Nos. 14-3723, 15-1187

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONTEMPORARY CARS, INC. doing business as MERCEDES-BENZ OF ORLANDO and AUTONATION, INC., SINGLE AND JOINT EMPLOYERS

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

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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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

The jurisdictional statement of Contemporary Cars, Inc., doing business as Mercedes-Benz of Orlando ("MBO"), and AutoNation, Inc., single and joint employers (jointly, "the Company"), is complete and correct.

ISSUE STATEMENT

1. With respect to the Board's findings that the Company committed multiple violations of Section 8(a)(1) of the Act, the issues are:

   a. Whether the Board is entitled to summary enforcement of its uncontested finding that the Company unlawfully informed employees that it would not recognize the Union until there was a contract;

   b. Whether the Company waived any challenge to the Board's finding that it unlawfully maintained, nationwide, an overly broad no-solicitation rule, and whether the Board acted within its broad remedial discretion in ordering the Company to post a notice at all its facilities;

   c. Whether substantial evidence supports the Board's findings that the Company unlawfully:

      - created the impression that it had placed employees' union activities under surveillance and interrogated them about their union activities;

- solicited employee grievances, implying they would be remedied, and informed employees that the Company had adjusted their grievances by demoting team leaders; and
- issued a documented coaching to an employee for his protected conduct.

2. Whether substantial evidence supports the Board's finding that the Company discharged employee Anthony Roberts because of his protected union activity in violation of Section 8(a)(3) and (1) of the Act.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by:

- laying off four employees without giving the Union notice or an opportunity to bargain;
- unilaterally suspending skill-level reviews;
- unilaterally reducing the number of hours for which employees would be paid when performing certain work; and
- failing to provide the Union with relevant, requested information.

STATEMENT OF THE CASE

Acting on charges filed by the International Association of Machinists and Aerospace Workers ("the Union"), the Board's Acting General Counsel issued a complaint alleging that the Company committed numerous violations of Section

8(a)(1), (3), and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, et seq. Following a hearing, the administrative law judge issued a decision finding multiple violations, but dismissing the remaining allegations. On September 28, 2012, a three-member Board panel (Members Hayes, Griffin and Block) issued a Decision and Order ("the 2012 Order"), adopting most of the judge's findings with some modifications. (A.4-29.)[1] The Company filed a motion for reconsideration, which the same Board panel denied. The Company petitioned this Court for review, and the Board cross-applied for enforcement. On June 27, 2013, the Court placed the case in abeyance "pending the Supreme Court's decision in *Noel Canning v. NLRB*, No. 12-1281, *cert. granted*, 81 U.S.L.W. 3629 133 (U.S. June 24, 2013)."

On June 26, 2014, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which held three recess appointments to the Board in January 2012 invalid under the Recess Appointments Clause, including those of Members Griffin and Block. On October 3, 2014, this Court, granting the Board's motion, vacated the 2012 Order, and remanded the case to the Board for further consideration in light of *Noel Canning*.

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[1] "A." refers to the "Required Short Appendix" filed by the Company with its opening brief ("Br."). "Tr." refers to the transcript of the hearing below; "GCX" refers to the exhibits introduced by the Board's Acting General Counsel at the hearing, and "RX" refers to those introduced by the Company. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence.

On December 16, 2014, a panel of three Senate-confirmed Board members (Chairman Pearce and Members Johnson and Schiffer), after considering the record and the prior decisions de novo, issued the Decision and Order that is now before the Court (the "2014 Order"). The 2014 Order, which is reported at 361 NLRB No. 143, incorporates by reference the 2012 Order and order denying reconsideration. (A.30-34.)

I. THE BOARD'S FINDINGS OF FACT

A. Background

MBO operates an automotive dealership in Maitland, Florida, where it sells, repairs, and services Mercedes-Benz vehicles. AutoNation, Inc., a national corporation, owns and operates MBO and other automotive dealerships throughout the United States. (A.9; Tr.52-54.) MBO and AutoNation admit, for purposes of this proceeding, that they are a joint employer. (A.9.)

This case primarily involves MBO's service and parts department, which is composed of service technicians, service advisors, and parts department employees. In 2008, MBO had approximately 37 service technicians, who are classified according to their skills, from D to A, or lowest to highest. (A.9; Tr.334-36.) MBO has three service teams—Green, Gold, and Red—each of which has a Team Leader, an admitted supervisor. Team Leaders report to Service Director Art Bullock, who in turn reports to MBO General Manager Bob Berryhill.

Service technicians are paid hourly, but only for the work performed. Specifically, they are compensated on a flat-rate basis, in which they are paid by the job, not by the hour. Each job has an industry standard "book time" associated with it. When a technician completes a job, he places his name on a list for the next available job. Thus, faster and more experienced technicians typically receive more work. If an insufficient number of vehicles is brought in for service, some technicians will remain idle and not earn money. (A.9; Tr.333.)

B. The Company's Employee Handbook Bans Any Solicitation on Company Property

The AutoNation employee handbook—which, during the times relevant here, applied to employees at all its locations nationally—states: "[W]e prohibit solicitation by an associate of another associate while either of you is on company property." (*See* A.11; Tr.72, 306; GCX54-56, 173.) The policy provides no exception for solicitation on company property by employees on their own time, such as during breaks or lunch.

C. The Technicians Begin a Union-Organizing Campaign; the Company Creates the Impression that Their Union Activities Are Under Surveillance, Interrogates Them About Those Activities, Solicits Their Grievances, and Impliedly Promises To Fix Them

In the summer of 2008, service technicians began discussing potential union representation. Union representatives began an organizing campaign among the technicians that July. (A.20; Tr.312-15, 538.)

Also in July, Gold Team Leader Andre Grobler asked technician Juan Cazorla, as he was preparing to leave work, why he was in "such a rush?" Grobler immediately answered his own question, stating, "Oh, I guess you have that meeting to go to." Cazorla "played dumb" and asked "what meeting?" when he was, in fact, on his way to attend a union meeting. (A.11; Tr.839-40.)

General Manager Berryhill learned of the union campaign by September 23. The next day, AutoNation Area Manager Pete DeVita directed Berryhill and Service Parts Manager Bullock "to meet with the technicians and get a feel for what's going on." Between September 25 and 30, Berryhill called technicians individually into his office to ask them, with Bullock present, what they knew about the union campaign, and what issues they had with their employment. Berryhill took notes on who he met with and what was said during each conversation. (A.10-11; Tr.1499-1512, GCX174-75.)

Berryhill first summoned technician Tony Roberts, informing him that "there's a union drive going on again," and asking him "if there was anything the[] [Company] could do about it?" Berryhill also asked Roberts "if any of the technicians or [Roberts] was having any trouble at the dealership that they could help with." Roberts, who was rated B+, replied that he could "use some more money or a skill level change." Berryhill replied that there was "a raise freeze at the time." (A.10-11; Tr.889-91.)

Berryhill and Bullock next spoke in Berryhill's office with technician Brad Meyer. (*Id*.) Berryhill began by stating that the Company had heard rumors of union activity, and asked whether Meyer had "heard anything about it or if there were any issues or complaints . . . they needed to address as management." Meyer replied that there had long been rumors of union activity at MBO. He mentioned issues with service advisors taking too long and problems with the parts department. Berryhill replied that "those were things they were working on . . . they were in progress and they thought they had made some changes with that." (A.11; Tr.339-42.)

Next, Berryhill and Bullock met with technician David Poppo, querying him about the Union, which Poppo said he had heard "a little bit about." Berryhill also told Poppo, "we understand that there are some unhappy technicians and . . . we'd like to know what's going on [and] see if there's any things that maybe we could correct or . . . help out with." Poppo replied that trainees Ben Wu and Patrick Fenaughty should be promoted to technician positions. (A.11; Tr.429-31, 1517-18, GCX175.)

None of the foregoing employees had openly identified themselves as union supporters. (A.11.) Prior to General Manager Berryhill learning of the union campaign, employee workplace issues had been presented in monthly technician advisory panel ("TAP") meetings where two members from each team would meet

with management. Previously, Berryhill had not systematically sought to learn about employee concerns by calling them individually into his office in the presence of Service Director Bullock. (A.11-12.)

D. The Union Files an Election Petition and the Election Is Scheduled; During the Intervening Period, the Company Holds Several Meetings With Employees About the Union, and Continues To Interrogate Them About Their Union Activities

The Union filed a petition to represent the technicians on October 3, and the election was thereafter scheduled for December 16. (A.10; Tr.76, GCX58.) During this period, the Company, through AutoNation Vice President and Assistant General Counsel Brian Davis, conducted about 10 weekly group meetings about the Union with employees. (A.13-18; Tr.83-84, 972.) On October 10, after one such meeting, Team Leader Grobler asked Larry Puzon, a technician on his team, if he had gone to a union meeting. Puzon untruthfully denied having done so. While Puzon attended union meetings, he did not openly display his union sentiments at work. Then, after each of the meetings about the union that Davis conducted, Grobler asked Puzon whether he had or would attend union meetings. Puzon continued to deny such attendance because Grobler was "for management." (A.12; Tr.496-98.)

On about October 9, Davis asked technician James Weiss, in Berryhill's presence, which employees were the leading union organizers. Weiss named

technicians Tony Roberts, Brad Meyer, Dean Catalano, Alex Aviles, and Ruben Santiago. (A.12, 14; Tr.652-54, 808-10.)

In early December, Davis approached employee Tumeshwar Persaud—who had not openly supported the Union—in his working area and asked how he "felt about the election?" Persaud replied that "the Company is going to learn I think we have a good chance." (A.15; Tr.587-88.)

E. The Company Discharges Tony Roberts

Roberts was a technician from May 20, 2002, until the Company discharged him on December 8, 2008. He was an active union supporter who attended union meetings from the inception of the campaign and signed an authorization card in July 2008. He spoke with other employees about the Union and invited them to union meetings. (A.20; Tr.884-88, GCX162.)

At the time of his discharge, Roberts was a certified master technician on the Red Team. At skill level B+, he was rated more highly than 9 other technicians. He also had more seniority than 14 other technicians, and his productivity, as shown by hours sold, was higher than that of 19 other technicians. (A.20; Tr.881-83, GCX118.)

On December 8, Berryhill informed Roberts that he was being permanently "laid off" because of "downsizing." When Roberts asked why him, Berryhill replied, "we are just downsizing." When Roberts pointed out that he had seniority "over half the shop," Berryhill repeated that MBO was "just laying people off." Roberts noted that when former parts employee Doug Huff was laid off in 2004, technicians were told that the last one hired would be the first one fired. Berryhill claimed that whoever said that was lying. (A.20; Tr.902-04, 935.)

F. Shortly before the Election, General Manager Berryhill Tells Employees that the Company Had Adjusted Their Grievances by Demoting Team Leaders Grobler and Manbahal

Technicians had complained about then-Team Leaders Grobler and Manbahal when Berryhill solicited their grievances in late September. (A.16; Tr.1508-15, GCX174-75.) On about December 9, the week before the election, Berryhill announced at an impromptu meeting with employees that "as of today" Grobler and Manbahal were no longer team leaders, and that Alex Aviles and Rex Strong would replace them. Berryhill declared that he made the decision because of "feedback from a lot of different [technicians and] . . . numerous complaints about [the former team leaders'] leadership abilities." Berryhill stated, "as we told you, we were going to try to fix some of the problems in this dealership . . . some of the complaints that we have received from employees." He asserted that employees had seen some of the changes, and that others "we haven't done yet, but

we are going to continue to try to make improvements here." Berryhill reiterated that this was "the beginning of fixing the problems that you guys brought in." (A.16; Tr.355-56, 498-99.)

G. The Union Wins the Election; the Company Unilaterally Changes Employment Terms, Tells Employees It Will Not Recognize the Union Until There Is a Contract, Lays off Technicians Without Notifying or Bargaining With the Union, and Refuses To Provide the Union with Information It Requested

Despite the Company's vigorous opposition, the Union won the election among the service technicians. The election was part of a representation proceeding that ultimately resulted in a court-enforced Board Decision and Order directing the Company to recognize and bargain with the Union. *See Contemporary Cars, Inc.*, 355 NLRB 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). In the meantime, while that case was being litigated, the Company made several changes to the employees' terms and conditions of employment, described below, without notifying or bargaining with the Union. The Company also told employees that it would not recognize the Union until there was a contract, and refused to give the Union information it requested for contract bargaining.

1. Unilateral Suspension of Skill-Level Reviews

As of September 2007, the Company had a policy of conducting skill-level reviews for each technician twice annually: once in January or February, and again

in June or July. Notwithstanding this policy, the Company, through Team Leader Aviles, informed technician Meyer in January and May 2009 that it had suspended skill-level reviews "because of the pending union negotiations and the status quo." Meyer replied that the Company's position was incorrect, and that it should continue the reviews as it had done them in the past. Aviles said that he was just relaying what "management told him." (A.25-26; GCX86; Tr.365-66, 379-80, 1410-11.)

Timely skill-level reviews could result in a technician receiving a pay increase or promotion to a higher skill level, which would automatically result in a pay increase. Meyer, for example, was told that given the suspension of skill-level reviews, the Company could not consider promoting him at that time from his current B+ skill level to A-level. (A.26; Tr.365-66, 379-80.)

The Company did not resume regular skill level reviews until May 2009. As a result, Meyer did not receive his review until May, and his promotion to A-level was delayed until August. (A.26; Tr.186-87, 379-80.)

2. Unilateral Changes to Employee Compensation When Performing Prepaid-Maintenance Services

Prior to February 2009, technicians were paid for 1.2 hours work for performing Flex A maintenance on vehicles driven less than 10,000 miles, and 4.2 hours for performing Flex B maintenance on vehicles with 20,000 miles. (A.26; Tr.376-77.) The specific hourly rate was automatic: if the work was accomplished

in a shorter time, it was to the technician's advantage; if it took longer than the allotted time, the technician was still only paid for the specified time. (*Id.*)

In February 2009, Aviles distributed a document reflecting that the Company had reduced technicians' compensation from 1.2 to 1.1 hours for Flex A service, and from 4.2 to 2.3 hours for Flex B service. This reduced their earnings when performing such work. (A.26-27; Tr.374-77, 451, GCX155.)

3. Declaration of No Union Recognition Until There Is a Contract

On March 31, 2009, Berryhill requested that Union Steward Poppo stay behind after a TAP meeting. Berryhill noted he could stop him from wearing his steward pin, but was not going to do so. Berryhill continued, stating that the Company did not "recognize the Union unless there is a contract." (A.20; Tr.447-49.)

4. Unilateral Layoff of Four Technicians

MBO's business began to experience significant decline in 2008. In early 2009, Berryhill determined that the service department was overstaffed and layoffs might be necessary. Without notifying or bargaining with the Union, the Company laid off four technicians in early 2009: Juan Cazorla on April 2; and Poppo, Puzon, and Persaud on April 3. (A.25; Tr.324, 452, 501-03.)

5. Refusal To Provide Requested Information

On April 17 and September 3, in preparation for contract negotiations, the Union requested information concerning the classifications, wage rates, and related information about the bargaining-unit technicians. The Company refused both requests. (A.27; Tr.324, GCX87-90.)

H. The Company Issues Employee and Union Steward Catalano a Documented Coaching for His Remarks About An Employee Working Condition

In September 2009, Catalano, a shop steward, observed a coworker leaving a company restroom without washing his hands. After discussing the incident with coworkers, he mentioned it to Sales Manager Maia Menendez, who contacted the county health department about addressing the employees' hygiene concerns. In October, a health department representative visited the facility to give presentations, but they centered on the H1N1 virus. In response to the representative's invitation for questions, Catalano stated that she had not addressed the employees' concern about hand-washing, adding this "was not the meeting we were looking to have." The Company issued Catalano a documented coaching, stating that he needed to conduct himself in a "courteous, respectful" manner. (A.5; Tr.382-84, 553-58, GCX93.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 16, 2014, the Board issued its Decision and Order, finding that the Company violated Section 8(a)(1) of the Act by maintaining an overly broad work rule in its employee handbook prohibiting all solicitation on company property; creating the impression that its employees' union activities were under surveillance, and interrogating employees regarding those activities; soliciting employee grievances, implying they would be fixed, and announcing they had been fixed by demoting two supervisors in order to dissuade employees from supporting the Union; informing employees it will not recognize the Union until there was a contract; and issuing employee Catalano a documented coaching because of his protected concerted activities. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Roberts because of his protected union activities. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees, suspending skill-level reviews, and reducing the specified hours for performing prepaid-maintenance work, and by refusing to provide the Union with relevant requested information. (A.30-34.)

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 statutory rights. (A.30.)

Affirmatively, the Order requires the Company to rescind the unlawfully broad rule and notify employees that it has been rescinded and will no longer be enforced; offer Roberts and the four laid-off employees reinstatement to their former positions, make them whole for any lost earnings and benefits, and, with respect to Roberts, remove any reference to his unlawful discharge from company files. The Order further requires the Company to rescind its unilateral changes to employees' terms and conditions of employment; make whole employees who would have been promoted but for the suspension of skill-level reviews; restore the former hours specified for prepaid-maintenance work and make employees whole for any loss of earnings caused by the reduction in hours; provide the Union with the requested information; and post a complete remedial notice at the Maitland facility, and a notice specific to the unlawfully broad rule at all other AutoNation facilities. (A.31-35.)

STANDARD OF REVIEW

The standard governing the Court's review of Board unfair labor practice findings is well-established. The Court asks only if the Board's decision is "supported by substantial evidence and whether its legal conclusions have a reasonable basis in law." *L.S.F. Transportation, Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir. 2002). In applying the substantial evidence test, the Court "refuses to interfere with the Board's choice between two permissible views of the evidence,

even though [it] may have decided the matter differently, had the case been before [it] *de novo*." *L.S.F. Transportation*, 282 F.3d at 980. The Court gives "particular deference" to the Board's credibility decisions, and will not disturb them absent "extraordinary circumstances." *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005). *See also Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (attacks on credibility findings are "almost never worth making"). With respect to questions of law, the Court defers to the Board's interpretation of the Act unless the Board's view is arbitrary or capricious. *Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 751 (7th Cir. 2001).

SUMMARY OF ARGUMENT

The Company committed numerous violations in an effort to quash its employees' union-organizing campaign. To begin, the Company does not dispute that it unlawfully told employees it would not bargain absent a contract, and maintained an overbroad rule banning all solicitation on its properties; accordingly, the Court should summarily uphold those Board findings. Further, substantial evidence supports the Board's findings that the Company unlawfully interrogated employees, created the impression of surveillance, and solicited their grievances; discharged one employee, and issued a documented coaching to another, for their protected activities; unilaterally laid off employees and altered their working conditions; and refused to provide the Union with relevant information. The

Company's challenges to two aspects of the Board's remedial order—a nationwide posting regarding the unlawful rule, and reinstatement of the unlawfully laid-off employees with backpay—fail because the Board followed its judicially-approved practices in ordering those remedies. Finally, the Company's claim that it had no duty to bargain when it made the unilateral changes in 2009 fails because its duty attached when the Union won the December 2008 election.

ARGUMENT

I. THE BOARD'S FINDINGS OF MULTIPLE SECTION 8(a)(1) VIOLATIONS SHOULD BE ENFORCED

A. The Board Is Entitled to Summary Enforcement of Its Uncontested Finding that the Company Unlawfully Told Employees It Would Not Recognize the Union Until There Is a Contract

In its exceptions before the Board, the Company did not dispute (*see* A.4 n.4) that it violated Section 8(a)(1) by telling employees that it would not recognize the Union until there is a contract.[2] The Court is therefore jurisdictionally barred from considering that claim now, *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982), and the Board is entitled to summary enforcement of the portion of its order that is based on the uncontested finding. *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc) (summarily enforcing uncontested findings). Moreover, the uncontested

[2] This statement was plainly unlawful. After all, the Union could not bargain over a first contract if the Company refused to recognize it.

violation does not disappear simply because it is unchallenged. Rather, it remains, "lending the[] aroma to the context in which the [challenged] issues are considered." *Id.*

B. The Company Waived any Challenge to the Board's Finding that It Unlawfully Maintained, Nationwide, an Overly Broad No-Solicitation Rule, and the Board Did Not Abuse Its Broad Remedial Discretion In Ordering the Company To Post a Notice at all Its Facilities

In its opening brief, the Company, far from challenging the Board's finding (A.4 n.3, 7-8) that it violated Section 8(a)(1) by maintaining, nationwide, an overly broad no-solicitation rule, squarely states (Br.52) it "does not dispute that the handbook language is facially overbroad." Accordingly, the Company has waived any challenge to the Board's finding of a violation, and the finding should be summarily affirmed. *See* cases cited at p. 19.[3]

Instead, the Company limits its challenge to the Board's remedy, which requires AutoNation to post a notice about the nationwide rule at all its facilities. In so doing, the Board did not abuse its "broad discretionary power" to fashion

[3] Its passing reference (Br.52) to the lack of enforcement of the overbroad rule is both insufficient to preserve the issue for judicial review and irrelevant. *See 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 Hentosh v. Herman M. Finch Univ.*, 167 F.3d 1170, 1173 (7th Cir. 1999) ("Arguments not raised in an opening brief are waived."). In any event, as shown below, the maintenance of an overbroad, no-solicitation rule is unlawful even absent enforcement.

remedies, which must be upheld so long as it is not "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). As the Board noted (A.4 n.3), it has, with judicial approval, "consistently held that, where an employer's overbroad rule is maintained as a companywide policy, [it] will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *See, e.g.*, *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enforced in relevant part*, 475 F.3d 369, 381 (D.C. Cir. 2007).

The Company wrongly asserts (Br.52) that nationwide posting is inappropriate absent unlawful enforcement of the admittedly overbroad rule. As the Board explained, however, "the mere existence of a broad no-solicitation rule may chill the exercise of employees' [Section 7] rights." (A.11, citation omitted.) *See Guardsmark*, 475 F.3d at 374 (observing that the "mere maintenance of a rule likely to chill section 7 activity . . . can amount to an unfair labor practice even absent evidence of enforcement") (citation omitted); *accord NLRB v. General Thermodynamics, Inc.*, 670 F.2d 719, 721 (7th Cir. 1982). Thus, the Company plainly errs in asserting (Br.52) that a nationwide posting is not tailored to expunge only actual violations. Commensurate with the unfair labor practice found—namely, maintaining an unlawful rule nationwide—the Board appropriately

tailored the remedy to require notice-posting at all locations where the Company maintained the rule.

C. Substantial Evidence Supports the Board's Findings that the Company Unlawfully Created the Impression of Surveillance, Interrogated Employees, and Solicited Their Grievances

1. The Act bars employer conduct that would reasonably tend to coerce employees in the exercise of their statutory rights

Section 7 of the Act guarantees employees the right "to form, join, or assist labor organizations." 29 U.S.C. § 157. Section 8(a)(1) of the Act implements this guarantee by making it an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by [S]ection 7." 29 U.S.C. § 158(a)(1). The standard for evaluating potentially coercive employer statements is both objective and context-sensitive. "The test for what constitutes 'interference' with [employees'] rights is not whether an attempt at coercion succeeded or failed, but whether the employer engaged in conduct that 'reasonably tends to interfere with, restrain, or coerce employees in the free exercise'" of those rights. *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473, 477 (7th Cir. 1994) (citation omitted). The Supreme Court has instructed that an employer's statements must be assessed "in the context of its labor relations setting." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). This requires accounting for "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up

intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.*; *see also Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1262-63 (7th Cir. 1997) ("The words used by the employer, as well as the context in which they were conveyed, must be examined.").

2. Team Leader Grobler unlawfully created the impression of surveillance and interrogated employees

An employer violates Section 8(a)(1) by creating the impression that it has placed its employees' protected activities under surveillance. *Promedica Health Sys., Inc.*, 343 NLRB 1351, 1352 (2004). A violation occurs where employees would reasonably infer from the employer's statements or conduct that their union activities have been placed under surveillance. *Donaldson Bros.*, 341 NLRB 958, 961 (2004). This objective test is based on the rationale that "employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders [and] taking note of who is involved in union activities and in what particular ways." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993); *accord Q-1 Motor Express, Inc.*, 25 F.3d at 477 (citing *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982)).

The test for unlawful interrogations is whether, under all the circumstances, the employer's questioning reasonably tends to coerce, not whether the employee was actually coerced. *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *enforced sub nom. HERE v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The factors the

Board may consider include the employer's antiunion hostility; the interrogator's rank relative to the employee's; whether the information sought is of the kind that could be used to take action against the employee; the place and method of interrogation; whether a valid purpose for the questioning was communicated; whether assurances against reprisals were provided; and the truthfulness of the employee's response. *Multi-Ad Services, Inc. v. NLRB*, 255 F.3d 363, 372 (7th Cir. 2001); *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). No one factor is determinative; rather, they serve only as a useful "starting point for assessing the totality of the circumstances." *Perdue Farms*, 144 F.3d at 835.

Applying these settled principles, the Board reasonably found (A.4 n.4, 11-12) that Team Leader Grobler created the impression that the Company had placed employees' union activities under surveillance and interrogated them about their union activities. Substantial evidence supports both findings.

Thus, in July 2008, Grobler asked employee Cazorla why he was in such a rush, and then answered his own question by stating, "Oh, I guess you got that meeting to go to." (A.4 n.4, 11; Tr.839-41) As the Board reasonably found (A.4 n.4, 11), this statement implied that Grobler knew that Cazorla was, in fact, on his way to a union meeting, even though the dates and times of those meetings were not publicly announced, the meetings were held away from the dealership, and

Cazorla had not identified himself to management as a union supporter. In these circumstances, employees could reasonably infer that the Company had placed their union activities under surveillance. After all, Grobler's comment conveyed both that he knew a union meeting was being held, and that Cazorla was among the employees involved with the Union. *Cf. NLRB v. Gold Standard Enterprises, Inc. v. NLRB*, 679 F.2d 673, 676 (7th Cir. 1982) (impression of surveillance created when employer stated it knew "all about" employees' union meetings).

Next, substantial evidence, including Puzon's credited and unrebutted testimony, support the Board's finding that Grobler repeatedly and unlawfully interrogated him. Thus, as shown at p. 9, following an employee meeting held by Vice President Davis to discuss the union campaign, Grobler asked Puzon, a technician on his team, whether he had gone to union meetings. Although Puzon had attended union meetings, he denied doing so because he had not identified himself to management as a union supporter. Grobler then repeatedly questioned Puzon in a similar manner after each of the approximately 10 meetings Davis held with employees before the election. In response, Puzon continued to deny his union activities because Grobler was "for management." (A.11; Tr.496-98.)

Insofar as Grobler repeatedly questioned Puzon immediately after meetings conducted by Davis to discuss the Company's views about the union campaign, Puzon would reasonably believe that Grobler sought to determine whether the

Company's response to the Union was having any effect. (A.11.) Grobler's direct and repeated questioning of his immediate subordinate, who had not announced his union support, was coercive, as confirmed by Puzon's refusal to admit his union activities. The Company, therefore, violated the Act by repeatedly interrogating Puzon.

The Company (Br.53-54) provides no grounds for overturning the Board's well-supported findings that Grobler unlawfully created the impression of surveillance through his comments to Cazorla, and unlawfully interrogated Puzon. As to both violations, the Company does not help itself by claiming (Br.53) that there is no evidence of actual coercion. As shown, the applicable test is whether the employer's statements had a reasonably tendency to coerce; proof of actual coercion is unnecessary. Accordingly, under that objective test, it is immaterial (Br.54) whether Grobler's interrogation of Puzon failed to actually coerce him into disclosing his union activities. Nor does it matter (Br.53) whether Grobler's interactions were passed on to upper management; rather, the Board properly assessed the likely impact of Grobler's comments on his direct subordinate. Accordingly, the Company gains no ground by baldly asserting (Br.53) that Grobler's statements were "de minimis" and could not cause any reasonable employee to feel restrained.

3. General Manager Berryhill unlawfully interrogated employees, solicited their grievances while implying they would be remedied, and announced that their grievances had been remedied by demoting two team leaders

As soon as General Manager Berryhill learned of the Union campaign, he promptly committed a series of violations. Over the next few days, he systematically summoned a series of technicians to his office, and, with Service Manager Bullock present, questioned them separately about the Union. During these meetings, Berryhill also unlawfully solicited their grievances and impliedly promised to remedy them. Then, in a subsequent meeting, Berryhill again violated the Act by announcing to employees that he had adjusted their grievances by demoting Team Leaders Grobler and Manbahal. (*See* A.11-12, 16; pp. 7-9, 11.) As shown below, the Company fails to undermine the Board's well-supported findings that this conduct was unlawful.

The Company (Br.54-56) does not specifically dispute the Board's finding that Berryhill's repeated interrogations were unlawful. Berryhill, MBO's highest ranking official, summoned employees individually into his office, and, with Service Manager Bullock present, announced he had heard rumors of a union campaign and directly asked each employee for his views on it. None of these employees had as yet identified themselves to management as union supporters. Berryhill offered them no assurances against reprisal if they acknowledged knowing about or participating in the union campaign. He therefore put employees

in the position of admitting what they knew, and exposing union sentiments they were entitled to keep secret, or lying to their General Manager. This coercion was amplified by the systematic and coordinated nature of the interrogations, which were directed by senior management. These facts amply support the Board's findings of unlawful interrogations. *See* cases cited at pp. 23-24.

Moreover, Berryhill amplified the coercive nature of his interrogations by simultaneously, and unlawfully, soliciting employee grievances and impliedly promising to fix them. (A.11; *see* pp. 7-9.) It is well settled that an employer violates Section 8(a)(1) when it responds to a union campaign by soliciting employee grievances and explicitly or implicitly promising to remedy them. *See NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (7th Cir. 1996). Such conduct has the tendency to "lull[] [employees] into believing that they can obtain benefits without the Union's aid." *NLRB v. Windsor Industries, Inc.*, 730 F.2d 860, 864 (2d Cir. 1984).

As shown (*see* pp. 7-9), Berryhill repeatedly solicited employee grievances during—and in response to—a union campaign, in the same breath in which he unlawfully interrogated them. He began by telling employees that he had heard rumors of the union campaign and wanted to know if there was anything the Company could do about it. Likewise, he asked employees what he could correct, which suggested he intended to address the grievances. *See Uarco, Inc.*, 216

NLRB 1, 2 (1974) ("[T]he solicitation of grievances at preelection meetings raises an inference that the employer is making [a promise to remedy them]." Further, he assured employees that he was looking into and making progress on their concerns.[4] These facts amply support the Board's finding that Berryhill solicited employee grievances and impliedly promised to remedy them in order to induce employees to abandon their support for the Union, in violation of Section 8(a)(1).

The Board (A.12) reasonably rejected the Company's claim (Br.54) that Berryhill's conduct was lawful because it was purportedly consistent with a past practice of soliciting grievances. While an employer with a past practice of soliciting grievances may continue it during an organizing campaign, an employer may not rely on a supposed past practice where, as here, it "significantly alters its past manner and methods of solicitation." *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003). Here, the Company's past practice was simply to raise workplace concerns at monthly TAP meetings. There is no evidence that, before getting wind of the union campaign in September 2008, Berryhill had systematically sought to discover employees' concerns by individually calling them into his office and questioning them in front of another senior company official. (A.12; *see* p. 9.) Rather, Berryhill adopted this new method of soliciting grievances in response to

[4] The Company simply ignores this evidence in making the conclusory assertion (Br.54-55) that Berryhill, in questioning employees, never "expressly or impliedly promised to remedy anything."

rumors about a union organizing campaign. Accordingly, the Company's "past practice" defense is unavailing.

The Company's reliance (Br.56) on *Airport Concessions LLC*, 346 NLRB 958 (2006), is misplaced. There, in response to a complaint about health benefits, the employer told an employee only that it might be able to provide better benefits later. *Id.* at 961. Although the employer told another employee that it would look into providing more holidays, it later stated that it would not do so. *Id.* That case is distinguishable because Berryhill, in contrast, assured several employees that "they" were working on their concerns and changes were in "progress." (A.11; Tr.341.)

Berryhill committed yet another violation just a week before the December 16 election, when he told employees that the Company had adjusted their grievances by demoting Team Leaders Grobler and Manbahal. In the preceding months, technicians—responding to Berryhill's solicitations—had complained about working with those individuals. (*See* p. 11.) However, he waited until right before the election to redress them. Thus, on about December 9, he held an impromptu meeting to inform employees that, "as we told you, we were going to fix some of the problems in the dealership . . . and some complaints that we have received from [you]." He added that this was "the beginning of fixing [your] problems." (A.16; Tr.355-56, 498-99.) Having thus primed employees to see that

he was redressing their grievances shortly before the election, Berryhill announced that Grobler and Manbahal were no longer team leaders. He stated that the decision was because of numerous employee complaints about the Team Leaders. (Tr.355, 499.) This evidence, including the timing and wording of the announcement just before the election, shows (A.16) that Berryhill acted in a manner that would reasonably tend to induce employees to abandon their support for the Union, in violation of Section 8(a)(1).

Contrary to the Company's contention (Br.58), it is irrelevant whether the demotions themselves were lawful. The violation consists of telling employees the demotions were implemented to adjust their grievances. Nor can the Company show (Br.58) that Berryhill merely addressed employee concerns that "predated any hint" of union activity. Rather, he waited until right before the union election, and worded his announcement to remind employees that he was redressing, and would continue to address, their grievances. Thus, the Company cannot show (Br.60) that employees viewed his announcement as "unconnected to the Union campaign."

4. Company Vice President Davis unlawfully interrogated employee Persaud

Substantial evidence, including Persaud's credited and essentially unrebutted testimony, shows that AutoNation Vice President Davis unlawfully interrogated him. Thus, in early December, shortly before the election, Davis, a high ranking

company official, approached Persaud—who had not openly supported the Union—in his working area and asked him point blank how he "felt about the election?" Persaud replied that "the Company is going to learn I think we have a good chance." (A.15; Tr.588.) Davis' question demanded a response from a subordinate who had thus far purposefully exercised his right to keep his union sentiments secret. This gave Persaud a "Hobson's choice" of ignoring a senior official's direct question, lying to that official, or revealing his union sympathies. These circumstances amply support the Board's finding (A.15) of unlawful interrogation.

The Company asserts (Br.57-58) that Davis' questioning of Persaud was "brief" and "innocuous." This wrongly ignores the context of a high-ranking official confronting an employee about his union views shortly before the election. Nor did Davis specifically deny (Tr.1029, 1053-54) that this interaction occurred, as the Company wrongly suggests (Br.57). Rather, Davis denied interrogating other employees, but did not specifically deny the conversation with Persaud.[5]

[5] The Board (A.4 n.4) declined to address the judge's finding that Davis had also unlawfully solicited employee grievances, because any such finding would have been cumulative. Thus, that issue is not before the Court even though Company raises it (Br.56.)

5. The Company unlawfully issued a documented coaching to Catalano

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) by issuing a documented coaching to employee and union steward Catalano because of his protected, concerted activities involving a presentation by a health department official. The Company does not dispute that it issued the coaching because of his conduct during the presentation. Instead, it primarily argues (Br.48-51) that he acted in a manner that forfeited the Act's protection. This claim fails.

As shown at p. 15, after Catalano observed a coworker leaving the restroom without washing his hands, he first spoke to other employees about their health concerns, and then with Sales Manager Menendez, who contacted the county health department. A health department representative then made presentations to employees, focusing on the H1N1 virus. In response to the speaker's invitation for questions, Catalano commented that she had not addressed the employees' concerns about coworkers failing to wash their hands after using the restroom. He added, this was "not the meeting we were looking to have." (A.5; Tr.556.) The Company issued Catalano a documented coaching for those comments.

The Board reasonably determined (A.5) that Catalano's conduct was protected and concerted, and therefore that the Company could not lawfully discipline him for it. His complaints were clearly protected, particularly in light of

his status as a union steward, because they were for the employees' mutual aid and protection. Specifically, he addressed their concerns about working conditions, namely, on-the-job hygiene. *See generally NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (employees engage in protected concerted conduct by raising health and safety issues). Contrary to the Company's claim (Br.49), it is irrelevant that he addressed his comments to a public official. As the Board explained (A.5), what matters is that his remarks—voiced at a meeting organized and attended by management—furthered the employees' shared concerns over workplace sanitation, which is plainly a term and condition of employment.[6]

As the Board reasonably found (A.5), the documented coaching was unlawful because it would tend to inhibit an employee from engaging in further protected, concerted conduct. *See, e.g., Lancaster Fairfield Comm. Hosp.*, 311 NLRB 401 (1993) (employer violated Section 8(a)(1) by issuing a conference report that would restrict employee's protected right to criticize management). The Company therefore gains no ground in suggesting (Br.48) that the coaching was "non-disciplinary."

The Company fails to show (Br.48-51) that Catalano behaved in a manner that forfeited the Act's protection. In determining whether conduct is so

[6] Moreover, the Company conveniently forgets that the health department presentation occurred only because Catalano engaged in protected concerted conduct by raising the employees' health concerns to management.

"opprobrious" as to lose the Act's protection, the Board considers the place and timing of the discussion, its subject matter, the nature of the employee's outburst, if any, and whether it was provoked by the employer's unfair labor practices. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). Under this test, Catalano's conduct did not come close to forfeiting the Act's protection.

To begin, the place and timing of the discussion weighs in Catalano's favor. The meeting took place in a non-work area and did not cause any disruption of work. The Company chose the location as an appropriate one to discuss the health issue previously raised by Catalano on behalf of coworkers. And Catalano spoke only when the speaker invited questions. Thus, his conduct is nothing like the public "misconduct" cases cited by the Company (Br.51).

Moreover, the subject matter of the discussion—hygiene concerns affecting all employees at MBO—weighs heavily in Catalano's favor. As shown, Catalano's efforts were intended to protect employee health. There is, therefore, no support for the Company's claim (Br.51) that the subject was not employee health concerns, but Catalano's criticism of a public official.

Further, there was no "outburst," contrary to the Company's claim (Br.50). Merely speaking loudly, or even making "intemperate" remarks (Br.50), while engaging in protected activity will generally not deprive an employee of the Act's protections. *See Kiewit Power Constr. Co. v. NLRB*, 652 F.3d 22, 28-29 (D.C. Cir.

2011) (employee's statement that supervisor "better bring his boxing gloves" did not forfeit the Act's protection). It is undisputed that Catalano did not use any profanity or make any derogatory remarks during the encounter with the health department representative. He spoke only after the representative invited questions, and even Menendez admitted that the representative did not complain about Catalano's behavior. (Tr.1143-44.) Accordingly, the evidence hardly supports the Company's assertion (Br.51) that Catalano engaged in a "tirade" that was "rude."

Finally, although Catalano's comments were not provoked by the Company's unfair labor practices, and this factor weighs neither for nor against him, it is worth repeating that he spoke only when invited to do so. In sum, the Company fails to show that Catalano's concerted conduct, which plainly addressed a term and condition of employment, exceeded the Act's protections. The Company therefore violated the Act by disciplining him for his conduct.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY DISCHARGED ROBERTS BECAUSE OF HIS UNION ACTIVITIES

A. The Act Prohibits Employer Discrimination Against Employees for Engaging in Protected Union Activity

Under Section 8(a)(3) of the Act—which prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment . . . to discourage membership in any labor organization," 29 U.S.C. § 158(a)(3)—it is

unlawful to discharge an employee because of his union activities. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005). A Section 8(a)(3) violation derivatively violates Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

In determining whether an employer's action is unlawful under Section 8(a)(3), the critical question is its motivation. *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 180 (7th Cir. 1994). The Supreme Court approved the Board's test for resolving this question in *Transportation Management*, 462 U.S. at 397, 401-03. *See Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that the employees' union activity was "a motivating factor" in the employer's decision to take an adverse action, the Board's conclusion that the decision was unlawful must be affirmed, unless the record, considered as a whole, compelled the Board to accept its affirmative defense that it would have made the same decision even in the absence of the union activity. *Transp. Mgmt.*, 462 U.S. at 401-03; *accord FedEx Freight East*, 431 F.3d at 1025.

Because an employer will rarely concede an unlawful motive, the Board may infer discriminatory motivation from circumstantial as well as direct evidence.

NLRB v. So-White Freight Lines, Inc., 969 F.2d 401, 408 (7th Cir. 1992). Such evidence can include the employer's knowledge of its employees' union activity, manifestations of union animus, suspicious timing, and the contemporaneous commission of other unfair labor practices. *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000); *NLRB v. Shelby Mem. Hosp. Ass'n*, 1 F.3d 550, 562 (7th Cir. 1993); *Abbey's Transp. Serv., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988). Other circumstantial evidence includes departure from past practice and reliance on implausible or shifting explanations for the adverse action. *Shelby Mem. Hosp.*, 1 F.3d at 562; *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Further, the Board is under no obligation to accept at face value an employer's asserted explanation "if there is a reasonable basis for believing it 'furnished the excuse rather than the reason for [its] retaliatory action.'" *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted). Indeed, "the policy and protection of the [Act] does not allow the employer to substitute 'good' reasons for 'real' reasons when the purpose of the discharge is to retaliate for an employee's concerted activities." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969).

B. The Board Reasonably Found that the Company Discharged Roberts Because He Supported the Union

The Company's avowed union animus, its knowledge of Roberts' union activities, and the "stunningly obvious" timing of his discharge—just eight days before the election—strongly support the Board's finding (A.21) that the Company discharged him because he supported the Union. *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982). Indeed, this Court has noted that "timing alone" can support an inference of unlawful motive. *Rain-Ware, Inc.*, 732 F.2d at 1354.

The Company does not seriously dispute that its many violations of the Act (*see* pp. 19-36) provide an ample evidentiary basis for the Board's animus finding. This includes Berryhill's attempt to nip the union campaign in the bud by unlawfully interrogating Roberts and others about the campaign, soliciting their grievances, and impliedly promising to fix them even before the Union had filed its petition. (*See* pp. 27-31.)

The Board also had ample grounds for finding that the Company knew of Roberts' union activities. Roberts supported the Union from the outset, and given Berryhill's selection of him as the first employee to question about the campaign, the Board reasonably inferred that Berryhill already viewed him as a union advocate. (A.21; pp. 7-9.) Further, as employee Weiss credibly testified, he told

Berryhill that Roberts was a leading union advocate, and Berryhill tagged Roberts as a "troublemaker." (A.21; Tr.652-54, 808-10.)

The Company fails to show (Br.27-30) that any "extraordinary circumstances" (*see* p. 18) warrant disturbing the judge's sound decision to credit Weiss' testimony on these points. After all, Berryhill acknowledged communicating frequently with Weiss about the union campaign, and he did not specifically deny that Weiss reported Roberts as a union instigator. (A.20; Tr.1459, 1539-41.) The judge (A.20; Tr.1443) also properly gave little weight to Berryhill's carefully circumscribed testimony that Roberts had not demonstrated union support in his "presence," which begs the question whether he was otherwise aware of Roberts' union activities. Further, Berryhill's denial of such knowledge was undermined by his lack of candor as to when he first learned of the union campaign, which, the Board reasonably found (A.10; Tr.141-45, GCX175), "weigh[ed] heavily against his credibility."

While the Company makes much (Br.28-29) of the judge's discrediting Weiss' testimony about other events, "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). In any event, as shown, Berryhill also revealed his knowledge of Roberts' union activities by making him the first target

for interrogation. Thus, the Board's finding of knowledge is not, as the Company claims (Br.29-30), grounded solely in Weiss' testimony, which the Board reasonably credited.

C. The Record Does Not Compel the Conclusion that the Company Would Have Discharged Roberts Absent His Union Activities

Given the blatantly pretextual nature of the Company's asserted reasons for discharging Roberts, and its heavy reliance on testimony that the judge reasonably discredited, the Company cannot meet its burden of proving it would have discharged him even absent his union activities. Thus, it relies (Br.31) on Berryhill's discredited assertion that Roberts was discharged because Service Director Bullock and Team Leader Makin—neither of whom testified (A.21)—believed he had the least mastery of diagnostic skills, and had shown no real interest in furthering his skills. The Board, however, reasonably rejected this claim (A.20-21) because it is unsupported by record evidence, founded on unreliable testimony, and otherwise suspect.

As an initial matter, the Board reasonably viewed with skepticism Berryhill's complete failure to offer Roberts any reason for laying him off permanently while retaining less-senior, lower-rated technicians. Instead, Berryhill merely said it was because of "downsizing." (A.21; *see* p. 11.) This non-explanation stands in stark contrast to Berryhill's later claim that he discharged Roberts for his purported lack of diagnostic skills. *See* cases cited above at p. 38

(employer's reliance on shifting or unsupported explanations supports finding of pretext).

The lack of contemporaneous explanation is especially suspicious because the Company singled out Roberts even though he had seniority over 14 employees; he had a B+ skill rating, which was higher than 9 employees; and his documented productivity (in terms of "booked hours") was higher than that of 19 technicians. (A.21; *see* p. 10.) Yet, when Roberts protested that he had seniority over half the shop, Berryhill simply replied, "we're just laying people off." (Tr.902-04, 935.) And when Roberts observed that the Company had previously followed a practice of last hired, first fired, Berryhill erroneously stated that was a lie. In fact, the record shows that before getting rid of Roberts, the Company had used seniority as a factor in selecting employees for staff reductions. (A.21; Tr.304, 902-04, 935, GCX108.) As the Board aptly observed (A.21), the Company's decision to ignore its prior practice and lay off a senior employee with superior experience and proficiency supports the inference that the real reason for the action was an unlawful one. *See* cases cited at p. 38 (employer's departure from past practice and reliance on pretextual explanations supports inference of unlawful motive).

Nor could the Company credibly explain its failure to compare Roberts with other technicians when, around the same time, it made employee-to-employee comparisons in selecting tire technicians Crossland and Frias for layoff in part

because of their relatively low productivity and fewer booked hours. (A.21; GCX69 at p.2, Tr.1556-60.) Noting this disparity, the Board reasonably inferred (A.21) that the real reason why the Company did not compare Roberts with others was that, if it had, it would not have selected him for layoff given his superior seniority, skill rating, and documented productivity.

Further, the Company's defense must fail because the record, including its own documents, negates Berryhill's claim (Br.31) that Roberts lacked diagnostic skills and a demonstrated desire to improve. As the Board explained (A.21), there is no evidence that Roberts was counseled or otherwise notified of any deficiencies in his skills. Moreover, his productivity—he had more "sold hours" than several technicians who were retained—shows that he had no shortfall. His most recent evaluation (from August 2007) rated him as "on target" with regard to skills, and states that he "works hard to get the job done correctly." (A.21; RX7.) And, as noted, contrary to the Company's assertion that Roberts was the least skilled, 9 other technicians had lower skill ratings. At bottom, Berryhill conceded that Roberts was a "good" technician, but maintained that someone had to be let go. (A.21; Tr.1439.) This, of course, begs the question: why did he choose Roberts to be that someone? It is a question to which the Company provided no credible answer, other than its demonstrated union animus.

At the end of the day, the Company's defense fails because it is founded on Berryhill's unreliable testimony (A.10, 20-21; *see* p. 40), which was also suspect because, while he claimed that he consulted with Team Leader Aviles before discharging Roberts, Aviles denied any involvement. (A.21; Tr.166, 168, 1333.) With Berryhill's unreliable explanations properly discredited, the Company has nothing to prove it would have laid off Roberts for legitimate, non-discriminatory reasons even absent his protected union activities. Thus, the Court should affirm the Board's finding that the layoff was unlawful.

III. The Company Violated Section 8(a)(5) and (1) of the Act by Laying Off Employees and Making Changes to Their Terms and Conditions of Employment Without Notifying or Bargaining With the Union, and By Refusing To Provide Requested, Relevant Information

As this Court recognizes, "[w]hen a union wins an election to be the exclusive bargaining representative of a group of workers, the employer becomes duty-bound to bargain in good faith . . . ." *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 996 (2000). This obligation arises from Section 8(a)(5) of the Act, which makes it unlawful for an employer to "refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5).[7] *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). Moreover, Section 8(d) of the Act defines "the duty to bargain collectively" as meeting "at reasonable times

[7] An employer that violates Section 8(a)(5) also commits a "derivative" violation of Section 8(a)(1). *See* p. 37.

and confer[ring] in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). Bargaining is mandatory for subjects falling within that statutory language, *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958), and an employer violates the Act by changing a mandatory term and condition of employment without bargaining. *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962). An employer's duty to bargain includes an obligation to provide the employees' representative with requested information that is relevant to its representational duties. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-37 (1967).

The Board found (A.25-27) the Company violated its duty to bargain with the Union in 2009 by unilaterally laying off employees and changing their terms and conditions of employment, and by failing to provide the Union with relevant requested information. We first show that because the Company fails to establish that it had no duty to bargain until August 23, 2010, it was not free to make the unilateral changes and refuse the information request with impunity in 2009. Next, we show that the Board's failure-to-bargain findings are well-supported and should be affirmed.[8]

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[8] The Company does not dispute that it unlawfully failed to provide the Union with relevant, requested information in April and September 2009 (*see* A.27; p. 14, above), assuming it had a duty to bargain at that time. The Court should therefore affirm that finding if it agrees that the Company's bargaining obligation attached by that time.

A. The Company's Bargaining Obligation Attached as of the December 16, 2008 Election

As the Board explained (A.25), settled law holds that absent "compelling economic circumstances" not present here, an employer's bargaining obligation commences on the date of the union's election victory—in this case, December 16, 2008. *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975); *accord Advertisers Mfg. Co. v. NLRB*, 677 F.2d 544, 547 (7th Cir. 1982); *NLRB v. Sandpaper Convalescent Ctr.*, 824 F.2d 318, 320-21 (4th Cir. 1987). Thus, an employer acts "at its peril" in making unilateral changes while election objections are pending and before a final determination has been made in the Board's representation case. *Mike O'Connor Chevrolet*, 209 NLRB at 703. There is good reason for this rule: otherwise, the employer could undermine the employees' chosen representative and "box the union in on future bargaining" by making unilateral changes while election challenges are pending. *Id.*

At bottom, the Company (Br.34) bases its opposition to this settled rule on its belated claim that, in the separately litigated representation proceeding (*see* p. 12), the Regional Director erred in directing the opening and counting of three outcome-determinative challenged ballots. As shown below, however, the Company did not contest his action in the representation case, and it most certainly cannot collaterally attack here the final judgment of the Eleventh Circuit enforcing

the Board's technical refusal-to-bargain order. *See Contemporary Cars, Inc.*, 355 NLRB 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). In any event, contrary to the Company (Br.38), even if the Regional Director had temporarily impounded the ballots and delayed their tallying, under settled precedent applying *Mike O'Connor Chevrolet*, the Company still would have had to bargain as of the date on which the Union won the election. Finally, the Company errs in asserting (Br.36-37) that when the Board stated in *Contemporary Cars, Inc.*, 355 NLRB at 592 n.4, that it would deem the Union's certification of representative to have issued on August 23, 2010, it meant that date, rather than the election date, triggered the Company's duty to bargain.

1. In Claiming It Had No Duty To Bargain Before 2010, the Company Mounts an Improper Collateral Attack Based on a Procedural Challenge It Waived in the Representation Proceeding

In asserting (Br.34) that it had no duty to bargain before 2010, the Company essentially makes an impermissible collateral attack on a procedural action taken in the separately litigated representation proceeding, which culminated in a final judgment and mandate issued by the Eleventh Circuit. That court resolved with finality all of the Company's timely raised claims regarding any alleged irregularities in the underlying representation proceeding. Adding insult to injury, in the representation proceeding, the Company did not even make the procedural

challenge it inappropriately presses here—as the Board itself noted in *Contemporary Cars, Inc*., 355 NLRB at 592 n.3.[9]

The very function of a court's mandate is to signal that the appellate process in the technical refusal-to-bargain case has reached its conclusion. *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941) ("a single trial" on issues arising from a Board election is "enough"). As the Supreme Court has explained, the purpose of the rule ensuring finality of judgments is that "there should be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). The Company provides no reason for this Court to take the highly unusual step of disturbing the Eleventh Circuit's final judgment.

This is particularly so where, as here, the Company waived its procedural claim by failing to raise it in the representation proceeding, and, as shown below pp. 50-52, the claim is baseless. In a nutshell, the Company belatedly contests (Br.34) the Regional Director's opening and counting of challenged ballots. It has

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[9] Specifically, in the representation proceeding, no party filed a request for Board review of the Regional Director's supplemental decision directing the opening and counting of the challenged ballots. *See Contemporary Cars, Inc.*, 355 NLRB at 592 n.3. Instead, the only request for review filed by the Company involved its pre-election challenge to the appropriateness of the bargaining unit. *See Contemporary Cars, Inc. v. NLRB*, 667 F.3d at 1367, 1370-73.

long been recognized, however, that absent special circumstances not present here, a party may not litigate, in a technical refusal-to-bargain case, issues that could have been raised in the underlying representation proceeding. *Pittsburgh Plate Glass Co.*, 313 U.S. at 162. Accordingly, if the Company had wanted to preserve issues for review by the Eleventh Circuit, it would have had to raise them in the representation proceeding. *See Pace Univ. v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008) (collecting cases); *accord Cast N.A. (Trucking) Ltd. v. NLRB*, 207 F.3d 994, 999 (7th Cir. 2000). This settled rule accords with the basic principle that "[s]imple fairness" requires "that courts should not topple over administrative decisions unless the administrative body . . . has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952).

Here, the Company could have, but did not, challenge in the representation proceeding the Regional Director's decision to open the ballots. Notably, although his decision apprised the Company of its right to file a request for review with the Board, the Company failed to do so, choosing instead to first raise its claim in the instant unfair-labor-practice case—an entirely inappropriate forum.[10]

[10] The Company provides no explanation for failing to raise its challenge at the proper time. Thus, while it claims (Br.34, 36) that "the ballots should never have been opened in the first place," it has no one to blame but itself.

2. Even If the Company Had Timely Raised and Prevailed on Its Claim that the Ballots Should Have Remained Impounded, Its Duty To Bargain Still Would Have Attached Upon the Union's Election Victory

The Company's position before this Court is particularly pointless because even if it had raised and prevailed, in the representation proceeding, on its claim that the ballots should have been impounded until August 23, 2010, its duty to bargain would still have been triggered by the Union's December 2008 election victory. If the ballots had been impounded, then the situation would have been like others where determinative ballots are sealed until resolved. In such cases, the Board and the courts have held, pursuant to *Mike O'Connor Chevrolet*, that if the tally of ballots ultimately establishes the Union's victory, then the duty to bargain attaches on the date of the election—not, as the Company claims, on the date the ballots were opened. Thus, in *Han-Dee Pak*, 253 NLRB 898, 898 & n.3 (1980), the Board, relying on *Mike O'Connor Chevrolet*, concluded that the employer acted at its own peril in making unilateral changes during the two-year period between the election and the date when the ballot challenges were resolved and the election outcome finally determined. Other cases have reached the same result. *See, e.g.*, *NLRB v. 675 West End Owners Corp.*, 304 F. App'x 911 (2d Cir. 2008); *NLRB v. Westinghouse Broadcasting & Cable, Inc.*, 849 F.2d 15, 17-18, 20-22 (1st Cir. 1988); *accord Ramada Plaza Hotel*, 341 NLRB 310, 316 (2004). To hold otherwise would allow the Company to cause the harm that the Board sought to

prevent in *Mike O'Connor Chevrolet*—namely, "box[ing] the union in on future bargaining positions by [unilaterally] implementing changes." 209 NLRB at 703.

Nor does this case present "unique" circumstances (Br.34-38) that would warrant departing from this settled rule. As the Board observed (A.25), the Company, represented by experienced labor counsel, was fully aware that it would act at its peril if it made unilateral changes after the Union won the election. Moreover, as the Board noted in *Contemporary Cars, Inc.*, 355 NLRB at 592, and again in its December 7, 2012, order denying the Company's motion for reconsideration in this case, there is no dispute that the election was properly conducted and the tally of ballots reliably established that the employees had freely chosen the Union as their representative. In these circumstances, allowing the Company to unilaterally lay off employees and change their working conditions would negate their choice.

Contrary to the Company's suggestion (Br.35-36, 38), no unique circumstances were created by the Supreme Court's holding in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), that the two-member Board lacked the authority to issue decisions. Rather, as the Board explained (A.25), the situation here is similar to those where a court of appeals remands a technical refusal-to-bargain case to the Board. In such cases, the Board, applying *Mike O'Connor Chevrolet*, has held that an employer acts at its peril in making unilateral changes

during the period between the election and the union's certification following resolution of issues remanded by the court. *See, e.g.*, *Indiana Hosp.*, 315 NLRB 647, 648 n.3, 655 (1994).

3. The Board's 2010 Order Did Not Alter the Company's Duty To Bargain as of the December 2008 Election

The Company errs in asserting (Br.36) that the Board's August 23, 2010 Decision and Order in the technical refusal-to-bargain case, *Contemporary Cars, Inc.*, 355 NLRB 592, implicitly recognized that the Company was operating under a prospective duty to bargain only from the date of that decision. As the Board explained in its 2012 Decision and Order here (A.25), and reiterated in its order denying the Company's motion for reconsideration, it would not have departed from the long-established *Mike O'Connor Chevrolet* rule without explicitly saying so. And, as the Board further explained (A.25), if it had intended to signify that there was no bargaining obligation before August 23, 2010, it would have made the point expressly. Instead, in its August 23, 2010 Decision and Order, the Board merely stated that August 23 would be the date of the Union's *certification* "to the extent it may be relevant in future proceedings."[11] 355 NLRB at 592 n.4. After all, the date on which a union is certified does not determine the date on which it is entitled to recognition. Instead, as noted in cases like *Nova Plumbing, Inc. v.*

[11] Contrary to the Company's suggestion (Br.36), the instant case is not a "future" proceeding. It has been pending since at least March 31, 2010, when the initial complaint issued. (A.25.)

NLRB, 330 F.3d 531 (D.C. Cir. 2003), the certification date has different implications, such as setting the period of time during which a union's newly acquired majority status may not be challenged by a decertification petition. *Id.* at 534.

In sum, the Company was obligated to bargain with the Union as of December 16, 2008. As we now show, the Board reasonably found the Company thereafter violated its duty to bargain in several respects.

B. The Company Violated its Duty To Bargain by Unilaterally Laying Off Four Employees in April 2009

1. No compelling economic circumstances privileged the unilateral layoffs

Layoffs are indisputably a mandatory subject of bargaining. *See NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987). The Company admits unilaterally laying off four employees in April 2009, but claims (Br.39-41) its failure to bargain was excused by compelling economic circumstances. To support this claim, it cites (Br.39) a drop in business in late 2008 and 2009.

As the Board explained, however, it is settled that a drop in business does not itself rise to the level of an economic exigency or compelling economic circumstances necessary to privilege unilateral changes. (A.25, citing *Uniserv*, 351 NLRB 1361, 1369 (2007)). *Accord Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 997 (7th Cir. 2000) (describing the exception as requiring immediate action in order to "stave off disaster"); *Mike O'Connor Chevrolet*, 209 NLRB at

703 (phrasing the exception as requiring a showing of "compelling economic circumstances"). Further, a compelling economic circumstance justifying a refusal to bargain over a layoff decision must be "an unforeseen occurrence having a major economic effect . . . that requires the company to take immediate action." *Angelica Healthcare Servs. Group*, 284 NLRB 844, 853 (1987)); *accord Duffy Tool*, 233 F.3d at 997. *See also Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 340 (2d Cir. 2008); *Pleasantville Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755-56 (6th Cir. 2003); *Hankins Lumber*, 316 NLRB 837, 838 (1995) (all citing *Angelica* with approval).[12]

As the Board reasonably found (A.25), there was nothing unforeseen here. The Company had admittedly experienced declining sales and reduced income for several months prior to the layoffs. (A.25; Tr.1204, GCX 96-105.) Indeed, as early as February, Service Director Bullock had informed the team leaders that they should start thinking about identifying two members of each team for separation. (A.25; Tr.1342-43.) He repeated that warning in March. Thereafter, pursuant to discussions fostered by Team Leader Aviles, an alternate method of

[12] The Company observes (Br.41) that *Angelica* relied on *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), which was denied enforcement by the Sixth Circuit, 736 F.2d 343, 349 (1984). However, the court did not address whether the circumstance therein was unforeseen, much less reject the relevance of that inquiry to an analysis of exigent circumstances. Rather, the court simply remanded the case to the Board to determine the meaning of the parties' stipulation that the unilateral change was due to "business necessity." And, as shown, the Sixth Circuit subsequently cited *Angelica* with approval in *Pleasantville Nursing*.

selection was developed. (A.25; Tr. 1344-47.) This was, therefore, hardly an unforeseen event. And, as many months passed by, the Company did not behave as though immediate action was required. Although the Company also claimed (A.25; Tr.1581) it needed to act quickly in order to keep its best employees from quitting for lack of work, it failed to show that any such departures were imminent. In sum, it cites no economic exigency or compelling economic circumstances to justify its failure to notify and bargain with the Union over the layoffs.

The Company gains no ground in claiming (Br.40-41) that the Board analyzed the evidence under an "economic exigency" standard that is purportedly "stricter" than the one articulated in *Mike O'Connor Chevrolet*, which phrases the inquiry as whether "compelling economic considerations" relieved the employer of its bargaining obligation.[13] 209 NLRB at 703. As shown above, the Board correctly applied the judicially-approved standard, which uses those terms interchangeably. *See, e.g.*, *Pleasantville Nursing Home, Inc.*, 351 F.3d at 755-56 (discussing "economic exigency" and "compelling economic considerations" as variants of same test); *Uniserv*, 351 NLRB at 1369 (same). In any event, the Company fails to show how utilizing one phrase over the other would have led to a

[13] The Company also errs in positing (Br.41) that it should be easier for an employer facing a newly elected union to institute unilateral changes if it has completely refused to bargain than if it has at least commenced bargaining. Neither law nor logic justifies such a disparity.

different result here, given the complete absence of any "compelling economic considerations" or "economic exigency."

2. The Board did not abuse its broad remedial discretion by ordering the Company to reinstate the unlawfully laid-off employees with backpay

The award of reinstatement and backpay are the Board's standard, court-approved, remedies when an employer violates Section 8(a)(5) by unilaterally laying off employees. *See Adair Standish Corp. v. NLRB*, 912 F.2d 854, 865 (6th Cir. 1990); *Uniserv*, 351 NLRB 1361, 1362 (2007); *Alpha Assoc.*, 344 NLRB 782, 787 (2005), *enforced*, 195 F. App'x 138 (4th Cir. 2006); *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952 (1988). *Sunstrand Heat Transfer, Inc. v. NLRB*, 538 F.2d 1257 (7th Cir. 1976), cited by the Company (Br.42), is not to the contrary. The case involved the exception to the *Mike O'Connor Chevrolet* rule permitting unilateral action based on compelling economic considerations. After holding that the employer was not required to bargain over layoffs that had indisputably resulted from compelling economic considerations, the *Sunstrand* court concluded that it was not appropriate to award backpay to the laid-off employees. *Id.* at 1259-60. That holding has no application here, given the Board's reasonable finding that the layoffs were *not* compelled by economic necessity. Thus, *Sunstrand* simply does not speak to the proper remedy here,

where the Board found that the employer was obligated to bargain over its layoff decision.[14]

C. The Company Violated Its Duty To Bargain by Unilaterally Suspending Skill-Level Reviews

The Company (Br.45) offers no grounds for overturning the Board's well-supported finding (A.25-26) that it violated the Act by unilaterally suspending employees' skill-level reviews, which delayed promotions and pay raises for Meyer and up to four other employees.[15] (A.25; Tr.1426.) It is undisputed that evaluations and resulting promotions are mandatory bargaining subjects. *See Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 880 (7th Cir. 2011). The Company admits (Br.45), as did Berryhill (Tr.1426, 1569), that skill-level reviews, which should have been performed in January/February and again in June/July (GCX86), were suspended in early 2009 and not resumed until at least late spring of that year. And the Company admittedly did not notify or bargain with the

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[14] It follows that the Company errs in relying (Br.42) on *Sunstrand* where it states, *id.* at 1260, that the award of backpay would have been inappropriate even if there had been a duty to bargain over only the *effects* of the layoffs. That principle is inapplicable where, as here, the Company was obligated to bargain over the actual layoff decision. *See Alpha Assoc.*, 344 NLRB at 787. In those circumstances, the proper remedy is reinstatement and backpay. *Id.*

[15] The Company does not separately dispute the Board's determination (A.26) that it should be determined at a subsequent Board compliance hearing whether the four other technicians who received promotions when reviews were resumed in 2009 had their promotions delayed as result of the absence of timely reviews.

Union before taking that action. (Tr.320.) Accordingly, the Company violated the Act by unilaterally suspending skill-level reviews, which thereby delayed or denied promotions and raises to employees who would have received them had the reviews been timely conducted.

The Company misses the mark in objecting (Br.45) that its decision to forego reviews was unrelated to the Union. Motive and union animus have no bearing on whether an employer has unlawfully failed to notify and bargain with the union before changing employment terms. *NLRB v. Allied Prods. Corp.*, 548 F.2d 644, 652 (6th Cir. 1977) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)). The Company also errs in speculating (Br.45) that no technician was impacted by its unilateral suspension of reviews because a wage freeze was in effect. As Berryhill admitted (A.26; Tr.1426), the freeze did not bar promotions and the raises that automatically accompanied skill-level reviews. Further, reviews put employees on notice of perceived deficiencies; hardly the triviality the Company makes it out to be (Br.46).

D. The Company Violated Its Duty To Bargain by Unilaterally Reducing Pay for Pre-Paid Maintenance Work

The Company likewise fails to undermine the Board's finding (A.26-27) that it acted unlawfully by unilaterally reducing technicians' wages and hours when performing pre-paid maintenance services. It is undisputed that in February 2009, the Company distributed a document reflecting a reduction of the hours that

employees would be paid for such work, from 1.2 to 1.1 hours for Flex A service, and from 4.2 to 2.3 hours for Flex B service. (A.26; Tr.373-74, 376-77, GCX155.) The Company admitted that this change in allotted times lowered the earnings of technicians when they were performing pre-paid maintenance work. (A.27; Tr.1146.) It is beyond dispute that such changes to wages are mandatory bargaining subjects. The Company admittedly did not notify or bargain with the Union before making this change. It follows that the change was unlawful.

Contrary to the Company's contention (Br.46), it is of no moment whether it purportedly acted unilaterally to "correct a discrepancy" in payment for certain services, and was not "motivated by anti-union animus." *See* p. 58. The Court also should not be detained by the Company's speculation (Br.47) that the change was "neutral as to technicians' pay" because their time was "freed up to perform other services at standard rates." As shown, the change in allotted times lowered the earnings of technicians *when* they were performing pre-paid maintenance work. In sum, the Company altered the way technicians were paid without bargaining with the Union—an unlawful unilateral change.

CONCLUSION

For the foregoing reasons, 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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National Labor Relations Board
April 2015

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONTEMPORARY CARS, INC. doing business as MERCEDES-BENZ ORLANDO and AUTONATION, INC., SINGLE AND JOINT EMPLOYERS	*	
Petitioners/Cross-Respondents	*	Nos. 14-3723 15-1187
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 12-CA-26126
Respondent/Cross-Petitioner	*	
and	*	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,502 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, DC
this 29th day of April , 2015

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that on April 29, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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