14-4028-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SPRAIN BROOK MANOR NURSING HOME, LLC

Respondent

ON APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

FINAL BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, a Board Order finding that Sprain Brook Manor Nursing Home, LLC ("Sprain Brook") committed numerous unfair labor practices during negotiations with 1199 SEIU United Healthcare Workers East ("the Union") for an initial collective-bargaining agreement. The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the

National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)). The unfair labor practices were committed in Scarsdale, New York.

The Board's Order issued September 29, 2014, and is reported at 361 NLRB No. 54. (JA 255-58.)[1] It is a final order under Section 10(e) of the Act.[2] The Board filed its application for enforcement on October 24, 2014. The application was timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's findings that Sprain Brook violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisal for seeking assistance from the Union and threatening an employee that if she sought union representation she would not receive payments owed to her in connection with a prior unfair-labor-practice case.

2. Whether substantial evidence supports the Board's finding that Sprain Brook violated Section 8(a)(3) and (1) of the Act by discharging employee

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[1] Record references in this final brief are to the Deferred Joint Appendix ("JA"). "Br." references are to Sprain Brook's opening page-proof brief to this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] 29 U.S.C. § 160(e).

Catherine Alonso and suspending and discharging employee Karen Bartko because of their support for the Union.

3. Whether substantial evidence supports the Board's finding that Sprain Brook violated Section 8(a)(5) and (1) of the Act by changing bargaining-unit employees' terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

CONCISE STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by the Union, the Board's Acting General Counsel issued a complaint alleging that Sprain Brook committed numerous unfair labor practices during negotiations for an initial collective-bargaining agreement. (JA 4; 199-205, 210-17, 221-23.) After a hearing, the administrative law judge found that Sprain Brook committed the alleged violations. (JA 4-20.) Finding no merit to Sprain Brook's exceptions to the judge's decision, on April 26, 2013, a three-member panel of the Board (Chairman Pearce and Members Griffin and Block) affirmed the judge's rulings and conclusions and adopted the judge's recommended order with some modifications to the remedy. (JA 1-4.) Sprain Brook petitioned the D.C. Circuit for review of that order (D.C. Cir. No. 13-1175). On May 21, 2013, the court placed the case in abeyance "[u]pon consideration of the court's opinion and judgment issued January 25,

2013, in No. 12-1115, et al. - *Noel Canning, a Division of the Noel Corporation v. NLRB*."[3]

On June 26, 2014, the Supreme Court held in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), that three recess appointments to the Board in January 2012 were invalid, including the appointments of Members Griffin and Block. On August 26, 2014, the D.C. Circuit, granting the Board's motion, vacated the 2013 Decision and Order and remanded the case to the Board for further consideration in light of *Noel Canning*.

On September 29, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Schiffer) issued the Decision and Order (361 NLRB No. 54) now before this Court, finding that Sprain Brook violated Section 8(a)(1), (3), and (5) of the Act "to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 105, which is incorporated herein by reference." (JA 255.) That 2014 decision declined to rely on two cases cited in the 2013 decision; it also further modified the remedy recommended by the administrative law judge. (JA 255 nn.1, 2.)

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[3] Order, *Sprain Brook Manor Nursing Home v. NLRB*, No. 13-1175 (D.C. Cir. May 21, 2013) (Doc. # 1437188).

II. THE BOARD'S FINDINGS OF FACT

A. Sprain Brook's Operations and History of Unfair Labor Practices

Sprain Brook operates a nursing home in Scarsdale, New York. (JA 4.) In 2006, after a Board-conducted election, the Board certified the Union as the exclusive collective-bargaining representative in a unit of non-professional employees including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees, dietary aides, and cooks. (JA 4-5.) Sprain Brook refused to bargain with the Union in order to test the validity of its certification. The Board granted the General Counsel's motion for summary judgment finding that Sprain Brook violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and ordered Sprain Brook to bargain.[4] (JA 5.)

In 2007, the Board found that Sprain Brook committed additional unfair labor practices including:

- Photographing and placing employees under surveillance while they engaged in protected concerted activity;
- Threatening employees with more onerous working conditions;
- Threatening to cut overtime;
- Interrogating employees;

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[4] *Sprain Brook Nursing Home, LLC*, 348 NLRB 851 (2006).

- Soliciting grievances;
- Making statements indicating that supporting the Union would be futile;
- Threatening employees with discharge for participating in protected activities;
- Surveilling employees' union activities; and
- Calling the police and hiring a second, armed security guard in response to employees' union activities.

(JA 5.)[5] Sprain Brook also unlawfully discharged two employees, including Catherine Alonso, a discriminatee in this case.[6] It unlawfully reduced the overtime hours of three employees including Karen Bartko, a discriminatee in this case, and Clarisse Nogueira, a Union delegate and witness for the General Counsel in this case. (JA 5.)[7] The General Counsel and Sprain Brook entered into a backpay stipulation which provided for monthly installment payments from January 4, 2010, to December 5, 2011 for the discriminatees, including Alonso and Bartko. (JA 5; 226-41.)

From September 2010 to September 2011, Michael Reingold was Sprain Brook's administrator. (JA 5; 183-84.) In June 2011, Shlomo Mushell began

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[5] *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1190-92 (2007). The Board took administrative notice of the prior decision. (JA 12; 33-34.)

[6] *Id.* at 1205-07.

[7] *Id.*

working for Sprain Brook as a consultant and assumed the administrator's position in September 2011, continuing through the trial in this case. (JA 5; 185.)

B. In 2010, Employees Including Alonso and Bartko Participate in Contract Negotiations, Union Meetings, and Informational Picketing

As of that trial, Sprain Brook and the Union had not reached an initial collective-bargaining agreement. They most recently met for in-person contract negotiations in June 2010. Alonso and Bartko attended on behalf of the Union. (JA 5; 42-43, 64.) The employees also elected Bartko as a delegate for the Union. In addition to attending bargaining sessions, she accompanied coworkers to meetings with management to ensure that the employees' accounts of disputes were heard. (JA 5, 12; 147.)

Since its certification, the Union has held meetings called "visibilities" between union staff and employees in Sprain Brook's parking lot at the change between morning and afternoon shifts. Alonso and Bartko attended these meetings, which occurred in plain view and were visible from the facility's windows. (JA 5; 107-08, 147-51.)

On November 23, 2010, the Union sponsored an informational picket at the facility from 2:00 to 4:00 p.m. Alonso and Bartko—who returned early from her vacation for this purpose—attended this event along with other employees and union representatives. The picketers marched in the oval in front of the facility,

chanted slogans, and carried signs. Sprain Brook Owner Robert Klein observed the event and a manager photographed it with his cell phone. (JA 5; 46-48, 66-67, 107-09, 148-51.)

C. In November 2010, Sprain Brook's Administrator Accuses Alonso of Poor Job Performance, Threatens Her When She Seeks Union Representation To Address the Allegation, and Then Discharges Her

Alonso worked for Sprain Brook for 22 years, first as a nursing assistant and then in housekeeping. (JA 5; 60.) Most recently, Alonso was responsible for cleaning the facility's ground floor including the lobby, hallways, resident dining room, six bathrooms, and the facility's offices. (JA 5; 75-77.)

On November 9, 2010, Administrator Reingold summoned Alonso to his office. He asked when she would retire. When she responded that she was not going to retire, Reingold said she was being let go because the men's room was dirty and had dried urine on a toilet seat. Reingold said that if she signed the paper he had for her she would receive 5 weeks' pay, unemployment, and "the money that was coming to [her]." (JA 5; 67-70.) Alonso asked if she could leave the room to get her reading glasses and Union delegate Nogueira. Reingold responded that if Alonso left the room she would "really have trouble" and would "get nothing." (JA 5-6; 68-69.) Alonso signed the paper without reading it. (JA 6; 70.) The document stated that Alonso resigned her position, would receive 4 weeks' compensation, and would be paid for the rest of that week and for accrued vacation

and sick time. (JA 6; 248.) Reingold told Alonso to return that Friday to receive the money she was owed. (JA 6; 70.)

After leaving Reingold's office, Alonso sought out Nogueira and told her that Reingold had fired her and said he had found a dirty toilet. Nogueira asked why Alonso had not come to get her. Alonso replied that Reingold told her that if she left the room she would be sorry. Alonso also told Nogueira that she had signed a paper and tried to get her reading glasses and Nogueira first, but Reingold had not let her. (JA 6; 109-10.)

Nogueira then went with Alonso to Reingold's office. Nogueira asked him why he was firing Alonso. Reingold stated that he had found the toilet dirty and it was done and over with. Nogueira stated that Reingold could not fire Alonso due to a dirty toilet and that Alonso deserved union representation and asked why Reingold had not called for a union representative. (JA 6; 110.) Reingold replied that employees did not deserve union representation and that if Nogueira wanted to make this an issue, she would have to schedule an appointment and bring in a union representative. Because Reingold appeared very annoyed, Alonso told Nogueira not to get herself in trouble and they left. (JA 6; 110-11.)

D. In Late February 2011, Sprain Brook's Administrator Accuses Bartko of Improperly Taking Eight Ounces of Juice; After the Union Intervenes on Bartko's Behalf, the Administrator Relents on Disciplining Bartko

On February 22, 2011, Reingold approached Nogueira as she worked and asked if Bartko was "one of [her] people." (JA 7; 113-14.) Nogueira did not respond initially because she was confused. When Reingold repeated his question, Nogueira said yes, believing that Reingold referred to her status as a Union delegate. (JA 7; 113-15.) Reingold said that Bartko was seen leaving with cranberry juice and coming back into the facility without it. Nogueira replied that Bartko goes outside for her break. Reingold said that was impossible because she was back within a matter of seconds. He said he wanted to see Nogueira and Bartko in his office. (JA 7; 113-15.)

Nogueira found Bartko and advised her of Reingold's accusation. Bartko explained that she had gone outside and had cranberry juice on her lunch break. Bartko retrieved from the trash her lunch bag containing a banana peel and two empty four-ounce cups of juice. (JA 7; 114, 156-157.)

When Nogueira and Bartko went to Reingold's office, Bartko showed him the lunch bag and stated that she had been outside on her break. Reingold said that employees were not provided with juice. Bartko replied that she was given juice because she brings her own lunch. (JA 7-8; 115, 157-58.) Reingold asked who gave her the juice. Bartko told him a kitchen employee had provided it. Reingold

said that he would check the surveillance camera and both Bartko and the kitchen worker would be written up. Reingold had a paper on his desk. (JA 8; 115, 157-58.) For at least 10 years, Bartko has packed her own lunch and received milk or juice from the kitchen in lieu of the free lunch provided to employees. (JA 7; 143, 152-53, 160.)

Nogueira protested that employees would be written up over ounces of juice. Reingold replied that he had made clear that no one is supposed to obtain anything from the kitchen. Bartko explained that she had always gotten either milk or juice because she brought her own lunch. (JA 8; 115.) Reingold replied that if he felt like having a steak, would that be okay? Nogueira said he was comparing four ounces of juice to a steak. Bartko said that employees could have water which also cost something. She also offered to replace the juice but Reingold rejected the offer because the juice had to be Kosher. (JA 8; 115-16, 158-59.)

Reingold then summoned Cameron Wharton, Sprain Brook's director of dietary services, and asked why kitchen staff was giving out juice, stating that no one should get anything from the kitchen. (JA 8; 116, 158.) Wharton confirmed that Bartko did not take the free lunches and that the kitchen staff gave her juice or milk. Reingold stated that he would see what he could do about changing the lunch policy. Nogueira said all changes should be discussed with the Union. Reingold told Nogueira and Bartko they could leave and asked Wharton to stay.

(JA 8; 116-17, 158-59.) Although Reingold had threatened Bartko with written discipline, he did not discipline Bartko for this incident. (JA 8; 117, 157, 160.)

E. In Early March 2011, Sprain Brook's Administrator Accuses Bartko of Slamming the Door in His Face; He Suspends and Discharges Her

About 10 days later, on March 4, 2011, Bartko was walking out of the facility as Reingold entered. She did not hold the door open for Reingold as they passed in the vestibule between the two sets of doors. Reingold asked whether she held doors for people. Bartko did not respond. (JA 8; 161.) The doors to the nursing home each have a bar to prevent them from slamming or closing suddenly. (JA 8; 117, 120-21, 139-40, 161, 169.)

Reingold went to Nogueira in the laundry room and accused Bartko of slamming the door in his face. Nogueira replied that this was not possible since the doors have bars that cause them to close slowly. Reingold appeared annoyed and stated that he would not be subjected to that. He said he wanted both Nogueira and Bartko in his office. (JA 8; 117-18.)

Nogueira went outside to find Bartko on her break. While they were outside, Reingold knocked on the window and gestured for them to come inside. Reingold then went to the front door and yelled that he wanted union representative Adrian Trumpler. Nogueira asked if Trumpler was coming.

Reingold said he had left a phone message for Trumpler. He told Nogueira and Bartko to come to his office. (JA 8; 118, 161.)

Inside Reingold's office, Reingold yelled at Nogueira and Bartko, saying that he was going to write up Bartko and send her home for the day, with pay if required. (JA 8; 118-19, 164.) Bartko asked what she had done. Reingold asked if she held the door for people. Bartko replied that she would hold the door for others but not Reingold. She claimed she was being set up. When Reingold said he was sending her home, Bartko responded that he was the one who should go home, meaning that Reingold was the one who was yelling. (JA 8; 118-19, 161-62.) Reingold called a nearby office employee to be a witness to the meeting. As Reingold wrote what Bartko said, he yelled at her to "keep going, you're going to bury yourself." (JA 8; 118-19, 161-62.) Nogueira said that Bartko speaks up for herself, her coworkers, and the residents and that was something that was not liked there. Bartko said that Reingold was only hurting the residents because there were only three certified nurses' aides on duty and now there would only be two. (JA 8; 119, 162.)

As Nogueira and Bartko walked out to the parking lot, Nogueira advised Bartko to return to work on Sunday March 6, her next scheduled day, since Reingold had only sent her home for the day. (JA 8; 120, 162, 166.) Bartko worked her full shift on March 6 without incident. Later that day, a secretary

called to tell her that she should not return until further notice. Other than receiving insurance papers, Bartko had no further contact with Sprain Brook. (JA 8; 164-65.)

Subsequently in March, Union Vice-President Gregory Speller called Reingold to discuss Bartko's job status. Sprain Brook's counsel called him back and initially told him that Sprain Brook would take Bartko back but a couple weeks later advised Speller that he had spoken with someone else and the decision was that she would not be reinstated. (JA 8; 53-54.)

F. From Late 2010 to Late 2011, Sprain Brook Eliminates Four Employee Benefits Without Giving Notice to the Union

1. December 2010: Sprain Brook eliminates hot lunches and on-site check cashing

Sprain Brook had long provided a hot lunch to employees without charge. Typically, the employees received the same meals as the residents, consisting of items like chicken, mashed potatoes, and spaghetti and meatballs. (JA 9; 111-13, 153-54.)

Since 2010, a check-cashing company was present at the facility once a week so that employees could cash their paychecks at the facility during work time. The company charged employees a fee for this service. (JA 9; 121-22, 154.)

On December 14, 2010, Reingold sent a memorandum to employees stating that instead of a hot lunch, employees would be given a sandwich and salad. It

also stated that the on-site check-cashing service would end. (JA 9; 242.) Sprain Brook management did not discuss these changes with the Union. The Union first learned of them from an employee. (JA 9; 49-51.)

2. February 2011: Sprain Brook eliminates free on-site medical examinations required for employment

Sprain Brook requires its employees to have an annual physical examination and tuberculosis (PPD) test. Prior to February 2011, the employees were notified of a date when a weekend RN supervisor would perform these services, free of charge, in the resident dining room. She completed forms to certify that the employees had been examined and tested per Sprain Brook's requirements. (JA 9; 59, 122-25, 154-56.)

On February 18, 2011, Reingold sent employees a memorandum stating, in relevant part, that "[a]ll employees are required to submit their annual PPD & Physical Exam on or before MARCH 25, 2011 completed by your physician." (JA 9; 243.) The Union never received any notice that the required examinations and tests would have to be performed by employees' personal physicians. (JA 9; 51-52.)

3. November 2011: Sprain Brook eliminates medical payouts

For 5 to 6 years until late 2011, Sprain Brook provided a monthly payout to employees who did not participate in its health insurance plan. The payments were tied to and increased based on Sprain Brook's costs for the plan. For example, Nogueira received a monthly payout of about $350. (JA 10; 52-53, 125-28, 247.)

On November 11, 2011, Sprain Brook sent a memorandum to employees stating that "[d]ue to recent changes in health care legislation, Sprain Brook Manor Nursing Home is unable to continue offering a 'medical expenses' payout as has been done in the past. However you are afforded the opportunity to enroll in our current health plan . . . ." (JA 10; 244.) The Union received no notice regarding elimination of the medical-expenses payout. (JA 10; 52-53, 127.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found, in agreement with the administrative law judge, that Sprain Brook violated Section 8(a)(1) of the Act[8] by threatening an employee with unspecified reprisals for seeking assistance from the Union and by threatening an employee that if she sought union representation she would not receive payments owed to her in connection with the compliance settlement in the 2007 unfair-labor-practice case. (JA 1, 18.) Further, the Board

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[8] 29 U.S.C. § 158(a)(1).

agreed with the judge that Sprain Brook violated Section 8(a)(3) and (1) of the Act[9] by discharging Alonso and suspending and discharging Bartko. (JA 1, 18.) The Board found it unnecessary to pass on the judge's finding that Alonso's discharge also violated Section 8(a)(4) of the Act[10] as that additional finding would not materially affect the remedy. (JA 1 & n.3.) The Board also found that Sprain Brook violated Section 8(a)(5) and (1) by implementing the following changes to the terms and conditions of bargaining-unit employees without affording the Union notice or an opportunity to bargain: discontinuing free hot lunches, on-site check-cashing privileges, free on-site physicals and PPD (tuberculosis) examinations, and "medical expenses" payouts to employees who were not enrolled in Sprain Brook's health plan. (JA 1, 18.)

The Board's Order requires Sprain Brook to cease and desist from the unfair labor practices found and from, in any other manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.[11] (JA 255.) Affirmatively, the Order requires Sprain Brook to, *inter alia*:

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[9] 29 U.S.C. § 158(a)(3) and (1).

[10] 29 U.S.C. § 158(a)(4) (prohibiting discrimination against an employee because she has filed charges or given testimony under the Act).

[11] 29 U.S.C. § 157.

- offer reinstatement to Alonso and Bartko and make them whole for any losses suffered as a result of its discrimination against them, plus interest compounded daily;

- compensate Alonso and Bartko for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee;

- remove from its files any reference to the unlawful discipline and discharges;

- before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the unit employees;

- rescind the unlawful unilaterally implemented changes to unit employees' terms and conditions of employment;

- make employees whole for any losses they may have incurred as a result of the unilaterally implemented changes, plus interest compounded daily;

- post a remedial notice to employees, both physically and electronically, as set forth in the Order; and

- hold meetings at which the remedial notice is read to employees by Sprain Brook's Owner Klein or Administrator Mushell, or at Sprain Brook's option, by a Board agent in the presence of Klein or Mushell.

(JA 255-56.)

STANDARD OF REVIEW

The Board's findings—that Sprain Brook threatened, suspended, discharged, and changed the benefits of its employees—under review here all constitute factual findings and are therefore conclusive if supported by substantial evidence in the record considered as a whole.[12] Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."[13] As this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board."[14] In other words, this Court will reverse the Board based on a factual determination—such as a determination of employer motive—only if it is "left with the impression that no rational trier of fact could reach the conclusion drawn by the Board."[15]

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[12] 29 U.S.C. § 160(e). *See, e.g., Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (reviewing General Counsel's burden and respondent's affirmative defense under *Wright Line* for substantial evidence); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *accord NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001).

[13] *Universal Camera*, 340 U.S. at 477; *see also Allentown Mack Sales & Svc., Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998) ("Put differently, [the Court] must decide whether on th[e] record it would have been possible for a reasonable jury to reach the Board's conclusion."); *accord G & T Terminal Packaging Co.*, 246 F.3d at 114.

[14] *Abbey's Transp. Servs.*, 837 F.2d at 582; *see also Universal Camera*, 340 U.S. at 488.

[15] *G & T Terminal Packaging Co.*, 246 F.3d at 114 (citation omitted).

This standard of review is significantly heightened and becomes nearly insurmountable in those instances where the Board grounds its factual findings upon the administrative law judge's assessment of the credibility of the witnesses at the hearing. Given the administrative law judge's unique ability to assess witnesses' demeanor, among other things, such credibility-based findings "will not be overturned unless the testimony is hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony."[16]

SUMMARY OF ARGUMENT

Continuing its history of unfair labor practices, Sprain Brook threatened an employee who sought her Union's assistance, discharged two employees to whom it was still paying backpay from the last time it discriminated against them, and eliminated four employee benefits without bargaining with the Union. The record amply supports the Board's findings and Sprain Brook offers no persuasive argument otherwise.

Sprain Brook summarily discharged 22-year employee Alonso for a second time due to her union activity. In the process, it threatened her that she would have "trouble" and would not receive money owed to her if she sought the Union's help.

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[16] *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (citation omitted); *accord G & T Terminal Packaging Co.*, 246 F.3d at 114.

Its defense turns primarily on challenging the Board's credibility determinations but fails to meet the stringent standard of review for such challenges.

Likewise, Sprain Brook suspended and discharged 15-year employee and union delegate Bartko—also a previous discriminatee—purportedly for insubordination stemming from its administrator's claim that Bartko neglected to hold the door open for him. That absurd accusation came shortly after the Union successfully intervened when Reingold falsely accused Bartko of stealing two cups of juice. Again, Sprain Brook's defense ignores the credited evidence and presents no persuasive argument warranting reversal.

Lastly, Sprain Brook eliminated or altered employee benefits without notice to or bargaining with their union. It eliminated free hot lunches, on-site check cashing during work hours, free physical examinations and tuberculosis tests required for continued employment, and a monthly payment to employees who declined the health insurance benefit. Sprain Brook offers no persuasive defense, largely claiming that it did not actually change anything. As with the rest of the case, the record does not support Sprain Brook's position.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SPRAIN BROOK VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING AN EMPLOYEE

A. An Employer Violates the Act by Engaging in Activity that Would Reasonably Tend To Coerce Employees' Exercise of Their Rights

Section 7 of the Act guarantees employees "the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[17] Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7."[18] The test for a Section 8(a)(1) violation is whether, "under all the existing circumstances, the conduct has a reasonable tendency to coerce or intimidate employees, regardless of whether they are actually coerced."[19]

The employer's statements "must be judged by their likely import to [the] employees."[20] The critical inquiry, then, is what an employee could reasonably

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[17] 29 U.S.C. § 157.

[18] 29 U.S.C. § 158(a)(1).

[19] *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998).

[20] *C & W Super Markets, Inc. v.* NLRB, 581 F.2d 618, 623 n.5 (7th Cir. 1978) (citation omitted).

have inferred from the employer's statements or actions when viewed in context.[21] Thus, in applying this standard, the Board considers "the economic dependence of employees on their employer, and the necessary tendency of the former . . . to pick up the intended implications of the latter that might be more readily dismissed by a more disinterested ear."[22] Accordingly, it is well settled that a coercive threat may be implied as well as stated expressly.[23]

A Board finding that an employer has violated Section 8(a)(1) with coercive conduct must be sustained if supported by substantial evidence on the record as a whole.[24] Moreover, the Supreme Court stated that reviewing courts "must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship."[25]

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[21] *See, e.g., NLRB v. Solboro Knitting Mills, Inc.*, 572 F.2d 936, 940 (2d Cir. 1978) (employees could infer statement was a threat related to their decision to organize; Court noted that employer could have chosen his words more carefully to avoid misunderstanding by employees); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124-25 (D.C. Cir. 2001) (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context).

[22] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[23] *J.L.M., Inc. v. NLRB*, 31 F.3d 79, 83 (2d Cir. 1994) (implied threat of reprisal for union support); *Nat'l By-Products, Inc. v. N.L.R.B.*, 931 F.2d 445, 451 (7th Cir. 1991) ("coercive threats may be implied rather than stated expressly").

[24] *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 958 (2d Cir. 1988).

[25] *Gissel Packing Co.*, 395 U.S. at 620.

B. Sprain Brook Unlawfully Threatened Alonso with Unspecified Reprisal and Loss of Payments Owed to Her for Seeking Union Assistance

Seeking the assistance of a union representative is indisputably protected by the Act.[26] It is equally clear that an employer's threatening an employee with unspecified reprisal such as "trouble" for engaging in protected conduct violates Section 8(a)(1) of the Act.[27] Similarly, an employer violates Section 8(a)(1) by responding to an employee's protected conduct with a threat of withholding payments it owes the employee.[28]

Here, Sprain Brook's Administrator Reingold summoned Alonso to address purportedly deficient work performance and asked her to sign a document stating that she voluntarily resigned and outlining what payments she would get from

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[26] *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of s[ection] 7").

[27] *E.g., NLRB v. Brookwood Furniture*, 701 F.2d 452, 460 (5th Cir. 1983) (supervisor's statement that he was "afraid" an employee would "get into trouble" because of his union support was an implied threat of reprisal for union activities that violated Section 8(a)(1)); *Parkview Hosp., Inc*., 343 NLRB 76, 81 (2004) (unlawful threat of "trouble" for union activity).

[28] *See Nat'l Football League*, 309 NLRB 78, 86, 136-40 (1992) (Dallas Cowboys threatened to withhold various contractual money and benefits to coerce players to abandon a strike and return to work in violation of Section 8(a)(1)); *The Baytown Sun*, 255 NLRB 154, 161 (1981) (unlawful threat that, if employees filed charges with the Board or courts, the employer would subtract any backpay award from its contract proposal).

Sprain Brook. When Alonso asked to leave the room to get her coworker and union delegate Nogueira, Reingold responded that if Alonso left the room she would "really have trouble" and would "get nothing." Alonso reasonably understood Reingold's comment that she would "get nothing" as a reference to her continuing monthly backpay installments from Sprain Brook as that was the only specific money it owed her. (JA 5-6; 68-69.)

Sprain Brook provides no compelling grounds (Br. 24) for disturbing the Board's well-supported findings. Its primary defense is urging this Court to overturn the Board's crediting of Alonso. This Court, however, will not reverse the Board's credibility determinations unless the testimony is "hopelessly incredible or the findings flatly contradict either the law of nature or undisputed documentary testimony."[29] That burden is especially difficult to overcome where, as here (JA 4, 11, 13), the credibility determinations were based in part on witnesses' demeanor because only the judge has had the opportunity to observe the witnesses on the stand.[30]

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[29] *NLRB v. Thalbo Corp.*, 171 F.3d 102, 112 (2d Cir. 1999) (citation omitted).

[30] *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952) (Board assessment of demeanor is "ordinarily unreviewable"); *see also Lin v. Gonzales*, 446 F.3d 395, 400-01 (2d Cir. 2006).

Ignoring and failing this heavy burden, Sprain Brook cites (Br. 18, 24) only Alonso's confusion about details regarding an old disciplinary warning and the existence of her resignation letter, which she had to sign without the benefit of her reading glasses and union representative's help. None of those details unravel her clear testimony about Reingold's threats. As the Board explained, Alonso's testimony regarding her interactions with Reingold was unrebutted (as Reingold did not testify) and "detailed, consistent and credible." (JA 10.) The Board observed that "it is inherently likely that the events of this encounter would stand out in Alonso's recollection, while other less significant events may have faded." (JA 10.) Her account also comported with what she told coworker Nogueira shortly afterwards. (JA 10.) Nogueira also largely corroborated Alonso's accounts of her interactions with Reingold. (JA 10-11.) Similarly, as the Board noted, Alonso forthrightly "acknowledged facts which would be adverse to her interests." (JA 11.)

Sprain Brook's last attempt to overturn the finding that it threatened to withhold Alonso's backpay is that Reingold referenced severance pay not backpay in stating that she would "get nothing" if she left to seek union representation. (Br. 24.) Again, Reingold did not testify; accordingly, there is no evidence regarding what he intended. Moreover, as described above, a Section 8(a)(1) violation turns on the employee's reasonable inference of the statement, not the speaker's intent.

As discussed, Alonso reasonably interpreted the statement as referencing her backpay as that was the only money clearly owed to her. (JA 6, 11; 68-69, 81-82.) In fact, despite her coerced signing of the resignation agreement, there is no evidence Sprain Brook ever paid her any severance. (JA 6.)

In light of the Board's sound reasoning and Sprain Brook's failure to overcome its onerous burden in proving its credibility argument, the Board's findings of unlawful threats have the support of substantial evidence. The Court will reject defenses where—as here—"the company simply disagrees with the Board's findings and asks [the Court] to accept its characterization of the evidence as though [the Court's] function were to determine facts rather than to decide whether the Board's findings are supported by substantial evidence on the record considered as a whole."[31]

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[31] *S.E. Nichols*, 862 F.2d at 958.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT SPRAIN BROOK UNLAWFULLY DISCHARGED ALONSO AND UNLAWFULLY SUSPENDED AND DISCHARGED BARTKO FOR SUPPORTING THE UNION

A. Section 8(a)(3) of the Act Prohibits Employers from Discharging Employees for Union or Other Protected Activity

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[32] An employer thus violates Section 8(a)(3) by disciplining or discharging employees for engaging in union activity.[33] Such discrimination also derivatively violates Section 8(a)(1).[34]

In assessing discriminatory discharge cases, the critical inquiry is whether the employer's action was unlawfully motivated.[35] To answer this question, the Board employs its analysis articulated in *Wright Line*, which has been approved by

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[32] 29 U.S.C. § 158(a)(3).

[33] *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983).

[34] 29 U.S.C. § 158(a)(1); *see Office & Prof'l Employees Int'l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1992) ("A violation of 8(a)(3) in fact constitutes a 'derivative violation' of Section 8(a)(1) when 'the employer's acts served to discourage union membership or activities. . . . The same proof is therefore required to establish a violation of either section.'") (citation omitted).

[35] *See S.E. Nichols, Inc.*, 862 F.2d at 957.

both this Court and the Supreme Court.[36] Under that framework, the Board's General Counsel has the burden of demonstrating that the employer had knowledge that employees were engaged in activity protected by the Act, and that the employer was motivated to take the adverse employment action based on its hostility or animus toward that activity.[37]

Once the General Counsel satisfies that burden, the Board will find a violation of the Act unless the employer shows, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected union activity.[38] The Board need not accept "at face value the reason advanced by the employer" if the "evidence, and the reasonable inferences drawn therefrom," indicate that the employer was motivated by union animus.[39] Thus, "if the evidence establishes that the reasons given for the [employer's] action are

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[36] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and *approved by Transp. Mgmt. Corp.*, 462 U.S. at 403; *accord NLRB v. Fermont*, 928 F.2d 609, 613 & n.2 (2d Cir. 1991).

[37] *See Abbey's Transp. Servs. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

[38] *See Transp. Mgmt. Corp.*, 462 U.S. at 397-98, 401-03; *Wright Line*, 251 NLRB at 1089.

[39] *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962); *see also Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (employer's explanation rejected where it is an "excuse rather than the reason for [its] retaliatory action") (citation omitted).

pretextual—that is, either false or not in fact relied upon—the [employer] fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct."[40]

On appeal, the Board's factual findings regarding knowledge and motive are reviewed for substantial evidence.[41] The Board's motive findings are afforded particularly deferential review, however, because "the Act vests primary responsibility in the Board to resolve these critical issues of fact."[42] Furthermore, as explained above, factual findings based upon the administrative law judge's credibility assessments will be overturned only if "hopelessly incredible."[43]

B. Sprain Brook Unlawfully Discharged Alonso

The record fully supports the Board's findings (JA 12-14) that anti-union considerations were a motivating factor in Sprain Brook's discharge of Alonso and

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[40] *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *see also NLRB v. Matros Automated Elec. Const. Corp.*, 366 F. App'x 184, 187 (2d Cir. 2010) ("If the employer's proffered reason for the adverse employment action is shown to be pretextual, then the employer will be found not to have carried its burden."); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) ("[I]mplicit in the finding of pretext is the judgment of the court that the employer has not marshalled any convincing evidence to support its position.").

[41] *See Abbey's Transp. Servs.*, 837 F.2d at 580.

[42] *S.E. Nichols*, 862 F.2d at 956; *see also Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) ("Drawing . . . inferences from the evidence to assess an employer's . . . motive invokes the expertise of the Board.").

[43] *See Thalbo Corp.*, 171 F.3d at 112.

that Sprain Brook failed to demonstrate that it would have taken that action absent her union activity. Sprain Brook's defense ignores Alonso's continuing union activity as well the ample evidence of its union animus. It also offers alternate, though conflicting, bases for Alonso's termination: she voluntarily resigned and it discharged her for poor performance. Lastly, it repeats its fruitless attacks on the Board's crediting of Alonso's testimony.

1. The General Counsel proved that anti-union considerations were a motivating factor in Alonso's discharge

Alonso's union activism and Sprain Brook's knowledge of it are clear. Sprain Brook had previously discriminatorily discharged her in response to her union activity in September 2005, days after the Union's election win, and reinstated her only pursuant to a district court injunction and then the 2007 Board order. (JA 5.)[44] Indeed, at the time of Alonso's discharge, Sprain Brook had a monthly reminder of her union support as it continued its backpay installments to her. After the prior unfair-labor-practice case, Alonso continued to openly support and advocate for the Union by participating in the shift-change visibilities that management witnessed as well as negotiations for a collective-bargaining agreement.

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[44] *See also Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1190, 1205-07 (2007); *Mattina v. Sprain Brook Manor Nursing Home, LLC*, No. 06-CIV-4262 (S.D.N.Y. July 5 and October 12, 2006).

Sprain Brook's union animus is equally plain. As described above (pp. 5-6), Sprain Brook committed numerous unfair labor practices during the organizing campaign including firing Alonso. The Board took administrative notice of the decision in that case as background evidence of animus. (JA 12.)[45] As the Board noted (JA 12), Sprain Brook's owner remains the same as in the prior case. Moreover, in this case, Sprain Brook renewed its antiunion activity, subjecting Alonso to the unlawful threats described above (pp. 24-27) and stating that the employees did not deserve union representation when Alonso sought the Union's assistance during her meeting with Reingold.[46] Lastly, Sprain Brook's reliance on Alonso's prior disciplinary warnings was pretext (described below, p. 36) and therefore bolsters the Board's finding of unlawful motivation.[47]

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[45] *See Opelika Welding*, 305 NLRB 561, 566-67 (1991) (past unfair-labor-practice case supported finding of continued animus; "the Board is not required to blind itself to past infractions as is a judge or jury in determining the guilt or innocence of a criminal defendant" (citation omitted)); *accord NLRB v. Grand Rapids Press of Booth Newspapers, Inc.*, 215 F.3d 1327, 2000 WL 687666 at *3 (6th Cir. 2000) (table) (Board appropriately relied on prior case involving same protected activity and relevant past infractions as evidence of animus).

[46] *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 591 (2d Cir. 1994) (other instances of unfair labor practices supported inference of unlawful motivation); *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 736 (D.C. Cir. 2000) (discrimination established in light of the other unlawful conduct).

[47] *Sw. Merch. Corp. v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (employer's pretextual explanations supported Board's finding of unlawful

In addition to its unavailing attacks on Alonso's credibility (p. 26, above), Sprain Brook disputes (Br. 11, 20) the evidence of motive by claiming that Alonso's union activity was stale or inadequate. As shown, Alonso continued her visible and vocal support for the Union by attending meetings, demonstrations, and union-management contract negotiations. Sprain Brook admits (Br. 20) that Reingold participated in the same negotiation sessions as Alonso, on opposite sides of the table. Indeed, at the time it discharged Alonso, Sprain Brook reiterated its continuing animus against the Union and Alonso's support of it as Reingold opined that the employees did not "deserve" union representation, and threatened Alonso with reprisals if she sought the Union's assistance, as he fired her. Thus, the Board based its findings of union activity and animus on current events, not "ancient history." (Br. 20.) As the Board observed (JA 13), *Wright Line* does not require a direct evidentiary or temporal link between an employee's union activity and discharge. An employer may "watch and wait" for any infraction to use as pretext to discriminate against a union supporter. (JA 13.)[48] Accordingly, Sprain Brook's

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motive); *NLRB v. Wal-Mart Stores, Inc*., 488 F.2d 114, 116-17 (8th Cir. 1973) (pretext is evidence of unlawful motive).

[48] *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000) (discharged employee active in prior campaign and intended to renew organizing); *American Thread Co. v. NLRB*, 631 F.2d 316, 318, 322-23 (4th Cir. 1980) (discharge unlawful where last election was 5 years earlier and last union activity occurred about 8 months before discharge).

claims (Br. 20) that there was no temporal connection between Alonso's union activity and her discharge fall flat. Moreover, Sprain Brook ignores its history of extensive unfair labor practices, for which it still was paying Alonso backpay.

2. The Board reasonably rejected Sprain Brook's proffered justifications for Alonso's termination

Because the General Counsel met his burden, Sprain Brook's action is unlawful unless it proves that it would have taken the same action even absent Alonso's protected union activities. The Board reasonably found (JA 13-14) that Sprain Brook failed to do so.

Sprain Brook offers two principal arguments: that Alonso voluntarily resigned and that it discharged her for poor performance. Both lack evidentiary support. First, as the Board found (JA 13), Reingold induced Alonso to sign a resignation agreement with a combination of promises and threats. Alonso also stated that she could not read it because Reingold prohibited her from retrieving her reading glasses. Sprain Brook promised her severance and accrued sick pay, although as the Board noted (JA 6, 13 n.20), there is no evidence it met that commitment. It also unlawfully threatened her she would "get nothing" and would have "trouble" if she left the room without signing and sought union representation. Such circumstances hardly show a "voluntary" resignation.

Indeed, the Board has found that an employee who was similarly "hustled" into signing a resignation agreement was actually discharged.[49]

Sprain Brook's second argument—that it discharged Alonso because she had historical and continuing performance problems—is equally specious. At the time Reingold fired Alonso, he cited only one incident of a single toilet that was improperly cleaned, which Alonso disputed, and made no reference orally or in writing to past performance problems. Apparently insecure with this basis, Sprain Brook cited past warnings of performance issues after the fact. As the Board reasoned, there was no evidence that Reingold was even aware of any past problems at the time he discharged Alonso. Sprain Brook incorrectly stated (Br. 3) that the warnings stretched from September 2009 through October 2010. In fact, the prior warnings all issued in a two-month period from September through November 2009, about a year before Reingold joined Sprain Brook in September 2010. (JA 13; 32, 250-54.) The Board properly credited Alonso that, other than that two-month period, she assiduously performed her work. Her testimony was unrebutted as Reingold did not testify. (JA 13.) In fact, from November 2009 until she was terminated on November 9, 2010, Alonso received no other write-ups.

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[49] *See Federal Screw Works*, 310 NLRB 1131, 1139 (1993).

Moreover, there is no record evidence that Alonso's work history prompted Reingold or any other Sprain Brook official to "monitor" Alonso's cleaning work, as it claims. (Br. 21.) As the Board observed (JA 13-14), Sprain Brook's depiction of Alonso as an employee with serious performance problems does not add up with its assigning her to clean the publicly accessible and visible ground floor, which it deems (Br. 21) the "face of the facility" that "would give residents and visitors alike their first glimpse of Sprain Brook's quality." Lastly, Sprain Brook's invocation of housekeeper Pat Miller's termination to suggest consistent treatment has no evidentiary support as the record does not show why Sprain Brook discharged Miller. (JA 13 n.19.)

Accordingly, the Board found that Sprain Brook's "exhumation of Alonso's prior disciplinary notices and its newly-found reliance upon Alonso's limited history of performance deficits is a post-hoc justification for her discharge which supports the conclusion that it is pretextual . . . ." (JA 13.) The Board therefore properly rejected that defense.[50] Where, as here, the Company "simply disagrees with the Board's findings and asks [the Court] to accept its characterization of the evidence," the Court will reject those arguments because its function is not "to determine facts" but to "decide whether the Board's findings are supported by

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[50] *See Vincent Indus. Plastics*, 209 F.3d at 736 (refusing to "second-guess" the Board's finding that an employer's proffered explanations were not credible).

substantial evidence ….”[51] The Court should enforce the portion of the Board’s order relating to Alonso’s discharge because the evidence showed that Sprain Brook was motivated by antiunion animus and failed to demonstrate—as it must under *Wright Line*—that it would have terminated Alonso even in the absence of her protected activities.

C. Sprain Brook Unlawfully Suspended and Discharged Bartko

1. The General Counsel proved that anti-union considerations were a motivating factor in Bartko’s suspension and discharge

As with Alonso, Bartko continued to visibly support the Union and paid a price for it as Sprain Brook discharged her in retaliation. After the Union won the election, Bartko’s co-workers elected her to represent them as a union delegate. She participated in the Union’s shift-change visibilities and picketing viewed by management. Bartko also participated in Union-management negotiations for a collective-bargaining agreement. And, significantly, only 10 days before her discharge, the Union successfully assisted Bartko when Reingold accused her of improperly taking juice from the kitchen and reminded Reingold that any changes to the lunch policy are to be discussed with the Union. As the Board observed (JA 14), Reingold sought out union delegate Nogueira, “gratuitous[ly]” or

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[51] *S.E. Nichols*, 862 F.2d at 958.

"sardonic[ally]" asking if Bartko was one of "her people," meaning a union supporter, thus indicating that he linked Bartko with the Union.

As discussed above, Sprain Brook's animus—both past and present—against union activities is clear. Among the numerous unfair labor practices in the prior case, Bartko suffered discrimination: Sprain Brook unlawfully reduced her overtime hours in response to her union support. Sprain Brook reiterated its continuing union animus a few months earlier when it unlawfully threatened and discharged Alonso and stated that the employees did not deserve union representation. Sprain Brook's discharge of Bartko, a 15-year employee with a spotless record, stemming from her failure to hold open a door for Reingold is—to say the least—pretextual, as discussed below.

2. The Board reasonably rejected Sprain Brook's proffered justifications for Bartko's suspension and termination

Sprain Brook does not contest that the General Counsel met his burden under *Wright Line* with respect to Bartko, claiming instead that it justifiably discharged her for insubordination. (Br. 25-27.) This discharge violation therefore turns on its claim that it would have taken the same action even absent her union activity. The Board reasonably found that Sprain Brook failed to show that. Sprain Brook defends by asserting that it suspended and then fired Bartko because: she slammed the facility's entry door in Reingold's face, reacted intemperately when Reingold confronted her about the supposed incident, and then reported to

work despite being told to stay home. The Board found that Sprain Brook's claims were "exaggerated" and "to a large extent simply false." (JA 15.)

Several of Sprain Brook's factual assertions lack record support. (JA 14.) Bartko did not allow a door to "slam" in Reingold's face (Br. 5, 12, 25) because the entry doors have a bar that causes them to close slowly, which is sensible for a nursing home. (JA 14 & n.22; 120-21, 139-40, 161, 169.) Next, there was no evidence that Reingold carried numerous packages as he entered (Br. 5), inasmuch as Reingold did not testify and Bartko did not recall him carrying anything. (JA 14; 163-64.) Likewise, there is no evidence that Reingold told Bartko not to report to work after March 4. (Br. 25.) Instead, Nogueira and Bartko testified without contradiction that Reingold said he was sending Bartko home for "the day." (JA 119, 120, 166.) Indeed, Sprain Brook itself states that "Reingold sent her home for *the day*." (Br. 5, emphasis added.) Accordingly, Bartko returned to work for her next scheduled shift and completed it without incident. At best, Reingold left matters unclear as to when Bartko should return. (Br. 6.) Therefore, Bartko did not contravene any instruction and was not insubordinate. Moreover, as the Board noted, had Bartko not come to work, Sprain Brook may have claimed job abandonment. (JA 14 n.26.) Indeed, after Reingold's recent attempts at "gotcha" with Bartko—absurdly accusing her of juice theft and door slamming—she acted prudently in arriving for her scheduled shift.

Sprain Brook also attempts to leverage (Br. 5, 6, 26), Bartko's forthright account that—in response to Reingold's false accusation of slamming the door in his face, which came on the heels of his falsely accusing her of stealing juice—she told him that she would hold the door open for anyone else and that Reingold should go home because he was screaming at her. The record does not show, however, that Sprain Brook terminated Bartko based on her responses in the meeting with Reingold. Instead, Reingold suspended her for the day. Moreover, Reingold provoked Bartko's response with his false accusations. As the Fourth Circuit explained, "[a]n employer cannot provoke an employee to the point where she commits such an indiscretion as is shown here and then rely on this to terminate her employment."[52] Further, Bartko's understandable verbal reactions to Reingold's continued false accusations are not comparable to the conduct involved in Sprain Brook's cited cases. (Br. 25-26.)[53]

The Board reasonably concluded that the circumstances showed that Sprain

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[52] *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965); *accord Key Food*, 336 NLRB 111, 113 (2001) (employee discharged assertedly for touching supervisor during supervisor's tirade accusing him of loafing).

[53] *NLRB v. Starbucks Corp.*, 679 F.3d 70, 78-80 (2d Cir. 2012) (remanding to Board for consideration of whether employee's use of profanities in the presence of the employer's customers results in the loss of the Act's protection; observing that employees have some leeway for impulsive behavior in concerted activities); *Davey Roofing*, 341 NLRB 222, 223 (2004) (employees refusal to sign warnings "constituted insubordination in disregard for workplace safety").

Brook's actions, by Reingold, stemmed from anti-union sentiment rather than any misconduct on Bartko's part. (JA 15.) Coming days after the Union intervened on Bartko's behalf in the juice incident and a few months after Alonso's unlawful termination, Reingold patently overreacted to the possible slight of Bartko's failure to hold the door for him. Accordingly, the Board properly concluded that Sprain Brook's proffered justification for Bartko's discharge was pretextual and precludes a finding that it would have discharged her absent her protected activity.[54]

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[54] See cases cited at n.40, above.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT SPRAIN BROOK VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY CHANGING EMPLOYMENT TERMS WITHOUT BARGAINING WITH THE UNION

A. An Employer Violates the Act by Changing Employment Terms Without Giving the Union an Opportunity to Bargain

Sections 8(a)(5) and (d) of the Act make it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees" with respect to "wages, hours, and other terms and conditions of employment."[55] Accordingly, an employer violates Section 8(a)(5) of the Act by unilaterally announcing and changing "terms and conditions of employment" without first affording the union notice and an opportunity to bargain about the change.[56] A violation of Section 8(a)(5) of the Act "derivatively" violates Section 8(a)(1).[57] An employer therefore violates Section 8(a)(5) and (1) when it makes unilateral changes to employment terms unless it has first bargained in good-faith

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[55] 29 U.S.C. § 158(a)(5) (it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees"); 29 U.S.C. § 158(d) (the bargaining obligation requires the parties to "meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment").

[56] *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[57] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

to impasse with its employees' representative.[58] The Court recognizes that "[s]uch unilateral action 'detracts from the legitimacy of the collective-bargaining process by impairing the union's ability to function effectively, and by giving the impression to members that a union is powerless.'"[59]

Here, Sprain Brook eliminated four discrete employee benefits without giving the Union any notice or an opportunity to bargain even as it was supposed to be negotiating for a collective-bargaining agreement. As shown below, its various defenses to these changes are unavailing.

B. Sprain Brook Changed Employment Terms Without Giving the Union an Opportunity to Bargain

1. Free hot lunches

For years, Sprain Brook provided its employees with daily free hot lunches, which typically included items like chicken, mashed potatoes, and spaghetti and meatballs. On December 14, 2010, Administrator Reingold sent a memorandum to employees regarding "various changes at the facility" and advising them that, "[a]s

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[58] *Katz*, 369 U.S. at 737.

[59] *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (citation omitted); *see also Firch Baking Co. v. NLRB*, 479 F.2d 732, 735 (2d Cir. 1973) (unilateral action "seriously impair[s]" union's ability to function and "amounts to a declaration on the part of the [employer] that not only the union, but the process of collective-bargaining itself may be dispensed with").

of January 1st hot lunch will no longer be provided. In the meantime we will be offering a sandwich and a salad . . . ." (JA 242.)

The applicable principles are clear and undisputed. The Board and Supreme Court agree that changes to on-site food service are a mandatory subject of bargaining.[60] Because the Union received no prior notice of the change before it was announced to employees, it was unlawful.[61]

Sprain Brook does not contest the law or the fact that it did not provide notice or an opportunity to bargain to the Union. Instead, Sprain Brook glosses over the details of the situation in claiming (Br. 30) that employees continued to receive a free lunch. The record is clear that it unilaterally discontinued the hot lunches. Sprain Brook offered the (less hearty) option of sandwiches and salads to employees for six months before reinstating the hot lunch. The memorandum bluntly states the "hot lunch *will no longer be provided*." (JA 16; 242, emphasis

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[60] *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979) ("when an employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees . . . [t]he terms and conditions under which food is available on the job during working hours are plainly germane to the 'working environment'"); *Mercy Hosp. of Buffalo*, 311 NLRB 869, 873 (1993) (employer closed cafeteria from 2:00 – 4:00 a.m. and substituted vending machines offering similar meal options).

[61] *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988) (employer's change to dispatch procedures came to the union's attention as a *fait accompli*, not a bargaining proposal).

added.) Employees had received a free hot lunch every day until the memorandum issued. As Nogueira explained, it made no sense for Sprain Brook to make so much food that there were enough "leftovers" to feed all the employees every day. (JA 16; 132-33.) Plainly, the meals were prepared for employees as well as residents. To support its specious claim that nothing changed, Sprain Brook misrepresents Nogueira's testimony about employees' pre-change lunch as the post-change lunch. (Br. 30, JA 131-32.) Sprain Brook has offered no reason for the Court to conclude that this violation lacks the support of substantial evidence.

2. On-site check cashing

For about a year, employees could cash their checks at the facility's dining room during working hours with a third-party company. The service began weekly visits to the facility in 2010 but stopped in 2011 after Sprain Brook sent the December 14, 2010 memorandum to employees stating that the third-party company "will no longer offer on site check cashing." (JA 9; 242.) It is undisputed that the Union received no notice of this change.

The applicable principles are as clear as the facts. The ability to cash paychecks during working time affects the employees' means of pay and is a

benefit to them. Without that benefit, employees had to spend their own time to cash their checks. Accordingly, it is a mandatory subject of bargaining.[62]

Sprain Brook contends (Br. 8, 31-32) that it did not violate the Act because a third party provided the check-cashing service and independently chose to end its visits to the facility. The law is not on Sprain Brook's side. Even assuming those facts despite Sprain Brook's failure to prove them (JA 16 n.29), it is of no moment whether Sprain Brook or a third party cashed the checks. Many employee benefits—health insurance, to name one—are provided by third parties, but remain mandatory subjects of bargaining. (JA 16.)[63] Sprain Brook's inability to control the third party's service (Br. 32) is no defense; it overlooks that the violation is in failing to *bargain* with the Union over the change. Contrary to Sprain Brook's reading (Br. 32), *Ford Motor* did not turn on the employer's relationship with the vendor or cut of the fees. Instead, it instructs that the existence of such a relationship is not material to the employer's bargaining obligation.[64]

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[62] *See AT&T Corp*., 325 NLRB 150, 153 (1997) (unilateral cessation of third-party on-site check cashing services during working hours); *Sands Motel*, 280 NLRB 132, 143 (1986) (check-cashing privilege is a mandatory subject of bargaining).

[63] *Ford Motor*, 441 U.S. at 503 & n.15 (analogizing in-plant food services provided by third parties to health insurance).

[64] *Id.* at 502-03 (food prices set by third-party vendor were no trivial matter and were amenable to bargaining with the employer's affecting prices by, for example, offering a subsidy to employees).

Also, as the Board explained (JA 16), the benefit to employees lay in being able to spend their working, not personal, time cashing their paychecks.[65] While the check-cashing service offered a discount at its off-site store (Br. 8), the employees still lost the ability to complete this task on the clock and at work. As the Board noted (JA 16), the issue of using work time to cash a paycheck is "eminently suitable for collective bargaining." Sprain Brook has offered no reason why it could not discuss with the Union a substitute arrangement to allow employees to cash their checks as conveniently as before or a change to a different vendor.

3. Free on-site physicals and tuberculosis tests

Sprain Brook requires employees to have annual physical examinations and tuberculosis (PPD) tests. It previously assigned a weekend RN supervisor to offer these services, at no charge, to employees at a station in the resident dining room on a scheduled date. She then completed forms certifying that each employee had been examined and tested. On February 18, 2011, Reingold abandoned this well-established practice with a memorandum to employees stating that the

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[65] *AT&T Corp.*, 325 NLRB at 151, 153 (third-party service on site allowed employees to spend their working time cashing their checks; employer had previously allowed employees 15 minutes of paid time to cash their checks when the service was unavailable).

examinations and tests should be “completed by your Physician” by March 25. (JA 17; 243.) The Union received no notice of this change.

Sprain Brook’s defense (Br. 29) is that, contrary to the express language in its memorandum, there was no change and it continued to offer the free examinations and tests. Administrator Shlomo Mushell testified that certain employees “currently” receive the tests and examinations upon request. He claimed that this has been the practice since he became administrator in September 2011—six months after the March 25, 2011 deadline for the yearly examinations at issue. (JA 193-94.) He did not, however, provide any details about who provided the services, when or where they were provided or offered, or how many employees obtained them. Nor were there any completed examination forms in the record. Mushell also did not provide any evidence that Sprain Brook notified employees that it continued to provide these free services on site, contrary to the memorandum’s language. (JA 17; 193-94.)

Moreover, Sprain Brook strains to shift the blame from itself to the employees, asserting (Br. 29) that they should have deduced from the memorandum that—contrary to the explicit language stating that their physicians were to perform the examinations—the nursing staff would continue to provide these services just as it did before. It relies only on language listing the director of nursing or a RN supervisor as the contact points for questions as the basis for its

vague claim that the nursing staff would "remain involved in this process." (Br. 29.) The memorandum plainly stated that outside physicians were to perform the examinations. Nothing in the rest of the memorandum would indicate that the employees still had the option of Sprain Brook nurses continuing to provide those services.

The Board relied on the plain and unambiguous language of Sprain Brook's memorandum stating that employees were to see their personal physician for these services. (JA 17.) Employees clearly and reasonably understood the memorandum to mean what it said—that they would need to go to their own doctors at their own cost and therefore would no longer receive these free services at work. (JA 17; 122-23, 154-56.) Where it is axiomatic that health benefits are a mandatory subject of bargaining,[66] Sprain Brook's unilateral elimination of free physicals and PPD tests was unlawful. Sprain Brook's nebulous evidence and strained attempt to shift the onus of sussing out its examination policies onto employees does not compel the Court to reject the Board's sound conclusion.

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[66] *See e.g., Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 575, 582 n.6 (D.C. Cir. 1977).

4. Medical-expense payouts

For several years, employees who declined Sprain Brook's health insurance plan received a monthly payment that was keyed to the cost of the insurance premiums. For example, Employee Nogueira received about $350 per month. On November 21, 2011, Sprain Brook sent a memorandum to employees that it was "unable to continue offering a 'Medical Expenses' payout as has been done in the past." (JA 17; 125-28, 244, 247.) Health benefits are a mandatory subject of bargaining.[67] The Union, however, received no notice of the change.

Sprain Brook acknowledges (Br. 9, 33) that it eliminated the medical-expense payout, but claims that it fulfilled its bargaining obligation in doing so. In its defense, it claims (Br. 9, 33) that the Union declined to raise the issue in negotiations and that its good faith in bargaining is evident from its discussions with the Union regarding other issues including employees' health insurance and the closure of the housekeeping department. None of these claims, even if true, absolve Sprain Brook of its duty to bargain over the specific change: the elimination of the monthly medical-expenses payout.

In putting the onus on the Union, Sprain Brook again ignores its obligations under the Act. As explained above, an employer must notify the union and provide

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[67] *Long Island Head Start Child Dev. Servs. v. NLRB*, 460 F.3d 254, 258 (2d Cir. 2006).

an opportunity to bargain *before* announcing a change to employment terms. Sprain Brook did not do so before announcing to employees that it had eliminated their medical-expenses payout. While it does not invoke waiver terminology, Sprain Brook seems to suggest just that in asserting (Br. 9) that "the Union never made a formal demand to negotiate regarding this alleged change in terms and conditions of employment even after being informed of [the] same." Its view is contrary to established law. The Union could not have waived its right to bargain where it had no meaningful notice or opportunity to bargain in the first place.[68]

Moreover, any negotiations over other employment terms (Br. 33) does not obviate Sprain Brook's obligation to bargain over the medical-expenses payout. As the Board explained (JA 17 & n.31), any negotiations or offers to bargain over other discrete subjects are irrelevant to this violation. Bargaining about Sprain Brook's subcontracting of the laundry department had nothing to do with the medical-expenses payout. Sprain Brook's invocation of negotiations regarding health insurance premiums is equally unavailing and unsupported. As the Board

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[68] *Int'l Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) ("notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated"); *see also NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513, 519 (7th Cir. 1998) (rejecting waiver-by-inaction argument); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1440-41 (9th Cir. 1995) (employer cannot assert waiver-by-inaction defense unless it shows that union had clear, advance notice of employer's intent to implement change).

noted (JA 17 & n.31), if Sprain Brook had made such a proposal regarding any of the allegations here, it could have provided such evidence. It did not. Sprain Brook's attempt (Br. 33) to tout its good faith in dealing with its employees and their union rings hollow given its related violations of the Act in this and prior unfair-labor-practice cases.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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June 2015

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	No. 14-4028-ag
	)	
v.	)	
	)	
SPRAIN BROOK MANOR NURSING HOME, LLC	)	
	)	
	)	
	)	Board Case No.
Respondent	)	2-CA-040231
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,568[1] 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 15th day of June 2015

[1] In the Board's page-proof brief, the Certificate of Compliance incorrectly stated that brief contained 9,686 words rather than the actual word count of 11,673. The count obtained from the Microsoft Word for the page-proof brief inadvertently did not include the footnotes. The word count for the instant final brief does include the footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

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