them. The record establishes that Haines would not otherwise have known either the locker number or the fact that the two shared a locker. (JA 353-54.)

Disregarding this logical, credited sequence of events, the Company insists (Br. 22-27) that Haines approached Courtaway and Schipper on the work floor; for the first time asked them to sign authorization cards; and then inexplicably and without invitation declared that she would put the cards in their locker. In taking this view of the evidence, the Company relies on the shifting, implausible testimony of Courtaway and Schipper as to what Haines said on the work floor.

Courtaway initially testified that Haines “called [her] over” and “told [her] that she need[ed] [Courtaway] and [her] husband to re-sign [their] union cards.” (JA 430.) However, on prompting from company counsel and the administrative law judge as to how she was expected to do what Haines “needed,” Courtaway amended her earlier testimony to add that Haines indicated “she was going to put [the authorization cards] in my locker.” (JA 431-32.) On further prompting from counsel (“Was [Haines] going to put them in your locker, or someone else’s

locker?”), Courtaway testified that Haines said she would leave authorization cards for Courtaway and her husband in Schipper’s locker. (JA 432.) And on cross-examination, Courtaway modified her story yet again and testified that Haines said she would put the authorization cards in “our locker,” meaning a locker that Courtaway and Schipper shared. (JA 435.) Courtaway provided no explanation as to how Haines would have been able to identify any of the above-described lockers in order to leave authorization cards there.

Despite the fact that Courtaway did not respond in any way to Haines during the above episode on the work floor, Courtaway initially testified that it occupied five minutes, “at minimum.” (JA 432, 435.) Only on cross-examination as to how that could possibly have been the case did Courtaway admit that her interaction with Haines took up, at most, a few seconds. (JA 435.)

Schipper, for her part, testified that she overheard Haines telling Courtaway either that the Courtaways and Schipper needed to sign union cards and that she would “put them” in Schipper’s locker, or that “she was going to put three union cards in [Schipper’s] locker for [them] to sign.” (JA 438, 442.) Like Courtaway, however, Schipper provided no explanation as to how Haines would have known which locker belonged to Schipper. Indeed, under Schipper’s testimony,

Courtaway walked away from Haines without acknowledging her comment, much less agreeing to any plan involving Schipper's locker.⁹ (JA 438.)

Given the logical gaps and inconsistencies in the testimony of Courtaway and Schipper, as well as Courtaway's lack of independent recollection as to key aspects of Haines' statements, the Board reasonably credited the more plausible account of relevant events provided by Haines. Under that account, as detailed above, Haines asked Courtaway and Schipper, in a conversation off the work floor, if they would re-sign authorization cards. When they agreed to do so, Haines arranged with Schipper to leave the authorization cards in a locker that Schipper and Courtaway shared, and Schipper provided the relevant locker number for this purpose. Thus, in her subsequent remark to Courtaway and Schipper on the work floor, as the Board noted, Haines "merely informed her coworkers that she had done what she told them she would do, i.e., leave cards in a locker." (JA 1.)

As the Board reasonably found, this statement was merely informative, "it did not require an immediate response, and it occupied" just a few seconds—"too little time to be treated as a work interruption." (JA 3 n.8.) And as the Board noted, "the Act allows employees to make union-related statements such as [this],

⁹ Moreover, despite Courtaway's and Schipper's testimony that Haines was "going to" place authorization cards in their locker at some later point, presumably when she was no longer working, the record shows that the authorization cards were already in their locker as of just 20 minutes after Haines' remark. (JA 16; 439-40.)

which do not ‘occupy enough time to be treated as a work interruption in most settings.’” (JA 3, quoting *Wal-Mart Stores, Inc. v. NLRB*, 400 F.3d 1093, 1099 (8th Cir. 2005) (observing that an employer “may not . . . prevent conversations about unions that do not interfere with work productivity,” and emphasizing that “solicitation for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad” (internal quotation marks and citation omitted)).

Accordingly, Haines’ statement was no more a solicitation than the passing invitation to a union meeting addressed in *Wal-Mart*, 400 F.3d at 1099. Like the invitation found not to constitute solicitation in *Wal-Mart*, Haines’ statement was “more akin to a statement of fact that put [her] co-workers on notice” of what she had done, rather than a “solicitation that required an immediate response.” (JA 3 & n.8, quoting *Wal-Mart*, 400 F.3d at 1099.) As a result, Haines’ statement fell within the broad category of union-related comments and inquiries that traditionally have not been considered solicitations. *See Opryland Hotel*, 323 NLRB 723, 731 (1997) (asking employee to attend union meeting not solicitation); *Lamar Indus. Plastics*, 281 NLRB 511, 513 (1986) (asking employee if she had an authorization card not solicitation).

Moreover, because the credited evidence establishes that Haines did not make a request on the work floor while others were working, or even a statement

approximating a request, there is no analogy between the statement here and the solicitation found in a separate aspect of the Court's *Wal-Mart* decision. There, the employee-solicitor approached a co-worker on the work floor and told her that he would "like for [her] to have a [union authorization] card to sign," effectively conveying that he "would like her to consider signing a union authorization card." *Wal-Mart*, 400 F.3d at 1096, 1099. Here, by contrast, Haines made no such proposal; she simply said, "I put those cards in your locker." (Tr. 274.)

2. Haines did not present any authorization cards for signature

Further militating against any finding that Haines engaged in solicitation on the work floor is the fact that Haines did not present any authorization cards to Courtaway and Schipper at that time. Courtaway and Schipper admitted that Haines did not produce authorization cards as she addressed them on the work floor, but merely referred to authorization cards that they could later find in their locker. (Tr. 354, 361-62.) And Haines testified without contradiction that she did not have any authorization cards with her at the relevant time. (JA 1-2, 16; Tr. 274-75.) There is accordingly ample evidence to support the Board's finding that when Haines addressed Courtaway and Schipper on the work floor, "there were no cards presented for their signature." (JA 2.)

The Company does not take issue with this factual finding, but argues (Br. 31) that it should have no legal significance because "the act of asking"

purportedly suffices to establish a solicitation under Board law. In addition to the fact that the credited evidence in this case does not establish “the act of asking,” the Company misunderstands Board law. The Board has never held that “the act of asking” is sufficient to constitute solicitation. In *W. W. Grainger Inc.*, on which the Company heavily relies, the Board emphasized that solicitation for a union means “asking someone to join the union *by signing his name to an authorization card.*” 229 NLRB at 166 (emphasis added). That case, therefore, does not at all establish that the presentation of an authorization card is unnecessary to the solicitation process, or that the mere reference to an authorization card will suffice. Moreover, in other cases—namely, *Farah Manufacturing* and *Wal-Mart Stores*—the Board has affirmatively stated its view that the physical presentation of an authorization card for signature is “an integral part of the solicitation process.” 340 NLRB at 638; 187 NLRB at 602.

Acknowledging that the Board’s *Wal-Mart* decision, in particular, is directly at odds with its position, the Company argues (Br. 31-32) that this Court reversed the Board on appeal in that case and, in doing so, embraced the view that “the act of asking” suffices for solicitation. That is simply untrue. In its *Wal-Mart* decision, the Court did not make any broad pronouncement on the Board’s definition of solicitation, or substitute its view of what would suffice to establish solicitation under the Act. *See* 400 F.3d 1099-1100; *see also Chevron, U.S.A., Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 & n.11 (1984)

(noting that court “may not substitute its own construction” of statute for the reasonable interpretation of the agency charged with administering that statute). Instead, the Court merely found that given “the totality of the circumstances” in that case, substantial evidence did not support the Board’s finding that an employee was not engaged in solicitation when he approached a co-worker, apparently without an authorization card in hand,¹⁰ and said he “would like for [her] to have a [union authorization] card to sign.” *Id.*

Because there is, accordingly, no impediment—either in Board law or the law of this Court—to the Board’s interpretation of solicitation as requiring the presentation of an authorization card for signature, the only proper inquiry is whether the Board’s interpretation is rational and consistent with the Act. *See Curtin Matheson Scientific*, 494 U.S. at 787; *Chevron, U.S.A.*, 467 U.S. at 842-45 & n.11. As the Board explained in the present case (JA 2), emphasizing the presentation of an authorization card as a necessary component of solicitation “makes sense because it is that act which prompts an immediate response from the individual or individuals being solicited” and triggers the legitimate employer

¹⁰ As the Court noted, the record in *Wal-Mart* was silent as to whether the putative solicitor had authorization cards on his person at the time of this statement. *Id.* at 1100. All the record showed was that he “did not place a card directly in front of” his co-worker at the time of his statement. *Id.*

concerns underlying lawful employer rules against solicitation. (JA 2.) Where a card is presented for signature, there is a real ““potential for interference with employer productivity if the employees are supposed to be working.”” (JA 2, quoting *Wal-Mart*, 340 NLRB at 639.) *See Republic Aviation v. NLRB*, 324 U.S. 793, 803 n.10 (1945) (the Act does not prevent employers from prohibiting union solicitation where such conduct interferes with work). It is therefore entirely consistent with the Act and the principles set forth in *Republic Aviation* for the presentation of an authorization card to serve as a vital, distinguishing feature of solicitation.

Contrary to the Company’s claims (Br. 33-35), moreover, the requirement that solicitation must involve presentation of an authorization card does not pose an undue practical challenge for employers. On the contrary, it provides even “clearer guidance to employers, employees, and unions alike.” (JA 3.) The Board has long recognized “a distinction between solicitation, on the one hand, and union-related conversations on the other.” (JA 3.) *See W. W. Grainger*, 229 NLRB at 166; *accord Wal-Mart*, 400 F.3d at 1099. But the line between solicitation and talking has often been difficult to discern. The Board’s current “drawing [of] a line at the actual making of a request, accompanied by the presentation of a card for signature,” eliminates earlier ambiguities, and enables employers to know with certainty whether a solicitation has occurred.

C. The Company Unlawfully Applied Its Rule Against Solicitation to Union Activity that Did Not Qualify As Solicitation

Here, as shown above, the credited evidence establishes that Haines did not make any request to sign an authorization card on the work floor. Moreover, the record also clearly establishes that employee Haines did not present any authorization cards to fellow employees Courtaway and Schipper on the work floor. Thus, substantial evidence supports the Board's finding that Haines did not engage in solicitation, under either aspect of the Board's reasonable definition of that term. Because the Company admittedly cannot apply its rule against solicitation to prohibit union activity that does not qualify as solicitation, the Board reasonably found that the Company's discipline of Haines pursuant to its solicitation rule violated Section 8(a)(3) and (1) of the Act.

In a vain effort to defend against this unfair-labor-practice finding, the Company submits (Br. 27 n.7), in a footnote, that even if Haines did not in fact solicit anyone on the work floor, it disciplined her based on a good-faith belief that she had done so. Preliminarily, this passing reference to a "good-faith" argument does not preserve it for the Court's consideration. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (a party must do more than "merely mention a possible argument in the most skeletal way, leaving the [C]ourt to do counsel's work"); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("a skeletal

‘argument,’ really nothing more than an assertion, does not preserve a claim”); *see also* Fed. R. App. P. 28(a)(5) (requiring that briefs “contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on”).

In any event, the record undercuts the Company’s claim of good-faith belief that Haines solicited fellow employees on the work floor. Courtaway and Schipper each denied ever reporting to management that Haines had solicited them to sign authorization cards on the work floor. (JA 433-34, 441.) Indeed, they did not consider Haines to have said anything that required a response or action from them. (JA 430-31, 439.) And tellingly, although the Company elicited contemporaneous written statements from Courtaway and Schipper about what Haines had said on the work floor, the Company never produced those written statements or offered them into evidence, despite their obvious relevance to the Company’s purported good faith. (JA 16; JA 426-28.) Thus, the Company failed to provide the necessary factual foundation for its own defense.

Moreover, where an employer defends an adverse employment action by asserting a good-faith belief that the employee engaged in misconduct, the employer must show not only that it held a good-faith belief that the misconduct occurred—something the Company has failed to do here—but also that it “acted on that belief in taking the adverse employment action against the employee.”

Midnight Rose Hotel & Casino, Inc., 343 NLRB 1003, 1005 (2004). An employer's failure to conduct a fair investigation into alleged misconduct absolutely defeats any claim that it acted based on a good-faith belief that the misconduct occurred. *Id.*; accord *Allied Medical Transport, Inc.*, 360 NLRB No. 142, slip op. at 4 (2014).

In the instant case, when Human Resource Representative Holmes informed Haines that "two girls had complained that [she] had solicited them" on the work floor, Haines protested that she "absolutely did not" do that. (JA 16; JA 357.) Despite this protest, Holmes refused to entertain Haines' questions about the specifics of the accusations against her, making it impossible for her to counter those accusations with her side of the story. (JA 16-17; JA 416-17.) Instead, he simply issued Haines a previously prepared warning document. (*Id.*) Given the utter lack of even-handed investigation into what Haines did on the work floor, there is no possibility that the Company could have succeeded in its present claim of good-faith action against Haines.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY POSTING AND MAINTAINING AN OVERLY BROAD RULE RESTRICTING UNION-RELATED DISCUSSION

A. It Is Unlawful for an Employer To Maintain a Rule that Employees Would Reasonably Construe as Prohibiting Section 7 Activity

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7 of the Act (29 U.S.C. § 157). To determine whether an employer’s conduct violates Section 8(a)(1), the Board examines whether that conduct “reasonably tends to interfere” with employee rights. *NLRB v. Hitchiner Mfg. Co.*, 634 F.2d 1110, 1113 (8th Cir. 1980); *accord Medallion Kitchens, Inc. v. NLRB*, 806 F.2d 185, 191 (8th Cir. 1986) (emphasizing that the test is not whether an attempt at interference, restraint, or coercion actually succeeded or failed).

In the case of workplace rules, which employers impose unilaterally as a condition of employment, the Board examines whether the challenged rule “reasonably tends to chill employees in the exercise of their Section 7 rights.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999)). An employer’s mere maintenance of a rule has such a chilling effect, and therefore violates Section 8(a)(1), where the rule explicitly restricts protected

activity, or where “employees would reasonably construe” it as doing so. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47; *see also NLRB v. Northeastern Land Servs., Ltd.*, 645 F.3d 475, 478, 481-83 (1st Cir. 2011) (applying *Lutheran Heritage Village* to provision of employment contract); *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007) (same; employee-handbook rule); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same; arbitration agreement), *enforced*, 255 F. App’x 527 (D.C. Cir. 2007).

B. The Board Reasonably Found That Employees Would Reasonably Construe the Company’s April 30, 2012 Letter as Restricting Union-Related Discussion on Working Time

Substantial evidence supports the Board’s finding (JA 3-4) that the Company posted and maintained an unlawfully overbroad rule restricting “discussions about unions” to non-working time. It is undisputed that the Company allows employees to discuss non-work-related matters, from NASCAR to vacation plans, during working time. (JA 3-4; JA 100, 119.) Nevertheless, the Company chose to single out and mention “discussions about unions” in an April 30, 2012 letter to employees. (JA 3-4; JA 557.) Those “discussions,” the letter stated, “are covered by our Company’s Solicitation policy,” which “says that solicitation for or against unions or other organizations by employees must be limited to nonworking times.” (JA 3; JA 557.)

As the Board noted, the letter “neither define[d] solicitation nor explain[ed] the relationship between ‘discussions’ about unions and ‘solicitation for or against unions.’” (*Id.*) These omissions were significant, as the Board explained, because “[s]ome discussions about unions, indeed, most discussions about unions, are just that—discussions, not solicitations.” (JA 3.) By failing to recognize any distinction between “discussions about unions” and “solicitation,” and instead flatly stating that such discussions were “covered by” a company policy that prohibited solicitation during working time, the letter left the “unmistakable” impression that *all* discussions about unions were governed by the Company’s solicitation policy, “and hence forbidden during working time.” (*Id.*) The Board accordingly found that “employees would reasonably construe [the letter] to prohibit all discussions about unions during working time.” (*Id.*)

Notwithstanding the Board’s close analysis of both operative sentences in the April 30 letter, the Company charges (Br. 38) that the Board “ignor[ed]” the second sentence summarizing the Company’s solicitation policy. As shown above, the Board did no such thing. In any event, that sentence does not “clarif[y],” as the Company claims (Br. 38), “that solicitations are the only type of communication subject to limitation.” Rather, the sentence to which the Company refers merely re-states the Company’s solicitation policy (“solicitation for or against unions or other organizations by employees must be limited to nonworking times”), and it

does not distinguish solicitation from employee discussion about union-related matters or “clarify” that the policy only applies to solicitation. (JA 3; JA 557.) Accordingly, contrary to the Company’s claims, the letter’s re-statement of the solicitation policy does nothing to dispel the impression created earlier in the letter, that all discussions about unions are “covered by” the Company’s restrictive solicitation policy.

Likewise, there is no merit to the Company’s suggestion (Br. 39) that the Board’s reasonable interpretation of the letter should be rejected because no employee testified to that interpretation. The Board’s task in regard to the April 30, 2012 letter was to determine, objectively, whether ““employees *would reasonably* construe the [its] language to prohibit Section 7 activity.”” *Cintas Corp.*, 482 F.3d at 467 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), and adding emphasis). For this purpose, it was entirely appropriate for the Board to “focus[] on the text” of the letter, and there was no need for the Board to “rely on evidence of employee interpretation consistent with its own” in order to determine that the Company’s letter violated Section 8(a)(1) of the Act. *Id.*; accord *Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014) (affirming Board’s finding of Section 8(a)(1) violation and rejecting employer argument that employees did not actually interpret rule as restricting Section 7 rights).

Nor can the unlawful prohibition reasonably conveyed by the Company's letter be disregarded based on the Company's claim (Br. 40) that no such prohibition was ever enforced. As a matter of law, an employer may violate the Act by merely maintaining a rule that reasonably tends to chill protected activity such as lawful working-time conversation about unions. *See Grandview Health Care Ctr.*, 332 NLRB 347, 349 (2000) ("It is axiomatic that merely maintaining an overly broad rule violates the Act." (citation omitted)), *enforced sub nom Beverly Health & Rehab. Servs. v. NLRB*, 297 F.3d 468 (6th Cir. 2002); *Lafayette Park Hotel*, 326 NLRB at 825 (finding that where employer rules "are likely to have a chilling effect" on Section 7 activity, the Board "may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement"). Thus, evidence of actual enforcement is not necessary or relevant to the Board's finding of the unfair labor practice here, which was predicated on the reasonable tendency to chill union-related discussion during working time. *See Cintas Corp.*, 482 F.3d at 467 (finding evidence of actual enforcement not required to support Board's conclusion that employer rule was overly broad and thus unlawful); *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (observing that "the finding of a violation is not premised on . . . evidence of enforcement"), *enforced*, 987 F.2d 1376 (8th Cir. 1993). *See also Northeastern Land Servs.*, 645 F.3d at 481 (finding employer rule unlawful even though never applied to restrict Section 7 activity);

Brockton Hosp., 333 NLRB 1367, 1377 (2001) (same), *enforced in relevant part*,
294 F.3d 100 (D.C. Cir. 2002).

CONCLUSION

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

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April 2015

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and)	09-CA-062889
)	09-CA-062899
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75)	09-CA-068198
)	
Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,033 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board’s brief, is identical to the hard copy of the Board’s brief filed with the Court and served on the petitioner/cross-respondent. Board counsel further certifies that the CD-ROM has been scanned for viruses

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According to that program, the CD-ROM is free of viruses.

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this 1st day of April 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2015, I electronically filed the foregoing Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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