

Nos. 15-1024, 15-1047

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FLAMINGO LAS VEGAS OPERATING COMPANY, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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COMPANY, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1024
)	15-1047
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-69588
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board certify the following:

A. ***Parties and Amici:*** Flamingo Las Vegas Operating Company, LLC, was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court. International Union, Security, Police and Fire Professionals of America was the charging party before the Board. The Board’s General Counsel was a party before the Board.

B. ***Rulings Under Review:*** The case under review is a decision and order of the Board issued on December 10, 2014, and reported at 361 NLRB No. 130.

C. *Related Cases:* This case has not previously been before this Court.

The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

s/Linda Dreeben
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Dated at Washington, DC
this 12th day of August, 2015

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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GLOSSARY OF ABBREVIATIONS

Act	National Labor Relations Act
Board	National Labor Relations Board
Company	Flamingo Las Vegas Operating Company, LLC
FTO Gold	Field Training Officer
HIFOB	Harrah's, Imperial Palace, Flamingo Las Vegas, O'Sheas, Bill's Gamblin Hall and Saloon
Union	International Union, Security, Police, and Fire Professionals of America

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Flamingo Las Vegas Operating Company, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against the Company. The Board had subject matter jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act

(“the Act”) (29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Decision and Order issued on December 10, 2014, and is reported at 361 NLRB No. 130.¹ The Order is final with respect to all parties. The Company petitioned for review of the Board’s Order on February 3, 2015, and the Board cross-applied for enforcement on March 2, 2015. The Court has jurisdiction over the Company’s petition and the Board’s cross-application pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), which provides that petitions for review of Board orders may be filed in this Court. Both filings were timely because the Act imposes no time limit on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company committed numerous violations of Section 8(a)(1) of the Act by engaging in conduct that interfered with, restrained, or coerced the security officers in the exercise of their Section 7 rights.

2. Whether there is a basis to reach the Company’s challenge to the Board’s posting remedy.

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

RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

Acting on charges filed by International Union, Security, Police and Fire Professionals of America (“the Union”), the Board’s General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158 (a)(1)) by committing numerous unfair labor practices prior to and during a union organizing campaign. (A. 237; 173-82, 187-88, 198.) Following a hearing, an administrative law judge found merit to most of the unfair-labor-practice allegations. On April 25, 2013, after the Company filed exceptions, the Board (Chairman Pearce and Members Griffin and Block) issued its Decision and Order, affirming all but three of the judge’s unfair labor practice rulings, findings, and conclusions. *See Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, 2013 WL 1786663. The Company petitioned the Court for review of that order. (D.C. Cir. 13-1186). On June 24, 2013, the Court placed the case in abeyance pending the Supreme Court’s decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which raised questions concerning the validity of certain recess appointments to the Board.

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 the appointments of Members Griffin and Block. On August 26, 2014, the Court granted the Board's motion to dismiss the case. On December 10, 2014, a properly constituted Board panel (Chairman Pearce and Members Hirozawa and Johnson) issued the Decision and Order now before the Court, which incorporates by reference the prior 2013 Decision and Order. (A. 157-59.) *See Flamingo Las Vegas Operating Company, LLC*, 361 NLRB No. 130, 2014 WL 6989152.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Security Operations

The Company operates a hotel and casino in Las Vegas, and is one of five properties that form a "pod" under the parent company Caesars Entertainment. (A. 238; 24, 189, 200.) The other properties in the pod are Harrah's, Imperial Palace, O'Sheas, and Bill's Gamblin Hall and Saloon ("HIFOB"). (A. 238; 23, 26-27.) Eric Golebiewski is the security director for HIFOB. (A. 238; 24, 39.)

The HIFOB security operation is extensive, with each property having security shift managers, supervisors, and field training officers ("FTO Golds").² The Company's operations require security officers 24 hours a day, 365 days a year, and it employs about 50-70 security officers. (A. 238; 24.) These officers are primarily responsible for providing a friendly and safe environment for guests

² FTO Golds are supervisors under the Act. (A. 238 n.6.)

and team members, while also protecting the Company's assets. (A. 238; 26, 204-07.) Security officers patrol the casino and perform "sweeps" of "undesirables," which include homeless persons, prostitutes, pimps, thugs, drug dealers, and persons covered under "be on the lookout" alerts. (A. 238; 27.) Security officers also perform "total service" sweeps, where they meet with and engage customers to make them feel welcome. (A. 238; 34.) Supervisors rate the officers' performance on these sweeps in a process called the "spotlight." (A. 238; 34, 57, 99.)

At the beginning of every shift, the shift manager or supervisor holds a pre-shift meeting. (A. 238, 243; 27-28, 44.) In these meetings, which typically last 15-30 minutes, officers receive information such as updated procedures, policies, flyers, alerts, and anything that they need to know for their shift. (A. 238, 243; 27-28, 44.)

B. The Company's "Believe Or Leave" Campaign; Security Officer Bizzarro Complains that a Supervisor Is Threatening and Harassing the Officers; FTO Gold Larry Myatt Warns Bizzarro To Keep His "Mouth Shut" Because He Is "Inciting the Men"

In early September 2011, after customer surveys revealed low customer service scores, the Company responded with a "believe or leave" campaign. (A. 234, 240.) The campaign emphasized that the customer service scores needed to be raised or "changes" would be made. (A. 129, 131.) Supervisors and other managers intended the "believe or leave" to motivate employees at all of the

HIFOB properties to improve their customer service. (A. 239; 77-79, 115-16, 147-48.)

On September 3, 2011, the Company held a pre-shift meeting detailing the “believe or leave” campaign. (A. 240; 42-43.) During the meeting, several officers, including security officer Francis Bizzarro, complained about several issues, such as shortened breaks, total service sweeps, and safety concerns regarding having their last names on their nametags. (A. 240; 65-66.) In response to the officers’ complaints, supervisor Kevin Quaglio warned the officers that they were expected to implement the Company’s new policy or to seek work elsewhere. (A. 240; 43, 66, 90.)

At the end of the meeting, security officer Bizzarro told FTO Gold Larry Myatt that Quaglio’s comments were threatening and harassing to the security officers. (A. 241; 66.) In response, Myatt told Bizzarro to stop talking because he was “inciting the men.” (A. 241; 66, 80.) Myatt, along with Supervisor Cedric Johnson, then took Bizzarro into the manager’s office, where Myatt again told Bizzarro that his comments were “inciting” the other security officers, that he “needed to stop making these comments,” keep his “mouth shut,” or there would be “consequences.” (A. 241; 66-67, 80.)

C. Bizzarro Contacts the Union About Representation and Begins Distributing Union Authorization Cards

In response to complaints about the “believe or leave” campaign and other security officer concerns, Bizzarro contacted the Union seeking representation. (A. 239, 243; 65, 67-68, 76.) In late September, Bizzarro began to distribute union authorization cards to security officers who expressed an interest in the Union. (A. 239; 43, 51, 68, 76.) Bizzarro passed out more than 100 authorization cards to security officers at the Flamingo, O’Sheas, and Bill’s. (A. 243; 68, 69.) Bizzarro also began posting union flyers on a bulletin board inside a briefing room. (A. 252; 64.) Bizzarro was the security officer “most active” in the Union’s campaign. (A. 234, 239, 243; 48-49, 95, 170.)

D. The Company Distributes an Antiunion Flyer Containing a Blank Union Authorization Card

It is undisputed that by October 7, after a security officer gave one of the blank authorization cards to Supervisor Quaglio, the Company knew about the Union’s campaign and knew that Bizzarro had been distributing the cards. (A. 243; 121, 148.) Immediately after receiving the blank card, the Company created and distributed an antiunion flyer containing a copy of the card and, with a circle drawn around the place for an employee to sign, an admonition against signing. (A. 253; 43, 69, 84, 90, 98-99.) The Company distributed this flyer at a pre-shift

meeting, but did not explain to the officers how it obtained the card. (A. 253; 43, 84.)

E. The Company Holds a Mandatory Four-Hour Pre-Shift Meeting

A week after learning of the Union's campaign, Security Director Golebiewski, who typically did not attend pre-shift meetings, held a four-hour pre-shift meeting before the 9:00 p.m. shift to address the campaign. (A. 243; 28, 44, 69, 91.) Security supervisors Keith Berberich and Kevin Quaglio were present at the start of the meeting, but, in an unusual move, Golebiewski ordered them to leave. (A. 243; 44, 47, 69, 91.)

Golebiewski began the meeting by removing a union flyer from a bulletin board in the room and asking the security officers collectively why they wanted a union to represent them. (A. 244; 69, 91.) When no officers replied, Golebiewski then asked each officer the same question individually. (A. 244; 44, 69, 91.) Bizzarro was one of the few officers who responded. He told Golebiewski that the officers were unhappy with the way management treated them, mentioning the shortened breaks and spotlight checks. (A. 244; 70.) Other officers also raised complaints with Golebiewski. (A. 244; 44, 70.)

Golebiewski mentioned the ways in which he had helped specific officers with their work-related issues. For example, Golebiewski stated that in the past, he had helped officers address problems with attendance, absenteeism, and negative

customer feedback. (A. 22; 44.) In addition, Golebiewski stated that he saved the jobs of several officers by his considerate treatment of their alleged infractions of the Company's policies. (A. 246; 44, 69-70, 91-92.) Golebiewski told the officers that if there was a union contract, he would have to strictly adhere to the contract and would not have the "leeway" to help the officers. (A. 244; 44, 69-70, 91-92.)

During the meeting, Golebiewski also informed the officers that he was aware of their complaints concerning security supervisor Rick Casali. Golebiewski informed the officers that he was moving Casali to another casino and replacing him with Supervisor Charles Willis, who Golebiewski said "the officers would really like." (A. 244; 33, 44, 70.)

This meeting lasted four hours, which was "highly unusual" and had not previously occurred. (A. 243; 71, 125.) During the meeting, the casino floor was short-staffed. (A. 243; 28, 45, 71, 99.) In fact, the meeting lasted into the start of the next pre-shift meeting, and the next shift's officers were unable to have their meeting, were unable to retrieve the batteries for their radios, and were turned away from the room when they attempted to enter. (A. 243; 28, 45, 71, 99.)

F. The Company Distributes an Antiunion Flyer Highlighting the Word "BIZARRE"

On October 16, during a pre-shift meeting, the Company distributed another antiunion flyer. (A. 246; 71.) In the middle of the page, the flyer contained the following sentence:

We realize it's a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up (without asking questions) for a union that has absolutely no track record for achieving 'better' or 'more' for its dues-paying members.

(A. 247; 209.) The word "BIZARRE" appeared in capital letters in the original.

(A. 247; 209.) The Company prepared hundreds of flyers, which it posted at the Flamingo, O'Sheas, and Bill's. (A. 32-33, 71.)

G. Security Director Golebiewski Interrogates Officer Ty Evans About His Union Sympathies; Golebiewski Tells Officer Christopher Rudy That if the Union Were Representing the Employees, He Would Be Disciplined

In mid-November, after the Union filed its representation petition, Golebiewski approached security officer Ty Evans, who was on duty near the beer pong area in the O'Sheas casino. (A. 239, 253; 85.) Golebiewski asked Evans his opinion of the union. (A. 253; 85, 87.) When Evans replied that he was undecided, Golebiewski walked away. (A. 253; 85, 87.)

In late-November or early-December, Golebiewski approached security officer Christopher Rudy while he was on-duty in the Flamingo and talking to guests and "a cigarette girl." (A. 247; 100.) Golebiewski approached Rudy, put his hand on Rudy's shoulder and said, "if this was a union area, I would have to write you up." (A. 247; 100.) Rudy responded that he was "glad" he was not being disciplined. (A. 247; 100.)

H. Vice President Paul Baker Accuses Bizzarro of Disloyalty Because of His Union Sympathies; the Election Is Postponed

In mid-January 2012, as Bizzarro was walking into the casino, he saw Assistant General Manager and Vice President Baker waiting for him at the end of a hallway. (A. 248; 72.) Prior to Bizzarro's employment at the Company, Baker and Bizzarro had a friendly relationship. (A. 248; 40, 77.) After the men exchanged greetings, Baker stated that he was upset with Bizzarro and that he felt "betrayed" by Bizzarro's attempt to bring the Union into the Company. (A. 248; 72, 77, 82.) When Bizzarro tried to leave, Baker followed him. (A. 248; 72, 77.) Baker then yelled and screamed at Bizzarro, berating Bizzarro for placing Baker's job "in jeopardy" by his actions. (A. 248; 77.) During the encounter, Baker "seemed very frustrated, was red in the face, very angry, . . . and was in fact screaming." (A. 248.) Baker caused "quite a scene" and other officers came to see what was going on. (A. 248; 72.)

Shortly thereafter, on January 27, 2012, the Regional Director for Board issued an order postponing the election indefinitely pending the investigation and disposition of the unfair-labor-practice charges at issue in this case. (A. 239.) To date, no election has been held. (A. 30.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 10, 2014, the Board (Chairman Pearce and Members Hirozawa and Johnson) issued its Decision and Order, which incorporates by reference the 2013 Decision and Order. The Board, in agreement with the 2013 Decision and Order, concluded that the Company violated Section 8(a)(1) of the Act by repeatedly threatening and interrogating its employees; creating the impression of surveillance, soliciting grievances, and promising employees improved terms and conditions of employment if they declined to choose union representation.³

To remedy the violations, the Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Order requires the Company to post a remedial notice at three of its properties and, in accord with *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372 (Oct. 22, 2010), to distribute the same notice

³ In light of the judge's finding that the Company violated § 8(a)(1) by threatening its employees with unspecified reprisals because of their concerted activities, the Board found it unnecessary to pass on whether the Company's October 16 flyer also threatened its employees with unspecified reprisals, explaining that such a finding would not materially affect the remedy. (A. 234 n.3.) Accordingly, the Company's arguments (Br. 53-54) that the flyer did not constitute a threat are irrelevant as that violation is not at issue in this case. *See Fortuna Enter., LP v. NLRB*, 665 F.3d 1295, 1304-05 (D.C. Cir. 2011) (Board's conclusion that a violation is cumulative and would not materially affect the remedy is entitled to "substantial deference").

electronically if the Company customarily communicates with its employees by such means. (A. 255, 258.)

SUMMARY OF THE ARGUMENT

1. Substantial evidence supports the Board's findings that the Company committed numerous unfair labor practices by engaging in conduct that interfered with, restrained, or coerced the security officers in the exercise of their Section 7 rights. This behavior started from the moment the Company learned of the Union's campaign and continued until the postponement of the representation election. The Company's unlawful conduct included interrogating and threatening employees, creating the impression of surveillance, promising its employees improved terms and conditions of employment, and soliciting its employees' complaints and grievances. The Board properly found that this conduct reasonably tended to coerce employees in exercising their Section 7 rights.

The Company's defenses lack merit. In an attempt to present a blanket defense of its actions, the Company repeatedly claims that its conduct merely conveyed its opinion regarding unionization and is therefore lawful under Section 8(c) of the Act. But, where, as here, an employer's statements and actions may reasonably interfere with employees' exercise of their Section 7 rights, an employer cannot shield its unlawful behavior under the guise of lawful opinion. Further, the Company's claims that its multiple unlawful statements are susceptible

to different meanings ignores the context in which its statements were made—in the midst of contested union campaign where the Company openly expressed its antiunion views. The Company’s remaining arguments rest on discredited evidence, and its many objections to the Board’s credibility findings fail to show that such determinations were patently unupportable.

2. The Company’s challenge to that portion of the Board’s Order requiring it to electronically distribute a remedial notice is not properly before this Court. The Company failed to raise its challenge to the remedy before the Board; in fact, it expressly told the Board that it would reserve its objections to the electronic notice posting for the compliance phase. Nor is the issue ripe for review, because whether the Company will have to electronically post a remedial notice will not be decided until the compliance phase.

STANDARD OF REVIEW

This Court “accords a very high degree of deference to administrative adjudications by the [Board].” *United Steelworkers of Am. v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993). The Court will affirm the findings of the Board unless they are “unsupported by substantial evidence in the record considered as a whole,” or unless the Board “acted arbitrarily or otherwise erred in applying established law to fact.” *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999). “Substantial evidence” for purposes of this Court’s review of factual findings,

consists of “such relevant evidence as a reasonable mind might accept to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); accord *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 923 (D.C. Cir. 2005).

The Court likewise will “defer to the Board’s interpretation of the Act if it is reasonable.” *Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002).

See also *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990);

Ceridian Corp. v. NLRB, 435 F.3d 352, 356 (D.C. Cir. 2006). Finally, the Board’s

assessment of witness credibility is given great deference and must be adopted

unless it is “hopelessly incredible” or “self-contradictory.” *Teamsters Local Union*

No. 171 v. NLRB, 863 F.2d 946, 953 (D.C. Cir. 1988).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1) OF THE ACT BY ENGAGING IN CONDUCT THAT INTERFERED WITH, RESTRAINED, OR COERCED THE SECURITY OFFICERS IN THE EXERCISE OF THEIR SECTION 7 RIGHTS

A. An Employer Violates the Act by Engaging in Activity That Would Reasonably Tend to Coerce Employees’ Exercise of Their Section 7 Rights

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1))

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.” The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, the employer’s conduct has a reasonable tendency to coerce or interfere with employee rights. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 931 (D.C. Cir. 1991). Proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *Avecor*, 931 F.2d at 931; *Teamsters Local 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988).

An employer’s statements “must be judged by their likely import to [the] employees.” *C & W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978). *Accord Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006) (assessing the legality of employer statements based on whether employees would “reasonably perceive” them as threats). The critical inquiry, then, is what an employee could reasonably have inferred from the employer’s statements or actions when viewed in context. *See, e.g., Tasty Baking Co.*, 254 F.3d at 124-25 (explaining that statements that may appear ambiguous when viewed in isolation can have a more ominous meaning for employees when viewed in context). 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.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). And the Court “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.” *Id.* at 620.

B. The Company’s Section 8(c) and Credibility Arguments Lack Merit

As discussed below (pp. 21-53), the Company, in an effort to thwart the Union’s campaign before it could even gain momentum, committed numerous Section 8(a)(1) violations of the Act. In defense of its actions, the Company repeatedly raises two defenses. First, it argues that its statements to employees were lawful expressions of opinion and not coercive. Second, the Company criticizes the Board’s adoption of the judge’s credibility determinations. Neither argument has merit.

1. The Company’s statements lack Section 8(c) protection

The Company (Br. 31-34) asserts the same defense to each violation, accusing the Board of transforming lawful statements of opinion that are protected by Section 8(c) into unlawful conduct. Consistent with Section 8(a)(1)’s bar on coercive conduct, Section 8(c) of the Act (29 U.S.C. § 158(c)) provides that an employer may state its opinion about unionization, but only if its statements do not

contain an express or implied “threat of reprisal or force or promise of benefits.”

See generally Gissel Packing Co., 395 U.S. at 618-20.

Section 8(c), however, does not insulate employer conduct that goes beyond voicing a preference about employees’ union status. *Southwest Reg’l Joint Bd. v. NLRB*, 441 F.2d 1027, 1032 (D.C. Cir. 1970) (“An employer’s right cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in Section 7 and protected by 8(a)(1) and the proviso to 8(c).”) As this Court has recognized, employer speech that would otherwise appear to be within the scope of Section 8(c) may be unlawful under Section 8(a)(1) of the Act, because, “the employer’s statements may reasonably be said to have tended to interfere with employees’ exercise of their Section 7 rights.” *Exxel/Atmos v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) (quoting *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992)). To that end, the Company “cannot obtain the protection of [S]ection 8(c) simply by labeling [its] statements ‘opinions,’” where, as here, the remarks have a reasonable tendency to coerce employees. *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 363 (6th Cir. 1984). *See also Alleghany Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1366-67 (D.C. Cir. 1997) (finding employer’s statement that unionization would result in layoffs lacked Section 8(c) protection). Therefore, “if there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic

necessities and known only to him,” the statement is a threat that violates Section 8(a)(1). *Gissel Packing Co.*, 395 U.S. at 618.

Here, as shown below, the Company’s conduct was decidedly not lawful objective predictions or opinions regarding unionization in general or the consequences of unionization. Instead, the Company, relying on threats, interrogations and other unlawful conduct, engaged in behavior meant to stifle employees’ lawful Section 7 activity and to convey the message that unionization would cause unwelcome changes—changes that the Company would make based solely on its opposition to unionization.⁴ Thus, there is no merit to the Company’s blanket assertions (Br. 31-34, 41, 49-50, 54, 57) that its conduct was nothing more than lawful expressions of opinion.

2. The Company fails to meet the heavy burden necessary to overturn the judge’s credibility determinations

Throughout its brief (Br. 34-36, 38-39, 49, 50, 52, 58-60), the Company relies on discredited testimony to challenge a number of the Board’s findings. As

⁴ The Company’s frequent attempts (Br. 32, 34, 44, 56) to claim its statements are similar to those at issue in *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994), are misplaced. In that case, the court found that the employer’s statements predicting unionization would cause economic difficulties and loss of job security were lawful because the employer referred expressly to factors outside the employer’s control. *Id.* at 1137. Here, as discussed below, the Company’s statements had no objective basis and were mere threats that violated Section 8(a)(1)’s bar on conduct that would reasonably tend to coerce employees in the exercise of their Section 7 rights.

this Court has noted, a party that wishes to overturn credibility determinations adopted by the Board must show, not only that the credited testimony “carries . . . its own death wound,” but also that the “discredited evidence . . . carries its own irrefutable truth.” *United Auto Workers v. NLRB*, 455 F.2d 1357, 1368 n.12 (D.C. Cir. 1971). The Company fails to show that the judge’s credibility determinations “are hopelessly incredible, self-contradictory, or patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (quoting *Federated Logistics & Operations*, 400 F.3d at 924).

A recurring credibility contention in the Company’s brief (Br. 36, 39, 58-60) is that the judge erroneously credited Bizzarro instead of the Company’s witnesses with regard to several violations. The Company specifically claims that because the judge discredited some of Bizzarro’s testimony, his testimony regarding all events should be disbelieved. However, “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). *See also Underwriters Labs. Inc. v. NLRB*, 147 F.3d 1048, 1053 (9th Cir. 1998) (“[T]he ALJ could reasonably find some parts of [a witness’s] testimony believable and other parts unbelievable.”) (internal quotation marks omitted).

Overall, the Company identifies no countervailing evidence sufficient to overturn the judge's findings. At most, the Company's arguments show that the record contains "conflicting testimony," which is precisely the situation where "essential credibility determinations [must] be[] made," *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985), and where deference to the Board and judge is most appropriate. What the Company seeks to do is have the Court "retry the evidence," which is "not for [a] court to do." *See Vico Prods. Co., Inc. v. NLRB*, 333 F.3d 198, 209 (D.C. Cir. 2003).

Thus, the Company's Section 8(c) and credibility defenses do not withstand the Board's findings –supported by substantial evidence – that the Company committed numerous violations of the Act.

C. FTO Gold Larry Myatt Threatened Security Officer Bizzarro

An employer violates Section 8(a)(1) of the Act when it threatens an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011). *See also Rinke Pontiac Co.*, 216 NLRB 239, 241-42 (1975). However, an employer's unlawful threat need not predict that a specific action will be taken for engaging in protected activity; unspecified reprisals also violate the Act. *Santa Fe Tortilla Co.*, 360 NLRB No. 130, 2014 WL 2705194, at *1 (2014). *See also Ozburn-Hessey Logistics, LLC v.*

NLRB, 2015 WL 3369876, at *2 (D.C. Cir. May 1, 2015) (affirming Board’s finding that threats of unspecified reprisal violates § 8(a)(1)).

Substantial evidence supports the Board’s finding (A. 241) that the Company violated Section 8(a)(1) of the Act when FTO Gold Larry Myatt threatened Bizzarro in response to Bizzarro’s protected concerted activity. As shown above (p. 6), after Bizzarro told Myatt that supervisor Quaglio’s statements were threatening and harassing to the officers, Myatt told Bizzarro to “keep his mouth shut” because he was “inciting” the other officers. He further warned that there would be “consequences” if Bizzarro continued talking.

As an initial matter, the Board properly found (A. 241) that Bizzarro was engaged in protected concerted activity when he challenged Quaglio’s statements. Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962). The Board’s test for concerted activity is whether the activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984)), *aff’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Here, Bizzarro was concerned that supervisor Quaglio’s statements about the Company’s “believe or leave” campaign were threatening and harassing to the security officers, and

Bizzarro expressed his discontent in the meeting. As the Board noted, “[c]ertainly this expressed concern related directly to the conditions under which Bizzarro and his fellow security officers worked.” (A. 241.) *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (recognizing protected concerted activity includes situations “in which the lone employee intends to induce group activity”).

The Board properly determined that Myatt’s warnings to Bizzarro—issued directly after Bizzarro expressed his concern that Quaglio was harassing the officers—constituted a threat of unspecified reprisal for engaging in protected concerted activity. After warning Bizzarro “to keep his mouth shut” or risk facing “consequences,” Myatt immediately removed Bizzarro from the meeting room, effectively cutting off any further discussion. (A. 241.) Myatt then delivered his threat a second time, so as to ensure that Bizzarro would stop, in Myatt’s words, “inciting the men.” (A. 241.) Given this context, an employee would reasonably understand that Myatt was warning employees against expressing their concerns as to their working conditions.

The Company is mistaken in its argument (Br. 37-38) that because Myatt’s warning was “not directed to the substance of Bizzarro’s concerns,” the Company was within its right to discipline Bizzarro for “insubordination.” In support of its argument, the Company relies on *Metro Mayaguez, Inc.*, 356 NLRB No. 150, 2011 WL 1633940, at *21 (Apr. 29, 2011), but that reliance is misplaced. In that case, a

nurse that was otherwise engaged in protected activity lost the Act's protection by shouting "rambunctious[ly]" at her supervisor and slamming keys on the desk, all while in a hospital setting with patients recovering from recent surgery. Here, the record contains no comparable evidence; instead, the credited evidence shows that the extent of Bizzarro's alleged insubordination was his comment that Quaglio's statements were threatening and harassing. As the Board found, this comment was protected activity, not insubordination. *See Trompler, Inc.*, 335 NLRB 478, 479 (2001), *enforced*, 338 F.3d 747 (7th Cir. 2003) (employee walkout to protest supervisor's conduct was protected activity); *Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 766 (6th Cir. 1998) (employee objections concerning supervisor's "rude, belligerent and overbearing behavior" that "directly impacted employees' jobs and their ability to perform them" was protected concerted activity); *Rockwell Int'l Corp. v. NLRB*, 814 F.2d 1530, 1534-35 (11th Cir. 1987) (employee criticizing announced work rule during a group meeting was engaged in protected activity).

Moreover, there is similarly no merit to the Company's argument (Br. 38) that Bizzarro's "personal sensitivities" and his "suspicious" feelings towards the Company played a role in the Board's analysis. The Board's finding of the unlawful threat was based on how a reasonable employee would view Myatt's warnings and was not based on Bizzarro's subjective interpretation of the threats.

Finally, the Company's credibility challenge (Br. 38-39) likewise lacks merit. The judge properly determined that Myatt's denials that the encounter even occurred were "half hearted and made with little conviction," and that Myatt's attempt to move the incident to another time "did not seem reasonable or credible." (A. 241.) In contrast, as the judge noted, Bizzarro's account "had the ring of authenticity." (A. 241.) The Board's adoption of a judge's credibility determinations will not be reversed absent evidence that they are "hopelessly incredible, self-contradictory, or patently unsupportable." *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1092 (D.C. Cir. 2012). The Company has failed to adduce any such evidence.

Therefore, the Board properly found that supervisor Myatt's warning to Bizzarro to "stop making" comments about the employees' working conditions or else face "consequences" was an unlawful threat that violated Bizzarro's right to engage in protected concerted activity.

D. The Company's October 7 Antiunion Flyer Created the Impression of Surveillance

An employer's conduct violates Section 8(a)(1) if it creates the impression among employees that they are subject to surveillance. *Parsippany Hotel Mgmt*, 99 F.3d 413, 420 (D.C. Cir. 1996). When an employer creates the impression that it is subjecting employees lawful union activities to surveillance, it "inhibits the employees' right to pursue union activities untrammelled by fear of possible

employer retaliation.” *Miss. Transp., Inc. v. NLRB*, 33 F.3d 972, 978 (8th Cir. 1994) (citation omitted). The Board’s test for determining whether an employer has created an impression of surveillance is “whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance.” *Mountaineer Steel, Inc.*, 326 NLRB 787, 787 (1998), *enforced mem.*, 8 F. App’x 180 (4th Cir. 2001) (citing *United Charter Serv.*, 306 NLRB 150 (1992)). *See also Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 266 (D.C. Cir. 1993) (citing *Road Sprinkler Fitters Local Union v. NLRB*, 681 F.2d 11, 19 (D.C. Cir. 1982)).

The Board reasonably found (A. 253) that the Company unlawfully created the impression of surveillance when the Company prepared and disseminated an antiunion flyer containing a copy of a blank union authorization card. Both the timing and the content of the flyer support the Board’s finding. As to the timing, the organizational campaign was in its infancy—a time when it is “most vulnerable to threats and impression of surveillance.” (A. 253.) Indeed, only a week had passed since Bizzarro began distributing the cards.

The content of the flyer – which contained a blank card of unidentified origin – further added to the impression of surveillance. Despite distributing the flyer at a pre-shift meeting, the Company did not take the opportunity to state that a security officer voluntarily provided the card. At this point in the campaign, “the

employees who had signed cards had not done so openly, nor was there evidence that they wanted [the Company] to be aware of their involvement in the campaign.” (A. 257 n.1.) Thus, the Company’s argument (Br. 41) that an employer does not violate the Act by publicizing information voluntarily provided by employees is beside the point. As the Board explained, because “management gave no explanation as to how it came to possess a blank union card, security officers might reasonably have feared that the [Company] was spying on their union activity.” (A. 253.) *See, e.g., NLRB v. Gerbes Super Mkts., Inc.*, 436 F.2d 19, 21 (8th Cir. 1971) (when an employer informs employees that it knows about their protected activity, but does not reveal the source of that knowledge, employees may reasonably fear that the employer obtained its information through unlawful monitoring); *North Hills Office Servs.*, 346 NLRB 1099, 1103 (2006) (employer’s failure to identify source of information was the “gravamen” of an impression of surveillance violation); *Sam’s Club*, 342 NLRB 620, 620-21 (2004) (manager created impression of surveillance when, without revealing the source of the information, he told an employee that he had heard the employee was circulating a petition about wages).

Under these circumstances, *Bridgestone Firestone S.C.*, 350 NLRB 526 (2007), upon which the Company relies (Br. 40-41), is inapplicable. In that case, the Board found that the employer did not create an unlawful impression of

surveillance by revealing its knowledge of the union's campaign. In doing so, the Board explained that the employer had informed the employees that "certain coworkers had voluntarily provided [the] information" to the employer, and "there was no evidence or implication that management had previously solicited or coerced that information from employees." *Id.* at 527. The Board reasonably found that absent a similar explanation in this case, employees were left to fear that the Company was "spying on their union activity."⁵ (A. 253.)

Further, the Company overreaches in its claim (Br. 41) that the Board's finding interferes with the Company's right under Section 8(c) to express its opinion. This argument ignores the flyer's coercive undertone which strongly implied that the Company was monitoring the employees' union activity. As the Board explained, "[e]mployees have the right to be free of the concern that management is peering over their shoulders to watch their protected activity." (A. 253.)

Thus the Board properly concluded that the Company created an unlawful impression of surveillance by distributing a flyer containing a blank union authorization card and warning employees not to sign the card.

⁵ The Company contends (Br. 40) that the Board erred in finding that flyer "constituted unlawful surveillance." The unfair labor practice at issue, however, is whether the flyer created the impression of surveillance, which is a Section 8(a)(1) violation separate and apart from unlawful surveillance.

E. During the Company's October 14 Pre-Shift Meeting, Security Director Golebiewski Interrogated and Threatened Employees, Solicited Grievances, and Promised Improved Terms and Conditions of Employment

On October 14, the Company held an unprecedented pre-shift meeting for Bizzarro's shift. As an initial matter, the meeting was unusual because the Company's highest ranking security officer, Eric Golebiewski, conducted the meeting, instead of the usual line supervisors. The meeting was also remarkable for its length. While pre-shift meetings typically last 15-30 minutes, Golebiewski held the officers for four hours, without permitting them to exit the meeting room. (See pp. 8-9.) As shown below, during the course of this mandatory meeting, Golebiewski unlawfully questioned, threatened, solicited grievances, and made promises of improved benefits and conditions of employment.

1. Security Director Golebiewski interrogated employees

An employer violates Section 8(a)(1) of the Act by coercively interrogating employees about their union support and activities. See *Avecor*, 931 F.2d at 931; *Southwire Co. v. NLRB*, 820 F.2d 453, 456 (D.C. Cir. 1987). In determining whether an employer's interrogation has a reasonable tendency to coerce, the Board appropriately considers the totality of the circumstances. See *Rossmore House*, 269 NLRB 1176, 1178 & n.20 (1984), *aff'd sub nom.*, *Hotel Employees & Rest. Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Southwire Co.*, 820 F.2d at 456. Factors that may be considered include: the

background of the employer's hostility to unionization; the nature of the information sought; the identity of the questioner; the place, timing, and method of the interrogation; the truthfulness of the reply; whether the employee is an open union supporter; and whether the questioner gave the employee assurances against reprisals. See *Perdue Farms, Inc., Cookin' Good Div. v. NLRB*, 144 F.3d 830, 835-36 (D.C. Cir. 1998) (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)). See also *Midwest Reg'l Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977). This Court has noted that these "*Bourne* factors" are not prerequisites to a finding of coercive questioning, "but rather useful indicia that serve as a starting point for assessing the totality of the circumstances." *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

Substantial evidence supports the Board's finding (A. 245) that Golebiewski coercively interrogated the officers during the October 14 meeting. Specifically, the credited facts show that in the highly unusual 4-hour pre-shift meeting, Golebiewski asked the group of officers how they felt about the Union. When he received few responses, he then repeated his questions by directly asking each individual officer for a response.

The Board reasonably determined (A. 245) that a majority of the *Bourne* factors weigh in favor of finding unlawful interrogation. As to the nature of the information, the Company sought information about the officers' views on the

Union. Questioning that seeks information about the employees' organizing effort and their opinion of the Union is evidence of coercion. *W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1348 (D.C. Cir. 2007) (questioning about union sympathies has a "tendency to coerce"). As this Court has noted, "any attempt by an employer to ascertain employees' views and sympathies regarding unionization generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge upon his Section 7 rights." *Allegheny Ludlum Corp.*, 104 F.3d at 1359.

As the Company's highest ranking security official, Golebiewski's position in the Company hierarchy further supports the Board's finding that the questioning was coercive. *See, e.g., Midwest Reg. Joint Bd.*, 564 F.2d at 443 (questioning by someone in the "management hierarchy" evidence of coerciveness); *K-Mart Corp.*, 336 NLRB 455, 469 (2001) (questioning by general manager, a high ranking official onsite, evidence of coerciveness).

The location of the questioning further illustrates the coercive nature of Golebiewski's questioning as Golebiewski questioned officers behind closed doors in a mandatory pre-shift meeting. *W& M Props. of Conn.*, 514 F.3d at 1348 (questioning that occurs "behind closed doors and [] initiated by a company official" is "especially" coercive).

The officers' replies to Golebiewski's prodding further supports the Board's unlawful interrogation finding. As the judge found, "[u]ndoubtedly the officers were concerned about giving truthful, candid responses, as many of them remained silent." (A. 245.) See *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, 2011 WL 1687418, at *1-2 (Apr. 29, 2011) (silence in response to question about union support indicated an attempt to conceal and weighed in favor of interrogation finding); *Sproule Constr. Co.*, 350 NLRB 774, 774 n.2 (2007) (same). Finally, Golebiewski's failure to convey any legitimate purpose for his questioning, or offer assurances against retribution, is also evidence of coercion. *Norton Audubon Hosp.*, 338 NLRB 320, 321 n.6 (2002) ("the absence of assurances that the questions did not have to be answered or that reprisals would not take place is a factor tending to establish the existence of coercive circumstances"); *Perdue Farms*, 144 F.3d at 835-36 (same).

Citing Golebiewski's "history of holding open court with the officers" in order to "flush out complaints," the Company's contends (Br. 42-44) that the October 14 meeting was "an intimate meeting designed to engage in honest discussion about unionization and not to pressure employees." This claim rings especially hollow in light of the fact that the October 14 meeting bore no resemblance to other pre-shift meetings. Indeed, Golebiewski started the meeting by asking the other supervisors to leave the room, which as the judge found, was

“highly unusual.” (A. 245.) Golebiewski then “held court” for *four* hours, which was unprecedented considering the pre-shift meetings typically lasted 15 – 30 minutes. In fact, the meeting was so long that Golebiewski was “apparently willing to sacrifice having an appropriate level of security on the casino floor.” (A. 245.) Moreover, officers are not permitted to leave pre-shift meetings without express permission from a supervisor. (A. 37, 71.) In fact, when one officer asked to leave to use the restroom, Golebiewski instructed him to “hold it.” (A. 71.)

Thus, contrary to the Company’s characterization (Br. 43), this meeting stands in stark contrast to Golebiewski’s “chief meetings.” At those meetings, Golebiewski met with employees and paid for their buffet lunch. In return, the employees, who voluntarily attended, could “express anything” they wanted. Here the employees were not met with an encouraging and open-door atmosphere, as they were not allowed to leave and were interrogated as to their union views. Such a meeting is far from a “chief meeting” and is not a lawful discussion warranting Section 8(c) protection.

Equally unavailing is the Company’s contention (Br. 44) that the purpose of the meeting was for Golebiewski to “gauge the officers’ concerns” and to discuss the “believe or leave campaign.” Such a claim is based on Supervisor Keith Berberich’s testimony that he suggested Golebiewski attend the meeting to address the officers’ complaints about him. But the judge properly rejected (A. 245) that

testimony in favor of the corroborated testimony of the three security officers (Bizzarro, Thomas Willequer, and Brian Meadows) who stated that Golebiewski started the meeting by asking the security officers why they wanted the Union. The judge also properly discredited (A. 245) Golebiewski's testimony that he held the meeting to address complaints about him, finding such a claim "defies credulity." As the judge explained (A. 245), while he "seriously doubt[ed]" that Golebiewski would have been willing to "find out what complaints the officers had with him personally," the judge certainly "believe[d]" that Golebiewski "would have gone to such extremes only in an effort to confront the union campaign, which was at the time gaining momentum." (A. 245.)

In sum, the Company has failed to mount a meritorious challenge to the Board's finding that Golebiewski unlawfully interrogated the officers regarding their union views.

2. Golebiewski solicited grievances and promised increased benefits and improved terms and conditions of employment

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) prohibits employers from soliciting grievances in a manner that interferes with, restrains or coerces employees in the exercise of Section 7 activities. *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 102-03 (D.C. Cir. 2000). While the solicitation of grievances alone is not per se unlawful, it may raise an improper inference that the employer is promising to remedy such grievances. *Amptech, Inc.*, 342 NLRB

1131, 1137 (2004), *enforced*, 165 F. App'x 435 (6th Cir. 2005). An employer also violates Section 8(a)(1) of the Act by promising or granting benefits to employees “with the express purpose of impinging upon [employees’] freedom of choice for or against unionization.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). *Accord Gen. Elec. Co. v. NLRB*, 117 F.3d 627, 636-37 (D.C. Cir. 1997).

Substantial evidence supports the Board’s finding (A. 246) that Golebiewski also unlawfully solicited employee complaints and grievances and that through these solicitations, “Golebiewski was implicitly promising the officers increased benefits and improved terms and conditions of employment for the purpose of dissuading them from supporting the Union.” As the Board explained (A. 245), the “substance and context of the conversation” made it “obvious” that Golebiewski “discussed concerns that [officers] had with management.”

Regarding the substance, the evidence shows that the meeting “evolved into a session where complaints were raised” and with “Golebiewski responding by indicating what he had done to benefit the officers.” (A. 245-46.) The context shows that Golebiewski solicited the officers’ complaints in reaction to the Union’s campaign, as he called the meeting one week after the Company learned of the organizing effort. Moreover, Golebiewski solicited the grievances in the midst of interrogating employees as to their union sympathies. *Aladdin Gaming, LLC*, 345 NLRB 585, 607 (2005) (where an organizational campaign is ongoing, the

solicitation of grievances creates a rebuttable presumption that the employer is going to remedy them).

The Company argues (Br. 46-47) that the judge “close[d] his eyes” (Br. 47) to the Company’s past practice of soliciting employee grievances and that this meeting was simply a continuation of its past practice of seeking, discussing, and resolving issues raised at regularly held meetings with employees. An employer, however, cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation.

Carbonneau Indus., 228 NLRB 597, 598 (1977). *See also Rotek, Inc.*, 194 NLRB 453, 455 (1971) (same). The judge (A. 243) did in fact note the Company’s past practice and explained why the October 14 meeting was anything but the typical pre-shift meeting, as it was “very unusual, both in its length and because it was conducted by the security director himself.” (A. 245.) Thus, given the abnormal nature of this meeting, the Company did not simply continue its “open door” policy (Br. 46) but instead significantly altered its manner and method of soliciting employee grievances, rendering its solicitation anything but a continuation of past practice.

Nor is there any merit in the Company’s contention (Br. 47) that Golebiewski’s behavior was lawful because he did not explicitly promise to resolve those complaints. What the Company overlooks is that an explicit promise

of benefits is not required for the Board to find a solicitation of grievances unlawful. *See St. Francis Fed'n of Nurses and Health Prof'ls v. NLRB*, 729 F.2d 844, 853 (D.C. Cir. 1984). *See also Reliance Elec. Co.*, 191 NLRB 44, 46 (1971) (an employer's refusal to commit to specific corrective action "does not cancel employees' anticipation of improved conditions if the employees oppose or vote against the union"). Moreover, an employer's "refusal to give a *specific* promise [does] not demonstrate the absence of an implied, general promise." *NLRB v. Cable Vision, Inc.*, 660 F.2d 1, 6 (1st Cir. 1982) (emphasis in original). The solicitation of grievances in the midst of a union campaign, as occurred here, inherently constitutes an implied promise to remedy those grievances. *Manor Care of Easton PA*, 356 NLRB No. 39, 2010 WL 4929679, at *28 (Dec. 1, 2010), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011). And, such an implicit promise is "clearly coercive and designed to show that [management] alone had the wherewithal to address and resolve employee problems.'" *Traction Wholesale Ctr. Co.*, 216 F.3d at 103 (quoting *Traction Wholesale Ctr. Co.*, 328 NLRB 1058, 1071(1999)).

The Board, therefore, properly found (A. 246) that the Company unlawfully solicited grievances and implicitly promised the employees improved terms and conditions of employment if they did not select the Union.

3. Golebiewski unlawfully promised improved terms and conditions of employment when he announced the transfer of a problematic supervisor

Substantial evidence also supports the Board's finding that the Company unlawfully promised the officers improved conditions of employment if they voted against the union. As shown above (p. 9), during the October 14 meeting, Golebiewski, while soliciting grievances and sharing his anti-union views, also informed the officers that the Company was transferring Security Shift Manager Rick Casali, about whom the officers had complained, to another casino and that Supervisor Charles Willis was replacing him. Golebiewski promised that the officers "would really like [Willis]." (A. 246; 70.)

Given these facts, the Board reasonably found that (A. 246) the Company's actions of relieving the officers of a disliked supervisor and replacing him with a well-liked supervisor was an unlawful promise of improved terms and conditions of employment – one made "in order to dissuad[e] the officers from supporting the Union." Indeed, Golebiewski "went beyond merely informing employees" about the transfer of a disliked supervisor. (A. 258 n.2.) He told them they "would really like" the new supervisor, "thus implying an attempt to remedy a grievance in response to the organizational campaign." *Id.*

The Board properly rejected (A. 246) the Company's argument (Br. 47-48) that the decision to transfer Casali was made prior to October 14 meeting. But, as

the Board further reasoned, assuming the matter had been pre-determined, “the real issue” was not when the decision was made but instead “what the security officers were told and when they were so told.” (A. 246.) The officers first heard about the transfer during the October 14 meeting when Golebiewski, having shared his anti-union views, was responding to complaints raised about Casali. As such, it was reasonable for the officers to conclude that Casali was being transferred “as a benefit to them” in order to dissuade them from supporting the Union. (A. 246.) Thus, even if the Company made the decision to transfer Casali “long before October 14,” because Company “employees had no reason to know” of that decision, “they could reasonably have viewed the . . . announcement as an attempt to discourage their support for the Union.” *Perdue Farms*, 144 F.3d at 837. The Board, therefore, reasonably determined (A. 246) that Golebiewski’s conduct in transferring Casali was a “transparent promise of benefit” made to dissuade union support.

4. Golebiewski unlawfully threatened employees with more strictly enforced work rules and potential job loss

It is well settled that threats of discipline and job loss violate 8(a)(1) “because these acts reasonably tend to coerce employees in the exercise of their rights, regardless of whether they do, in fact, coerce.” *Clinton Elec. Corp.*, 332 NLRB 479, 479 (2000) (quoting *Central Transport v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993)); *Progressive Elec.*, 453 F.3d at 544 (finding unlawful threats of

job loss in retaliation for protected union activities); *Southwire Co.*, 820 F.2d at 457 (threats of closure and job loss for engaging in protected activities). Such threats “serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood.” *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Substantial evidence supports the Board’s finding (A. 246) that Security Director Golebiewski unlawfully threatened employees that they would suffer more strictly enforced work rules or job loss if they chose union representation. As demonstrated above (pp. 8-9), during the four-hour pre-shift meeting, Golebiewski reminded the officers that he had saved certain officers’ jobs by his considerate treatment of their prior infractions of company rules. Golebiewski went on to state that if there had been a union contract in effect, he would have had to strictly adhere to that contract with no flexibility, and that he would not have had the “leeway” to assist the officers with their various problems or save their jobs.

As the Board explained, Golebiewski’s comments were “[o]bviously . . . meant to suggest to the officers that if the Union were successful in organizing the facility and subsequently signing a collective-bargaining agreement with the [Company], that work rules would be strictly enforced under the terms of that contract and employees who ran afoul of the rules could be terminated.” (A. 246.)

See P H Nursing Home, 332 NLRB 389, 392 (2000) (employer unlawfully threatened employees when employer told employees that if there was a Union, work rules would be more strictly enforced); *Southwest Reg'l Joint Bd.*, 441 F.2d at 1031 (same). In addition to the plain language of Golebiewski's comments, the Board properly emphasized the timing of the comments which occurred "shortly after [the Company] learned of the union campaign and just as that campaign was gathering momentum." (A. 246.) *See Carter's Inc.*, 339 NLRB 1089, 1089 n.2 (2003) (timing of employer's actions, shortly before an election, raised an inference of coercion). Thus the Board properly found (A. 246) that Golebiewski's comments were "clearly designed to restrain, coerce, and interfere with the security officers' right to engage in Section 7 activity."

There is no basis to the Company's contention (Br. 49-50) that Golebiewski's statements lawfully explained the general consequences of unionization. Rather, Golebiewski referenced specific employees whose jobs he had "saved" and others who he had helped, warning that if the employees selected the Union, instead of leniency for these infractions, the officers would be met with discharge. (A. 246.) Thus, while Golebiewski used to find ways to help employees, he stated that he would be less inclined to do so if the employees chose the Union. These statements strongly implied that this forecasted change would be due not to objective factors outside the Company's control, but instead would be

attributable to the Company's opposition to unionization. Such threats—tied explicitly to the presence of the Union—are plainly distinguishable from the cases upon which the Company relies. *See United Rentals, Inc.*, 349 NLRB 190, 190 (2007) (manager's statement to employee that his request for higher wages would be discussed after the election is lawful where there was no evidence that the employer "said or did anything . . . that would link consideration of [the employee's request] to the absence of union representation); *Sara Lee*, 348 NLRB No. 76, 2006 WL 3412554, at *5 (Nov. 22, 2006) (statement that employer could not deviate from a discipline procedure set forth in a future union contract was lawful because employer did not say that union contract would cause the employer to impose stricter discipline).

Thus, while an employer may lawfully state that unionization could change employer-employee relations, it may not threaten that benefits will be lost, or that tighter enforcement of company rules will ensure, if employees select union representation. *See Avecor, Inc.*, 931 F.2d at 932 (unlawful threat that employer would "deal more strictly with rule breakers" if the union represented employees); *Southwest Reg'l Joint Bd.*, 441 F.2d at 1031-32 (unlawful threat that choosing union representation would make it more difficult to obtain leaves of absence); *St. Vincent Hosp.*, 244 NLRB 84, 92 (1979) (unlawful threat that supervisors would alter current practices for scheduling shifts and granting time off).

Finally, for the reasons previously stated (pp. 19-21), the Company fails to show that the judge's decision to credit Bizzarro's version of events over that of Golebiewski is "hopelessly incredible, self-contradictory, or patently unsupportable." *Federated Logistics*, 400 F.3d at 924.

In sum, substantial evidence shows that by the end of the four-hour October 14 meeting, the employees had endured repeated violations of their Section 7 rights, including unlawful interrogation, threats, solicitation of grievances, and promises of improved conditions.

F. The Company's October 16 Antiunion Flyer Created the Impression of Surveillance

As demonstrated above (pp. 9-10), less than two weeks after the Company distributed its antiunion flyer with a copy of the blank union authorization card, and two days after the security director's four-hour pre-shift meeting where Golebiewski interrogated, threatened, solicited grievances, and made unlawful promises to the officers, the Company distributed a second antiunion flyer. (A. 246.) Figured prominently in the middle of the flyer, was the following sentence:

We realize it's a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up (without asking questions) for a union that has absolutely no track record for achieving 'better' or 'more' for its dues-paying members.

(A. 247; 209.)

Substantial evidence supports the Board's finding that this flyer created an unlawful impression of surveillance. First, the Board reasonably found (A. 247, 257 n.1) that the word "BIZARRE," which "certainly stands out" in the flyer, was a "thinly veiled barb at employee Francis Bizzarro." In fact, the Board concluded that the Company's argument that its word choice was "an innocent coincidence" was "preposterous." (A. 247.) Rather, as the Board explained, it was "very obvious" (A. 247) that the flyer "was intended for readers to understand the connection that was being made between the word 'BIZARRE' in all capital letters and the primary union organizer, Bizzarro." Indeed, the Board concluded that it was "highly doubtful that any security officer" who read the flyer to not have made the association. (A. 247.) And in fact, the officers did interpret the flyer as identifying Bizzarro. (A. 101.) Moreover, the Company's argument (Br. 51) that the flyer contained other words in all capital letters conveniently omits the fact that the word "BIZARRE" is the only non-acronym written in all capital letters in the flyer's main body. Therefore, the Board reasonably found (A. 247) that this "play on words" referenced Bizzarro.

Second, substantial evidence supports the Board's finding (A. 247) that the flyer's identification of Bizzarro created an unlawful impression of surveillance. As the Board explained, while it may have been generally known by the security officers that Bizzarro was the primary union organizer, seeing Bizzarro's name

“used and convoluted in this way would have served to alert those employees that [the Company] was aware of Bizzarro’s union activities and was targeting him and publically ridiculing him for those activities.” (A. 247.) And whether Bizzarro was already a known union supporter is irrelevant, as the “Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an impression of surveillance.” *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Moreover, the Company’s flyer was not an offhand remark; it was a prepared antiunion flyer that unmistakably conveyed the message that the Company knew of Bizzarro’s involvement in the union organizing effort. By making this fact known, the flyer served “as a warning” that the Company’s ability to surveil Bizzarro’s union activity meant that the Company “was capable of doing the same to other union supporters.” (A. 247.)

The Company misses the point with its claim (Br. 52) that the flyer was lawful because it was created in order to respond to questions from officers about the campaign. The Company can lawfully respond to questions, but not in a manner that suggests it is surveilling union activities. As the judge noted (A. 247), “[e]mployees should not have to fear that ‘members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.’” *Conley Trucking*, 349 NLRB 308 (2007) (quoting *Fred’k Wallace & Sons., Inc.*, 331 NLRB 914 (2000)). Coupled with the numerous other

violations found, the Board reasonably concluded (A. 247) that the flyer’s play on words in using Bizzarro’s name “created an impression among security officers that their union activities might be under surveillance by the [Company].”

The Company further argues (Br. 51) that the Board, in finding the flyer unlawful, “had to determine” that the Company was “actually monitoring” Bizzarro’s activities, and that the record does not support such a finding because “[r]eference to [Bizzarro’s] name does not translate into surveillance.” The Company’s argument confuses actual surveillance – which is not alleged – with the violation at issue here – the impression of surveillance. The Board does not require evidence that an employer is actively engaged in spying in order to show that an employer has created an impression of surveillance. *Flexsteel Indus.*, 311 NLRB 257, 257 (1993). Therefore, the Company’s argument (Br. 52) that the flyer’s word play “does not translate into surveillance” is irrelevant as actual surveillance was not alleged.

Finally, the Company contends that the flyer was a valid exercise of its Section 8(c) rights. Specifically, the Company argues (Br. 53-54) that the Board’s “only basis” for finding the flyer unlawful was because it “ridicul[ed]” or “demean[ed]” Bizzarro, and that Section 8(c) protects such disparaging comments. The Company’s argument misconstrues the Board’s unfair-labor-practice finding. As discussed above, the Board’s finding was not premised solely on whether the

flyer demeaned Bizzarro; instead, the Board determined that the officers, after seeing Bizzarro's name on the flyer, could reasonably conclude that the Company could monitor their activities as well. (A. 247.)

G. Security Director Golebiewski Interrogated Security Officer Ty Evans

Substantial evidence supports the Board's finding (A. 254) that the Company violated Section 8(a)(1) when Golebiewski coercively interrogated security officer Ty Evans about his union support. As shown above (p. 10), shortly after the representation petition was filed, Golebiewski approached Evans while Evans was working in the O'Sheas Casino and asked him what his "opinion was about the Union, of the union issue." Evans replied that he was undecided. (A. 253.)

Examining the *Bourne* factors, the Board properly found that Golebiewski's statement had a reasonable tendency to coerce. First, as the Board noted, Golebiewski was the security director, and "Evan's ultimate supervisor." (A. 254.) As a result, Evans, a "rank and file" employee, "likely would have been intimidated by a question from Golebiewski on his opinion of the Union," whose question came "out of the blue." (A. 254.) Second, Golebiewski's question directly sought information about Evans' support for the Union. *See Perdue Farms*, 144 F.3d at 835-36 (questions concerning employees' union sympathies tend to cause fear of reprisal).

Further, Golebiewski's inquiry took place while Evans was "making his rounds," which as the Board explained, is "not the type of environment where he would normally expect to have to field such a question." (A. 254.) *See Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1137-38 (D.C. Cir. 2003) (unlawful interrogation where manager questioned employee, while employee was working alone, about the employees' union sympathies and offered no assurance against reprisal). In addition, Evans' answer to Golebiewski's question was "ambivalent," which the Board considered (A. 254) to be "not surprising considering the discomfort that Evans must have felt" from Golebiewski's awkward questioning. *See Sproule Construc. Co.*, 350 NLRB at 774 n.2 (hesitancy in response to employer's questioning weighed in favor of interrogation finding).

Moreover, Golebiewski's questioning occurred during the "critical period" prior to the election—the period beginning with the union's filing of an election petition and ending with the election—and was therefore more "likely to affect employees' freedom of choice." *Amalgamated Clothing & Textile Workers v. NLRB*, 736 F.2d 1559, 1567 (D.C. Cir. 1984). *See also Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). Finally, the interrogation occurred against the backdrop of the Company's commission of numerous other violations. *See NLRB v. Los Angeles New Hosp.*, 640 F.2d 1017, 1019-20 (9th Cir. 1981) (interrogation part of "pattern of coercive conduct tending to inhibit the exercise of Section 7

rights”). Accordingly, given the totality of the circumstances, the Board properly found that Golebiewski’s interrogation of Evans was unlawful.

The Company’s characterization (Br. 55) of this exchange as a “normal” and “informal” conversation about employee concerns ignores the factors discussed above demonstrating the conversation’s coercive nature. And, the topic of the conversation was anything but normal; indeed, the Board noted that Golebiewski’s question came from “out of the blue.” (A. 254.) At any rate, while the Company offers its own reading of Golebiewski’s interrogation, it clearly fails to show, as it must, that the Board’s contrary view is unreasonable or unsupported by substantial evidence. *See Gissel Packing Co.*, 395 U.S. at 620 (noting the Board’s “competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship”).

H. Security Director Golebiewski Threatened Security Officer Christopher Rudy

Substantial evidence also supports the Board’s finding that Golebiewski threatened Security Officer Christopher Rudy. As shown above (p. 10), two weeks after interrogating security officer Evans, Golebiewski approached Rudy while he was talking to guests and a “cigarette girl” in the casino. Golebiewski put his hand on Rudy’s shoulder and said, “if this was a union area, I would have to write you up.” (A. 247.) Rudy responded that he was glad to not be disciplined.

As the Board explained, Golebiewski's statement contained "the implicit notice that under a union contract Golebiewski would have been required to take some disciplinary action against Rudy." (A. 248.) Officer Rudy certainly received that message, as he responded he was "glad" that he was not going to be disciplined. Given the context of this conversation, occurring in the midst of a union campaign where the employer was waging an open battle against unionization, the Board correctly observed (A. 248), "there is no mystery here. What Golebiewski was saying to Rudy was that he would have to be stricter with employee discipline if the Union were successful in organizing the facility." The Board therefore properly found that Golebiewski's statement was a threat of a changed condition of employment, warning that the existence of a union contract would eliminate all past leniency.

The Company's argument (Br. 56-57) that Golebiewski was merely expressing his "honest opinion" is mistaken. As the Board noted, "[i]f Golebiewski had merely told Rudy to get back to work, or words to that effect, there would be no issue here." (A. 248.) Instead, Golebiewski referenced a potential union contract "and what impact contractual language would have on such a situation." (A. 248.) Such threats of changed conditions of employment are not lawful predictions protected by Section 8(c) of the Act. As the Board further noted, Golebiewski made no reference to changes based on the collective-

bargaining process. To the contrary, Golebiewski warned Rudy that unionization would bring stricter discipline and loss of leniency. The Board therefore properly concluded that (A. 248), Golebiewski's statement "had the effect of interfering with, restraining, and coercing employees in the exercise of their Section 7 rights."

I. Vice President Baker Threatened Bizzarro by Accusing Him of Disloyalty

Substantial evidence supports the Board's finding that Vice President Paul Baker unlawfully threatened Bizzarro. In mid-January 2012, Baker waited for Bizzarro as he passed through an underground parking garage on his way to work. (A. 248; 72.) Baker then confronted Bizzarro, shouting at him that he felt "betrayed" by Bizzarro's union activity and that Bizzarro's union activity had placed Baker's job "in jeopardy." (A. 248; 72, 77.) During this confrontation, Baker grew very frustrated, was red in the face, and became increasingly angry at Bizzarro. (A. 248.)

An employer violates the Act when it makes comments about "loyalty" to employees based on their protected activities. *See HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996) (accusing employees of disloyalty because of their union support violates the Act). *See also Hialeah Hosp.*, 343 NLRB 391, 391-92 (2004) (same). Given Baker's statement, Bizzarro could reasonably conclude that Baker considered him a disloyal employee. And, as the Board explained, "an employee would reasonably assume that disloyal employees

get fired.” (A. 249.) Contrary to the Company’s characterization (Br. 60), Baker was not merely expressing his “personal feelings” toward Bizzarro. Rather, Baker, a high level manager, demonstrated acute frustration towards a known union supporter and openly accused him of disloyalty, which, as the Board found, constituted an unlawful threat.

The Company again takes issue (Br. 58-59) with the administrative law judge’s decision to credit Bizzarro over Baker. And, once again, the Company fails to mount a meritorious challenge to that finding. The judge expressly considered Baker’s testimony and found it “self-serving,” “unrealistic,” and not credible. (A. 249.) The judge found Baker to be “rather nervous,” testifying with “emotions just barely controlled.” Further, the judge “got the distinct impression that [Baker] was trying not to show the depth of his emotional feelings,” and his demeanor demonstrated that he “really felt deeply betrayed by Bizzarro’s union activity.” (A. 249.) In contrast, the judge found that Bizzarro’s testimony regarding the incident had “the ring of authenticity to it, while Baker’s story did not.” (A. 249.) Moreover, given that Bizzarro was a company employee at the time he testified, his testimony is especially worthy of credence. *See Flexsteel Indus.*, 316 NLRB 745, 745 (1995) (“[T]estimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests.”),

aff'd mem., *NLRB v. Flexsteel Indus.*, 83 F.3d 419 (5th Cir. 1996). *See also Shop-Rite Supermarket*, 231 NLRB 500, 505 n.22 (1977) (same). The judge, therefore, properly considered Baker's demeanor in giving his testimony little weight. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 NLRB 586, 589 (1996) (deference is owed to "judge's credibility determinations because [judge] 'sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records'" (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962))).

In sum, substantial evidence supports the Board's findings that the Company unlawfully interfered with and coerced the officers in the exercise of their Section 7 rights by threatening, interrogating, creating an impression of surveillance, soliciting grievances, and promising improved terms and conditions of employment.

II. THERE IS NO BASIS TO REACH THE COMPANY'S CHALLENGE TO THE BOARD'S POSTING REMEDY

The Company's claim that the Board's notice-posting remedy exceeded its authority is not properly before the Court. Almost as an afterthought, the Company claims, without developed argumentation (Br. 60-61), that the portion of the Board's notice-posting provision that includes possible electronic distribution "if the [Company] customarily communicates with its employees by such means" (A. 258)—is "extraordinary and punitive." (Br. 61.) That language has been part of the Board's standard notice-posting provision since 2010, and the Board fully

articulated the statutory authority and policy rationales for its inclusion in *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372 (Oct. 22, 2010), a case the Company fails to even draw to the Court's attention.

Because the Company failed to present the Board with an objection to electronic distribution in its exceptions to the administrative law judge's recommended order, which included the provision (A. 255), the issue is jurisdictionally barred from judicial review. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). The Company has claimed no extraordinary circumstance that would excuse that failure.

Moreover, as the Board explained in establishing the electronic distribution requirement, "matters bearing on whether the electronic notice is appropriate in a particular case may be resolved at the compliance stage." *J. Picini Flooring*, 356 NLRB No. 9, 2010 WL 4318372, at *4 (Oct. 22, 2010) (questions as to whether "some form of electronic posting is warranted," as well as whether a particular type of electronic notice is appropriate, "should be resolved at the compliance stage"). *See generally Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984) (explaining the bifurcated nature of Board proceedings in which a general remedy

is ordered in the liability stage and then the remedy is “tailor[ed] . . . to suit the individual circumstances” in subsequent compliance proceeding).

Accordingly, at this stage of the case, any claim of adverse effect resulting from the Board’s electronic distribution requirement is purely hypothetical, rendering the Company’s claim not ripe for review. *See Sheet Metal Workers Int’l Ass’n v. NLRB*, 561 F.3d 497, 501 (D.C. Cir. 2009) (challenge to a rule to be applied during the compliance stage was not ripe for review); *Scepter, Inc. v. NLRB*, 448 F.3d 388, 391(D.C. Cir. 2006) (the opportunity to contest an issue reserved for the compliance stage “will necessarily be deferred until the Board resolves the issue”); *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 118 (D.C. Cir. 2004) (it makes “no sense for [the Court] to anticipate a wrong when none may ever arise.”)

Accordingly, the Company will have the opportunity to demonstrate at a future compliance proceeding that it does not customarily communicate with its employees by electronic means, and to argue that its obligation to post a remedial notice should be limited to posting a traditional paper notice. *See J. Picini Flooring*, 2010 WL 4318372, at *4 (at a compliance hearing a party may challenge electronic distribution by “present[ing] evidence about any peculiarities in [its] email, intranet, internet, or other electronic communication systems that would affect [its] ability to post remedial notices by those means”). If the Board does

require electronic posting, that order will be subject to judicial review. Indeed, the Company itself acknowledged the compliance proceeding is the appropriate forum to address the issue. In a footnote in its exceptions brief to the Board, it specifically declared that it would “reserve its arguments” concerning electronic distribution “for the compliance phase, should such a phase be reached.” (Exceptions Br., p. 49 n.8.) For all of these reasons, the Company’s challenge is not properly before the Court for review.

CONCLUSION

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

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NATIONAL LABOR RELATIONS BOARD

August 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FLAMINGO LAS VEGAS OPERATING)	
COMPANY, LLC)	
)	
Petitioner/Cross-Respondent)	Nos. 15-1024
)	15-1047
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	28-CA-69588

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 12,787 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 12th day of August, 2015

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(c) Expression of views without threat of reprisal or force or promise of benefit

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise:

Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FLAMINGO LAS VEGAS OPERATING)	
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)	

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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 a registered user or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 12th day of August, 2015