

Oral Argument Not Yet Scheduled

Nos. 16-60124

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

UNF WEST, INCORPORATED,

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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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the credited facts. However, to the extent the Court believes that oral argument would be helpful or grants the Company's request for oral argument, the Board requests the opportunity to participate.

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of UNF West, Inc. (“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 in *UNF West, Inc.*, 363 NLRB No. 96 (Jan. 20, 2016). The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the

National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”).

The Board’s Order is final with respect to all parties.

The Company petitioned for review on March 1, 2016; the Board cross-applied for enforcement on April 11, 2016. Both filings were timely as the Act imposes no time limit on the initiation of review or enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the Company transacts business in this Circuit.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act when it interrogated employees about their union activities; threatened employees with futility regarding their rights under the Act; and threatened employees with reduced wages if they voted to unionize.

2. Whether the administrative law judge abused his discretion by requesting the Company’s bilingual witness testify in English unless he required translation assistance and by rejecting certain evidence offered by the Company.

3. Whether the Board properly exercised its broad remedial authority under Section 10(c) of the Act by ordering a public notice reading.

STATEMENT OF THE CASE

After investigating charges filed by the Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, International Brotherhood of Teamsters (“the Union”), the Board’s General Counsel issued a complaint against the Company, alleging violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (ROA. 237-45, 252-54, 262-65.)¹ Following a hearing, an administrative law judge issued a decision on August 3, 2015, finding that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union activities, by threatening employees with futility regarding their rights under the Act, and by threatening employees with wage reductions if they voted for the Union. (ROA. 511-16.) The judge ordered, among other remedies, a public reading of the remedial notice, in both English and Spanish. (ROA. 515.)

Before the Board, the Company excepted to the judge’s findings. (ROA. 511.) On review, the Board affirmed the judge’s rulings, findings, and conclusions, with slight modification, in a Decision and Order issued on January 20, 2016. (ROA. 511 & n.2.)

¹ “ROA” cites in this brief are to the three-volume administrative record on appeal. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to the supporting evidence. “Br.” cites are to the Company’s opening brief to the Court.

I. THE BOARD'S FINDINGS OF FACT

A. **Background: the Union Begins Its Organizing Campaign, the Company Violates the Act During the First Election, and the Company Starts Mandatory Union Information Meetings for Its Employees**

The Company is engaged in the non-retail distribution of natural, organic, and specialty foods. (ROA. 512; ROA. 288.) In 2012, the Union began an organizing campaign among the Company's warehouse employees at its Moreno Valley, California facility. (ROA. 512.) The Company vigorously opposed the Union. (*See, e.g.*, ROA. 29, 51, 53-54, 78, 268-74.)

Before and after the first election, conducted on May 17, 2012, the Company committed several violations of the Act. Specifically, the Company coercively interrogated an employee regarding union organizing at the facility and warned the lead employee organizer – on four separate occasions – that it would refuse to negotiate or sign any contract with the Union, that all workers could lose benefits if they selected the Union, that management was looking for a way to fire him, and that his working conditions would not improve unless he stopped complaining to the Union and to the Board. *UNF West, Inc.*, 361 NLRB No. 42, 2014 WL 4373094 (Sept. 3, 2014) (hereinafter “*UNF West I*”), *enforced*, No. 14-1181, slip op. (D.C. Cir. Jan. 15, 2016).²

² The Union later withdrew its objections to the election, shortly before filing a new petition to represent the warehouse employees. (ROA. 512.)

In April 2014, the Union filed a new petition to represent the Company's warehouse employees. (ROA. 512; ROA. 275-77.) The election was scheduled for May 29, 2014. (ROA. 512; ROA. 278-84.) In the two months preceding the election, the Company conducted mandatory meetings for employees – three times a week – to provide information about unionization and the Company's view that the Union would be detrimental to the employees. (ROA. 55, 82, 99-100, 300, 309, 314, 317-23, 331, 338, 344-46, 349-54.) Those meetings were conducted by Juan Negroni, Carlos Ortiz, and Luisa Perez – labor consultants from Kulture and admitted agents of the Company.³ (ROA. 512; ROA. 29-30, 51-53, 57-58, 78-80, 96-97, 99, 147-48, 165-66, 290.) In addition to the multiple weekly meetings, Negroni, Ortiz, and Perez engaged in one-on-one meetings with employees to discuss the Union. (ROA. 30, 53-54, 58, 99, 172-73.)

B. On May 9, Negroni Interrogates Employee Aceves About His Union Support and Threatens Him that Efforts to Unionize Would Be Futile

On May 9 at 2:15 p.m., Ortiz conducted a union information meeting for some of the Company's employees. (ROA. 512; ROA. 41, 120, 292.) That presentation was in a room near the Company's human resources department, which is also near its warehouse. (ROA. 512; ROA. 45, 80.) Employee Armando

³ The parties stipulated that Negroni, Ortiz, and Perez were agents of the Company within the meaning of Section 2(13) of the Act (29 U.S.C. § 152(13)) during April and May 2014. (ROA. 290.)

Perez Aceves attended, as did Negroni. (ROA. 512; ROA. 41, 152, 292.) Aceves was a union supporter who passed out union authorization cards, spoke to employees about the Union, and attended union meetings. (ROA. 512; ROA. 24-25.) There is no evidence, however, that the Company knew of Aceves' union sympathies. (ROA. 512-13.)

The meeting lasted approximately 40 to 50 minutes. (ROA. 512; ROA. 46, 153.) When the meeting ended, Aceves returned to work in the warehouse. (ROA. 512.) Shortly thereafter, Negroni approached Aceves in the warehouse and said to him in Spanish, “[h]ow do you feel with the Union?” (ROA. 512; ROA. 30-31, 46.) Aceves responded, “[i]s this an interrogation? . . . I’m working. Leave me alone. I’m working. Don’t interrupt me.” (ROA. 512; ROA. 31.) Negroni told him to calm down. (ROA. 512; ROA. 32.)

In response, Aceves removed a document (ROA. 266) from his pocket and showed it to Negroni (ROA. 512; ROA. 32). Aceves showed the document to Negroni because “normally when [Negroni] talks to any of the coworkers, he’s pressuring them and talking bad about the Union.” (ROA. 512; ROA. 47-48.)

The document’s large-font title is “Employee Rights Under the National Labor Relations Act,” and the document states, in part:

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. . . . This Notice gives you general information

about your rights, and about the obligations of employers and unions under the NLRA.

(ROA. 266 (hereinafter “Employee Rights document”).) The document further outlines specific employee rights under the Act, such as the right to “[f]orm, join or assist a union” and to “[b]argain collectively through representatives of employees’ own choosing” (ROA. 266.) Copies of that document are displayed at the Company’s facility, for example, in the lunch room and in the locker room.

(ROA. 512-13; ROA. 177.)

Upon seeing the document, Negroni said, “this document doesn’t work her[e], my brother [W]ho pays your check, the company or the Union?”

(ROA. 512; ROA. 33.) Aceves then asked Negroni “why, if the firemen, the policemen, have union[s], why are you always talking bad about the Union?”

(ROA. 512; ROA. 33.) Negroni did not respond; rather, he stared at Aceves, turned around, and left. (ROA. 512; ROA. 33.)

C. On May 16, Ortiz Tells Employees that the Company “Of Course” Could Reduce Their Wages if the Union Wins the Election

On May 16, Ortiz conducted another mandatory meeting. (ROA. 513; ROA. 52, 54, 80.) The meeting included a slide presentation entitled “Your Own Voice? Facts about Negotiations & Labor Disputes. Your Own Choice.” (ROA. 514; ROA. 294-355 (English version), 362-78 (Spanish version).) The Company ordered Lino Contreras (a union supporter who had passed out cards and spoken to

his coworkers about the Union), Juan Urquiza, and two other employees to attend. (ROA. 513, 515; ROA. 50-52, 64, 80, 356.) Perez attended as a witness. (ROA. 513; ROA. 100, 166-67.)

Ortiz began the meeting by criticizing the Union and stating that the Union only wanted the employees' money. (ROA. 513; ROA. 54-55, 82.) Contreras spoke up, stating that he had "heard from the warehouse that you guys are saying that if the Union wins, the Company's going to reduce the wages of all the employees." (ROA. 513; ROA. 55.) Ortiz responded, "we put that message on the projector so everybody could see it . . . Lino, of course, if the Union wins, the Company could reduce your wages." (ROA. 513; ROA. 55, 72, 83.) Contreras said, "[b]ut that's illegal," to which Ortiz responded, "Lino, who pays your salary? The Company, right? Therefore, the Company has the right to reduce your salary." (ROA. 513; ROA. 55-56, 83.)

Ortiz then read from the slides, which he had translated from English into Spanish for the meeting. (ROA. 514, ROA. 87-88, 90-91, 101-02, 105, 168-69, *see* ROA. 362-78.) Some of the slides addressed collective bargaining, including the statement that "[t]he company has never stated that bargaining 'starts from scratch.' In fact, we have told you that the bargaining starts from where you are now and you can gain, stay the same, or you can lose" (ROA. 514; ROA. 301, 354, *see also* ROA. 302.) Another slide in the presentation stated that

“[a]s a result of bargaining, you may end up with more than you have [today], the same as you have today, or less than you have today – and, all the while, be expected to pay union dues.” (ROA. 514; ROA. 309.)

D. On May 22, Negroni Interrogates Employee Contreras About His Union Support and Threatens Him that Efforts to Unionize Would Be Futile

On May 22 at approximately 5:00 or 6:00 p.m., Negroni approached employee Contreras while he was working in an aisle of the repack department. (ROA. 514; ROA. 58-59.) No one else was present. (ROA. 514; ROA. 59, 72.) Negroni asked Contreras, in Spanish, “[w]hat about the Union?” (ROA. 514; ROA. 59.) Contreras responded, “[f]ine. Everything’s fine. Why are you asking?” (ROA. 514; ROA. 59.)

Negroni then said, “I have heard that the Union is making a lot of promises.” (ROA. 514; ROA. 59.) Contreras disagreed, stating that “[t]he Union is not making any promises. You guys are making false promises. Lying to people and threatening them.” (ROA. 514; ROA. 60.) Negroni responded, “I hope the company won’t hear what you’re saying.” (ROA. 514; ROA. 60.)

In response, Contreras pulled out a copy of the Employee Rights document that Aceves showed to Negroni approximately two weeks earlier. (ROA. 514; ROA. 60, 266.) Upon seeing the document, Negroni countered, “You know what,

this is useless. The Company has its own policies.” (ROA. 514; ROA. 61-62.)

Negrone then turned around and left. (ROA. 514; ROA. 62.)

On May 28, 2014, the Regional Director issued an order cancelling the election after the Union filed unfair-labor-practice charges, including the charge in the instant case. (ROA. 512; ROA. 285.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On January 20, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued its Decision and Order finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies, threatening employees with futility regarding their rights under the Act, and threatening employees with reduction of wages if they voted for the Union. (ROA. 511.) The Board also reviewed and agreed with two of the judge’s rulings at the hearing: specifically, his request that a bilingual company witness testify in English and his refusal to admit certain evidence offered by the Company. (ROA. 511 n.1.)

The Board’s Order directs the Company to cease and desist from its unlawful conduct, and in any like or related manner, interfering with its employees’ Section 7 rights. (ROA. 511, 515.) Affirmatively, the Board’s Order requires the Company to post a remedial notice in English and Spanish. (ROA. 515.) The Board’s Order also directs the Company to read, or have a Board

Agent read in the Company's presence, the remedial notice to its employees in English and Spanish. (ROA. 515-16.)

SUMMARY OF ARGUMENT

This case involves numerous unfair labor practices committed by the Company to stifle employee support for the Union during an ongoing organizing campaign. The Company is no stranger to such violations, committing similar violations of the Act during a union election in 2012.

As an initial matter, the Company's arguments largely consist of urging the Court to take the extraordinary step of disregarding the judge's credibility findings. The judge's credibility determinations, which the Board adopted, were founded on his observation of the witnesses' demeanor, the vagueness or specificity of their testimony, and corroboration or inconsistencies in the evidence. As such, they are not "inherently unreasonable or self-contradictory," and should be upheld.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when its labor consultant, Negroni, separately interrogated and threatened employees Aceves and Contreras. In each private conversation, Negroni asked the employee questions about his support for the Union and threatened the employee that exercising his rights under the Act would be futile.

Substantial evidence also supports the Board’s finding that the Company violated Section 8(a)(1) of the Act when its labor consultant, Ortiz, threatened employees with wage reductions if they voted for the Union. During a captive audience meeting, in front of several employees, Ortiz told employee Contreras that “of course, if the Union wins, the Company could reduce your wages,” reminding Contreras that the Company pays his salary and therefore “the Company has the right to reduce your salary.” (ROA. 56.)

Under the totality of the circumstances, the Company’s conduct during the two private conversations, and during the captive audience meeting, reasonably tended to restrain its employees in exercising their Section 7 rights. The Company fails to refute those findings. Instead, its arguments rest primarily on a discredited version of the facts, including claims that the events did not occur, or are unsupported by relevant legal precedent.

The judge did not abuse his discretion by requiring the Company’s bilingual witness to attempt to testify in English before determining whether he needed a translator. The judge gave due consideration to the witness’ ability to understand and communicate in English, and the witness demonstrated no difficulty testifying. The Company did not renew its request for a translator, nor did company counsel attempt to clear up any inconsistencies in the witness’ testimony through redirect.

Likewise, the Board properly agreed that the judge did not abuse his discretion by excluding irrelevant and speculative evidence. None of the Company's excluded witnesses were present during the exchanges at issue. Because none of the excluded evidence makes it "more or less probable" that the Company unlawfully interrogated or threatened the employees during the three incidents at issue, the Company fails to show prejudice in its exclusion.

Finally, the Board's Order – directing a public reading of the remedial notice in English and Spanish – is well within its broad remedial discretion. The Company continued to violate the Act throughout the Union's second organizing campaign, despite an intervening administrative law judge decision finding similar conduct unlawful. In light of the Company's recidivism, the Board reasonably determined that a public notice reading is necessary to assure its employees of their rights and the Company's obligations under the Act.

STANDARD OF REVIEW

Although the Court reviews questions of law *de novo*, it defers to the legal conclusions of the Board "if reasonably grounded in the law and not inconsistent with the Act." *Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 559 (5th Cir. 2003). The Board's findings of fact are "conclusive" if supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). A reviewing court may

not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488; *see also El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656-57 (5th Cir. 2012) (stating that reviewing court will not “substitute [its] judgment for that of the Board, ‘even if the evidence preponderates against the Board’s decision’” (alteration and citation omitted)).

The Court has long recognized that questions of credibility are left to the trier of fact. The Court “do[es] not make credibility determinations or reweigh the evidence’ when reviewing the Board’s decisions.” *El Paso Elec.*, 681 F.3d at 655 (quoting *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007)). The resolution of credibility questions is not to be disturbed on review unless those credibility determinations are shown to be “unreasonable,” to “contradict[] other findings,” to be “based upon inadequate reasons or no reason,” or to be “unjustified.” *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007); *accord Tellepsen Pipeline*, 320 F.3d at 559-60.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY, THROUGH ITS LABOR CONSULTANTS, VIOLATED SECTION 8(a)(1) OF THE ACT

A. An Employer May Not Interfere with Employees’ Right To Support a Union or To Engage in Union Activity

Section 7 of the Act guarantees employees 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” 29 U.S.C. § 157. Section 8(a)(1) of the Act protects those rights by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. § 158(a)(1).

The test for a Section 8(a)(1) violation is whether, considering the totality of the circumstances, an employer’s conduct has a reasonable tendency to coerce or to interfere with employees’ rights, not whether employees are actually coerced. *See NLRB v. Brookwood Furniture, Div. of U.S. Indus.*, 701 F.2d 452, 459 (5th Cir. 1983); *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 415 (5th Cir. 1981); *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). The critical inquiry, then, is what an employee could reasonably have inferred from the employer’s statements or actions when viewed in context. *See TRW-United Greenfield*, 637 F.2d at 416 (noting that “[r]emarks that may not appear coercive

when considered in isolation may take on a different meaning when evaluated with respect to the totality of the circumstances” (citation omitted)). 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).

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 statement does not contain an express or implied “threat of reprisal or force or promise of benefit.” *See Gissel*, 395 U.S. at 617-18. If an employer chooses to make a prediction as to the economic consequences of unionization, “the prediction must be carefully phrased on the basis of objective fact” and “convey an employer’s belief as to the demonstrably probable consequences beyond his control.” *Id.* at 618.

Substantial credited evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act when it interrogated and threatened employees in the weeks before the scheduled election. (ROA. 511, 513-15.) In seeking to overturn the Board’s decision, the Company not only unpersuasively challenges those credited findings, but it repeats its claim, rejected by the Board, that the

events giving rise to the violations never took place. That argument, which requires the Court to set aside the Board's credibility findings, is meritless.

B. The Company Fails To Meet Its Heavy Burden in Seeking To Overturn the Board's Credibility Determinations

The Board's findings in this case rest on the judge's well-supported credibility resolutions – in particular, discrediting the Company's key witnesses and crediting the testimony of the employees who were interrogated and threatened. The Company's attempts (Br. 9-12, 24-25, 27-31, 40-41) to attack the judge's credibility findings fall far short of what is required to overturn them. *See NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1340 (5th Cir. 1993) (stating that court will overturn credibility findings “only in the most unusual of circumstances” (citation omitted)). As the Court has explained, deference to the Board's credibility resolutions is particularly appropriate where, as here, “the record is fraught with conflicting testimony, requiring essential credibility determinations to be made.” *Brookwood Furniture*, 701 F.2d at 456 (citing cases).

In making his determinations, the judge properly considered the witnesses' demeanor, the vagueness or detail of their testimony, and the extent to which their testimony was corroborated or inconsistent. (ROA. 513, 514.) Based on those considerations, the judge expressly discredited Negroni because of his “exaggerated and contrived” demeanor and inconsistencies between his testimony and that of other company witnesses, while crediting employee Aceves, whose

testimony “was given without contradiction,” with specificity, and with “the ring of truth to it.” (ROA. 513.) Similarly, the judge reasonably discredited portions of Ortiz’ testimony, which was contradicted by other witnesses, while crediting that of employees Contreras and Urquiza, who corroborated each other on pertinent details related to Ortiz’ coercive statements. (ROA. 514.)

The Company’s broader allegations (Br. 7-8, *see also* Br. 8 n.6, 9, 14, 16, 23, 28, 41, 44-45, 48) that the Union asked employees to fabricate allegations about the Company, or to goad its consultants into violating the Act, amount to thinly veiled attacks on the judge’s decision to credit the testimony of employees Aceves, Contreras, and Urquiza over that of consultants Negroni and Ortiz. For example, although the Company decries the Union’s so-called “tactics” as “well known” from a prior organizing drive (Br. 23, 28, *see also* Br. 7-8), the credited evidence shows that, despite being on notice of these alleged “tactics” (ROA. 107-08), Ortiz nevertheless was undeterred from violating the Act.⁴ Likewise, as

⁴ Similarly, there is no merit to the Company’s exaggerated reliance (Br. 8, 9, 16, 23-24, 26, 48) on what it calls the “Security Professionals letter,” a flyer with the heading “Beware of Management’s Union Busting Tactics,” which the Company then refuted in its May 16 mandatory meeting with the counter title “More Union Misinformation.” (ROA. 301, 354.) Such campaign materials are common during union organizing campaigns and the Board, with court approval, has long held that employees can recognize them for what they are. *See, e.g., NLRB v. Rolligon Corp.*, 702 F.2d 589, 597 (5th Cir. 1983) (“[E]mployees are ‘mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it.’” (quoting *Midland Nat’l Life Ins. Co.*, 263 NLRB 127, 132 (1982))).

evidence of its claim that the Union engaged in some form of misconduct, the Company references charges filed by the Union and subsequently dismissed by the General Counsel. (*See* Br. 4-5 n.4, 34, 42.) But these charges are irrelevant to the violations found here. And notably, when the General Counsel issued a complaint based on the Union’s charges during the previous organizing drive, the Board found that the Company violated the Act, and the D.C. Circuit enforced those findings. *See UNF West I*, 361 NLRB No. 42, 2014 WL 4373094 (Sept. 3, 2014), *enforced*, No. 14-1181, slip op. (D.C. Cir. Jan. 15, 2016). Thus, the Company’s unsubstantiated assertions boil down to nothing more than “[s]uspicion, conjecture[, or] theoretical speculation,” which, as the Company concedes (Br. 21), “register no weight on the substantial evidence scale.” *See TRW, Inc. v. NLRB*, 654 F.2d 307, 312 (5th Cir. 1981).

C. The Company Violated Section 8(a)(1) of the Act by Coercively Interrogating Employees About Their Union Views During the Organizing Campaign

Section 8(a)(1) prohibits an employer from questioning employees about their union activities if the interrogation tends to coerce employees in the exercise of their rights under the Act. *See Tellepsen Pipeline*, 320 F.3d at 560. Whether an employer’s interrogation tends to be coercive depends on the totality of the circumstances. *UNF West I*, 2014 WL 4373094, at *2 (citing *Rossmore House*, 269 NLRB 1176 (1984), *enforced sub nom., Hotel Employees & Restaurant*

Employees Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985)); *see also NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1341 (5th Cir. 1980). As with Section 8(a)(1) violations generally, an employer's questioning need not actually coerce its employees. *NLRB v. Great W. Coca-Cola Bottling Co.*, 740 F.2d 398, 404 (5th Cir. 1984); *accord Westwood Health Care Ctr.*, 330 NLRB 935, 940 n.17 (2000).

Relevant indicia in determining coercion, often referred to as the *Bourne* factors, include: the history of the employer's attitude toward its employees; the nature of the information sought; the rank of the questioner in the employer's hierarchy; the place and manner of the conversation; the truthfulness of the employee's reply; whether the employer had a valid purpose for obtaining the information sought about the union; whether a valid purpose was communicated to the employee; and whether the employer assured the employee that it would not retaliate for his or her union support. *Brookwood Furniture*, 701 F.2d at 460-61; *see also Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Analysis of an interrogation's tendency to coerce, however, involves "much more than a formalistic application of the *Bourne* factors." *UNF West I*, 2014 WL 4373094, at *2; *Westwood Health Care Ctr.*, 330 NLRB at 939 (stating that the *Bourne* "and other relevant factors are not to be mechanically applied in each case" (internal quotation marks and citation omitted)); *accord Perdue Farms, Inc., Cookin' Good*

Div. v. NLRB, 144 F.3d 830, 835 (D.C. Cir. 1998) (“[T]he *Bourne* criteria 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 circumstance.” (internal quotation marks and citation omitted)). Indeed, “[n]o single [*Bourne*] factor is determinative and ‘coercive interrogation may still be found to have occurred even if all the above enumerated factors operate in the employer’s favor.’” *Tellepsen Pipeline*, 320 F.3d at 561 (citation omitted).

1. The Company unlawfully interrogated Aceves

Substantial credited evidence supports the Board’s finding that Negroni’s “interrogation [of Aceves] was coercive and violated Section 8(a)(1) of the Act.” (ROA. 513.) Negroni approached Aceves while he was working, asked him “[h]ow do you feel with the Union?” and told Aceves that the Employee Rights “document doesn’t work her[e], my brother.” (ROA. 512; ROA. 30-33.) He then asked Aceves, “who pays your check, the company or the Union”? (ROA. 512; ROA. 33.) Numerous indicia of coerciveness support the Board’s finding that the interrogation was unlawful, many quite strongly.⁵

⁵ The Company suggests throughout its brief (*see, e.g.*, Br. 33), that the Board’s decision is infirm because the Board provided no additional analysis beyond adopting the administrative law judge’s findings. The Board, however, is under no obligation to write a separate decision where it agrees with the administrative law judge. *See* 29 C.F.R. § 101.12(a) (stating that Board, after reviewing the entire record, “may adopt, modify, or reject the findings and recommendations of the administrative law judge”).

To start, the Aceves interrogation took place against a background of hostility towards the Union, as evidenced by the Company's prior and contemporaneous violations of the Act. (*See* ROA. 513.) "Even a single question put to a single employee may be a violation, if there is a background of union hostility." *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 n.6 (5th Cir. 1965) (citation omitted); *see also Laredo Coca Cola Bottling Co.*, 613 F.2d at 1342 (finding interrogation unlawful, in part, because employer "clearly manifested its hostility toward the union to its employees"); *Norton Audubon Hosp.*, 338 NLRB 320, 321 (2002) (finding that unlawful "interrogation occurred against a background of other unfair labor practices committed by [employer] in its effort to avoid unionization"); *Westwood Health Care Ctr.*, 330 NLRB at 941 (finding unlawful interrogation where "most significantly, the conversations at issue were against 'a background of hostility' and unlawful conduct"); *cf. Dow Chem. Co. v. NLRB*, 660 F.2d 637, 653 (5th Cir. 1981) (stating that "a course or pattern of anti-union activity, or anti-union animus or hostility, may create an atmosphere in which otherwise seemingly innocuous statements may impede employees' free choice" but finding interrogation lawful, in part, because there was no "such course or pattern"). In addition to the interrogations and threats at issue, the Company committed several similar violations of the Act during and after the election in 2012. *See UNF West I*. The Company's claim (Br. 34) that there is "very little

evidence” of its hostility towards the Union not only disregards the substantial credited evidence in this matter, but also ignores prior violations found by the Board, and enforced by the D.C. Circuit.

That the questioner here was the Company’s admitted agent, hired to combat the Union’s organizing campaign (ROA. 513) and known to employees as someone who pressures them and “talk[s] bad about the Union” (ROA. 47-48), further lends an air of coercion to the conversation. Negroni’s alleged lack of disciplinary authority and failure to report his conversation to the Company (Br. 35), even if true, do not mitigate the interrogation’s coercive nature. Indeed, following the interrogation, Negroni implied otherwise, suggesting his and the Company’s influence over Aceves with the pointed reminder that the Company “pays your check.” (ROA. 512-13; ROA. 33.)

The information that Negroni sought, particularly coupled with the reminder of Aceves’ economic dependence on his employer, further supports the Board’s finding that the interrogation was unlawful. Negroni’s question – “[h]ow do you feel with the Union?” – assessed Aceves’ union sympathies during a union organizing campaign.⁶ (ROA. 512; ROA. 30-31.) Questions concerning an employee’s union support tend to be “of a coercive nature” because they are “more

⁶ The Company mistakenly states (Br. 34) that Negroni asked Aceves, “what about the union?” (*See* ROA. 31.)

potentially harmful to . . . employees in terms of possible [c]ompany retaliation than . . . casual information regarding how the [u]nion [is] doing.” *TRW-United Greenfield*, 637 F.2d at 417; *see Laredo Coca Cola Bottling Co.*, 613 F.2d at 1342 (finding that employer’s “invitations to [employee] to disclose his union activities, sympathies and the current status of union strength among employees” violated Section 8(a)(1) of the Act); *Perdue Farms*, 144 F.3d at 835 (finding that unlawful interrogation “appeared to seek information about individual employee union sympathies”). Indeed, the Board in *President Riverboat Casinos of Missouri* 329 NLRB 77, 78 (1999), found a similar question – “What do you think of this union stuff?” – unlawfully coercive because it was intended to “ferret out and report on the union leanings of unit employees.”

There is no evidence that Negroni and Aceves shared an ongoing or friendly relationship. To the contrary, Aceves considered Negroni someone who pressured employees. (ROA. 47-48.) When Negroni began questioning him, Aceves replied, “[i]s this an interrogation? . . . I’m working. Leave me alone. I’m working. Don’t interrupt me.” (ROA. 31.) As the Board found, “this was no casual, friendly or joking conversation.” (ROA. 513.) *Compare Lord & Taylor v. NLRB*, 703 F.2d 163, 167 (5th Cir. 1983) (finding interrogation lawful because “remarks were made between two persons who admittedly were on a first name basis and were casual inquiries”); *Dow Chem. Co.*, 660 F.2d at 651 (finding that lawful

“question was admittedly put and received in a humorous tone”); *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1250 (5th Cir. 1978) (finding that lawful “questions were more in the nature of casual remarks among friends”).

Instead, Aceves gave evasive responses to Negroni’s questions. An employee’s evasive answers to an employer’s questions can indicate that the employee reasonably fears retaliation for honest and direct answers. *TRW-United Greenfield Div.*, 637 F.2d at 417; *see also Tellepsen Pipeline*, 320 F.3d at 561 (“[T]hat the [employees] either avoided answering [employer’s] questions or told him that it was ‘none of his business’ lends additional support for the Board’s finding that, under the circumstances, the questioning was in fact coercive.”); *Brookwood Furniture*, 701 F.2d at 462 (“If an employee refuses to give a truthful answer even to an innocuous question, the inference of coercion is as strong as if he refused to answer a pointed question.” (quoting *Camco*, 340 F.2d at 807)). There is no support for the Company’s assertion (Br. 35) that Aceves answered Negroni’s question honestly and openly. Instead of telling Negroni how he felt about the Union, Aceves told Negroni to leave him alone so he could work and showed Negroni a document spelling out Aceves’ rights under the Act. (ROA. 512; ROA. 31-32.)

Rather than communicating a valid purpose for the questioning or providing assurances to Aceves that the Company would not retaliate against him based on

his responses, the Board found that Negroni reinforced the coerciveness of his interrogation with threats. (ROA. 513.) Specifically, when Aceves handed Negroni a copy of the Employee Rights document, Negroni stated, “this document doesn’t work her[e], my brother [W]ho pays your check, the company or the Union?” (ROA. 512; ROA. 33.) As the Board found, the coerciveness of the interrogation was highlighted when Negroni threatened Aceves both with futility (pp. 35-37) and with “an employer’s ultimate threat, that it controlled Aceves’ employment.” (ROA. 513.) *See Tellepsen Pipeline*, 320 F.3d at 561 (finding interrogation unlawful, in part, because supervisor did not communicate a valid purpose for his questioning and coupled his questions with threats of reprisal); *Brookwood Furniture*, 701 F.2d at 462-63 (finding interrogation unlawful because “not only were there no assurances against reprisals but also the interrogation was combined with statements which could be viewed as affirmatively warning of economic reprisals”). The Company’s argument (Br. 35) that it repeatedly tells its employees that it respects their rights, as shown by the slide deck for its May 16 captive audience meeting, is amply rebutted by the credited evidence here, as well as the violations documented in *UNF West I*.

The Company, in attempting to break down each *Bourne* factor separately, ignores the totality of the circumstances. *See Tellepsen Pipeline*, 320 F.3d at 561 (“No single [*Bourne*] factor is determinative.” (citation omitted)). For example,

the Company suggests (Br. 32-33, 35) that the conversation was not coercive because it took place on the warehouse floor and because Aceves was a known union supporter.⁷ But in context, those factors do not mitigate the interrogation's coerciveness. To the contrary, immediately after a captive audience meeting in which Aceves raised workplace concerns in front of fellow employees (ROA. 41-42), Negroni – the Company's agent "charged with combatting the Union's organizing campaign shortly before an election" (ROA. 513) – followed Aceves to his worksite, privately questioned Aceves about his support for the Union, and threatened him. As the Court has recognized, even if Aceves had "openly declared his support for the union, the employer is not thereby free to probe directly or indirectly into his reason for supporting" it. *TRW-United Greenfield Div.*, 637 F.2d at 418; *see also Norton Audubon Hosp.*, 338 NLRB at 321 (finding interrogation of open union supporter unlawful under totality of the circumstances); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1479 (1992) (same), *enforced*, 984 F.2d 556, 559 (1st Cir. 1993).

⁷ Although Aceves admitted that he was a union supporter (ROA. 35), there is no credited evidence that Negroni specifically was aware of this (ROA. 513). At most, Negroni witnessed Aceves raise issues regarding the employee handbook and a company called Roadlink in the May 9 captive audience meeting. (ROA. 41-42.) Aceves did not mention the Union during the meeting, and he denied the claim, repeated here, that he attempted to stage a walkout. (Br. 12, *see* ROA. 42.)

The Company's legal authority (Br. 32-33) is factually distinguishable. For example, in *Dow Chemical*, the court noted that the questioning was not accompanied by threats, there was "hardly a history of hostility on either side," and some of the interrogations were conducted "in a joking manner." 660 F.2d at 651-52. In *Lord & Taylor*, the court found "little evidence of employer hostility," the employee answered the questions truthfully, and the tenor of the conversation was "casual." 703 F.2d at 166-67. Similarly, in *Federal-Mogul Corporation*, there was little evidence of employer hostility towards the union, "[t]he questions were more in the nature of casual remarks among friends," the replies to the questions were truthful, and the questions were not accompanied by threats. 566 F.2d at 1249-52. There are no similar mitigating factors here.

In attempting to isolate Negroni's question from his accompanying threats and to characterize the conversation as a "one off," "for no apparent reason," and "to no ill end," (Br. 36) the Company asks the Court to do just what it so strenuously argues against: examine "bits and pieces of statements . . . out of context" (Br. 20 (citing *Dow Chem.*, 660 F.2d at 644)). Moreover, the Company's claim that there was "no ill end" ignores settled Board precedent that the standard is objective; "it does not take into account either the motive of the employer or the actual impact on the employee." *Westwood Health Care Ctr.*, 330 NLRB at 940 n.17 (citing cases). Here, the totality of the circumstances amply supports the

Board's finding that Negroni's interrogation of Aceves was unlawful. (ROA. 511, 513.)

2. The Board's crediting Aceves over Negroni is well-supported

The Company's remaining argument (Br. 27-31), that the conversation never took place, is a direct challenge to the judge's credibility findings. As demonstrated above at pp. 17-19, those findings are well supported.

Moreover, although the judge cautioned that "a reading of the transcript alone is insufficient," even a cold reading of the record gives a flavor of Negroni's exaggerated denials. (ROA. 513.) For example, he responded, "absolutely not," "no way," or "definitely [] not" nothing short of ten times. (ROA. 150, 154-58, 160.) He protested mightily when asked about the Aceves interrogation stating, "he's the last person in the world . . . I would never say something like that. I mean that's stupidity." (ROA. 155.) The Company contends (Br. 29) that the Court should overturn the judge's credibility findings because Negroni was simply offended by the challenge to his professionalism. But the judge, who was "in a unique position to evaluate the credibility and demeanor of the witnesses," *Tellepsen Pipeline*, 320 F.3d at 563, deemed that because of those exaggerated protestations, Negroni was "not to be believed." (ROA. 513.) That determination is not unreasonable or unjustified. *See Mission Clay Products Corp.*, 206 NLRB 280, 280 n.1 (1973) (refusing to adopt judge's reasoning for crediting company

witness based on witness' experience and familiarity with "what he could tell an employee" because, despite all that, "such 'naivete' is not uncommon"). Indeed, Negroni's "exaggerated and bombastic" (ROA. 513) responses during his testimony are consistent with his reactive behavior during the interrogations of both Aceves and Contreras.

In contrast, the trivial details the Company cites (Br. 30) to suggest that Aceves is unreliable are unpersuasive, especially considering the judge's finding that his testimony "had the ring of truth to it" (ROA. 513). "Where credibility determinations are based at least partially on the [judge's] assessment of demeanor, they are entitled to great deference, as long as relevant factors are considered and the resolutions are explained." *See NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987) (citation omitted). Here, in making his credibility findings, the judge examined and explained the ample supporting evidence. His findings should be upheld. *See Dynasteel Corp*, 476 F.3d at 257.

3. The Company unlawfully interrogated Contreras

Substantial credited evidence also supports the Board's finding that "[I]ike Negroni's interrogation of Aceves, his interrogation of Contreras violated Section 8(a)(1) of the Act." (ROA. 515.) Negroni's conduct here is consistent with his behavior during the Aceves interrogation. *See generally* discussion and cases cited at pp. 21-29. Negroni approached Contreras privately at his worksite, questioned

Contreras' support for the Union, threatened Contreras when he defended the Union and criticized the Company's labor consultants, stating "I hope the company won't hear what you're saying," and threatened Contreras with futility when presented with the Employee Rights document. (ROA. 514-15; 59-62.)

Again, the background of the Company's prior and contemporaneous violations of the Act and Negroni's prominent position as an agent of the Company during the organizing campaign, lend support to the Board's finding that "from the entire context of the conversation, Negroni's comments were plainly coercive." (ROA. 515.) As with the Aceves interrogation, Negroni sought similar information regarding "how Contreras felt about the Union," including "what the Union was promising" (ROA. 515; *see* ROA. 59-60) to employees. As discussed above (pp. 23-24), an interrogation seeking information regarding an employee's union support tends to be of a coercive nature, and contrary to the Company's assertion (Br. 42), certainly could be used against Contreras. Contreras' clipped and evasive responses ("Fine. Everything's fine." and "The Union is not making any promises . . .") are also indicative of the conversation's coercive nature, regardless of whether he later stood up to Negroni. (ROA. 514-15; ROA. 59-60.) *See Tellepsen Pipeline*, 320 F.3d at 561 (finding interrogations unlawful where employees either avoided answering questions or told questioner that it was "none of his business").

Like the Aceves interrogation, there was no evidence of a valid purpose for the interrogation and no assurances to Contreras that the Company would not retaliate against him for his replies. To the contrary, as the Board found, Negroni's response to Contreras' defense of the Union and criticism of the Company's tactics, that "I hope the company won't hear what you're saying" (ROA. 60), implied "there would be adverse consequences." (ROA. 515.) Moreover, as discussed below at pp. 38-39, after Contreras gave Negroni the Employee Rights document, Negroni threatened Contreras "that it was futile for him and his coworkers to assert their Section 7 rights." (ROA. 515; *see also* ROA. 61-62.) Thus, notwithstanding that Contreras may have been a union advocate, the Board reasonably found that in the totality of the circumstances, the interrogation was coercive. (ROA. 515.) *TRW-United Greenfield Div.*, 637 F.2d at 418 (finding that employee's public "support of and leadership in the [u]nion [did] not alter the suggestion of coercion" in his interrogation).

In challenging the Board's finding, the Company raises arguments (Br. 42-43) similar to those it advanced regarding the Aceves interrogation. They should be rejected for the same reasons. *See* pp. 22-29. In particular, the Company's attempt (Br. 43) to divorce one phrase of Negroni's conversation with Contreras – "[w]hat about the Union?" (ROA. 59) – from the rest of the conversation, particularly Negroni's threats (ROA. 59-62), distorts the record and ignores both

the totality of the circumstances and the context in which the unlawful interrogation occurred.

4. The Board’s crediting Contreras over Negroni and employee Ana Bravo is well-supported

The Company’s assertion that the Contreras interrogation never took place (Br. 40-41), once again challenges the judge’s explicit credibility finding, crediting Contreras over Negroni. (ROA. 511 n.1, 514.) As discussed above, the Board’s discrediting Negroni is well-supported. *See* pp. 17-19, 29-30. Moreover, the judge also explicitly discredited the testimony of company witness Ana Bravo, who was called to testify that no one saw Contreras and Negroni talking on May 22. (ROA. 514; ROA. 190.) Although Bravo, who works in the same part of the warehouse as Contreras, initially testified that she could see Contreras all day on May 22 and never saw the conversation, on cross examination she “admitted she could not see Contreras at every minute of the day on May 22, [] that she did not know where Contreras was at any given hour,” and that her line of sight into Contreras’ work area was severely restricted. (ROA. 514; ROA. 189-90, 191-94, 196, 199, 201-03.) Contrary to Negroni and Bravo, the Board found Contreras to be a credible witness. (ROA. 514.) The Board’s credibility findings are not “inherently unreasonable or self-contradictory,” and thus are entitled to affirmance. *Cent. Freight Lines, Inc. v. NLRB*, 666 F.2d 238, 239 (5th Cir. 1982) (citation omitted).

D. The Company Violated Section 8(a)(1) by Unlawfully Threatening Employees that Selecting Union Representation Would Be Futile

Substantial evidence supports the Board’s finding that Negroni, in addition to his unlawful interrogations, also unlawfully threatened Aceves and Contreras that it would be futile to assert their Section 7 rights. (ROA. 513, 515.) Such threats violate Section 8(a)(1) of the Act, particularly, as the Court has found, “when accompanied by a threat or implication that the employer will take some action to render union support futile.” *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 634 (5th Cir. 2003); *see, e.g., Laredo Coca Cola Bottling Co.*, 613 F.2d at 1340-41 (several threats, including one by company president that “he would never sign a contract with the union”); *NLRB v. Varo, Inc.*, 425 F.2d 293, 299 (5th Cir. 1970) (“threat that the [c]ompany would never agree to a contract”); *Kentucky Tennessee Clay Co.*, 343 NLRB 931, 937 (2004) (statement that “employees had no union, no contract and no rights”), *enforced*, 179 F. App’x 153, 162 (4th Cir. 2006); *Equip. Trucking Co., Inc.*, 336 NLRB 277, 283 (2001) (threat that employer “would never sign a contract with the [u]nion”); *Wellstream Corp.*, 313 NLRB 698, 706 (1994) (threats “that no ‘son of a bitch’ would bring a union into [the company], and that he would see to it that [the company] was never unionized”). “It is also settled that a coercive threat may be implied rather than stated expressly.” *Fleming Companies, Inc. v. NLRB*, 349 F.3d 968, 973 (7th Cir. 2003) (citation omitted); *see also Tellepsen Pipeline*, 320 F.3d at 564. The standard is easily met here.

1. The Company unlawfully threatened Aceves with futility

Substantial credited (*see pp. 17-19, 29-30*) evidence supports the Board’s finding that “Negroni’s statement that Aceves could not exercise his Section 7 rights violated Section 8(a)(1) of the Act.” (ROA. 513.) When Aceves showed Negroni the Employee Rights document, Negroni responded, “this document doesn’t work her[e], my brother.” (ROA. 512-13; ROA. 32-33, 266.) Negroni followed up with the question, “[w]ho pays your check, the company or the Union?” (ROA. 512; ROA. 33.) As the Board reasonably found, “Negroni’s message was clear that . . . it was therefore useless for Aceves to attempt [to] organize with his coworkers and assert their Section 7 rights to join the Union.” (ROA. 513.) The threat that it would be futile for Aceves to exercise the rights spelled out in that document, including the Section 7 right to organize with his coworkers and assert their Section 7 rights to join the Union, violated the Act. (ROA. 513; ROA. 266.) *See Laredo Coca Cola Bottling Co.*, 613 F.2d at 1340-41 (finding employer’s statements that “he did not want a union, that the plant would never have a union, and that he would never sign a contract with a union” unlawful threats of futility).

The Company raises a series of arguments in an unsuccessful attempt to rebut the Board’s well-supported finding of a coercive threat. First, the Company argues (Br. 37) that the Board impermissibly departed from precedent without

explanation because Negroni did not explicitly refuse to recognize the Union or refuse to bargain with the Union. But precedent demands no such explicit threat,⁸ and, given the context, during an interrogation, a threat of futility – either to recognize the Union or to refuse to bargain, or both – easily can be inferred here. At best, the Company’s argument boils down to an invitation to the Court to draw a different inference from Negroni’s statement than did the Board, which, as the Court has stressed, it is “not at liberty” to do. *See Tellepsen Pipeline*, 320 F.3d at 560 (stating that court may not “displace the [Board]’s choice if it is between two fairly conflicting views even though it would justifiably have made a different choice had the matter been before the court *de novo*” (quoting *Universal Camera*, 340 U.S. at 488)).

Equally meritless is the Company’s argument (Br. 38) that Negroni’s statement is too ambiguous to violate the Act, citing cases (Br. 38-40) that instead

⁸ For example, the Board has found Section 8(a)(1) violations for threats of futility that do not include an explicit refusal to recognize a union or refusal to bargain. *See, e.g., Federated Logistics & Operations*, 340 NLRB 255, 255-56 (2003) (statement that “we would start from zero and would negotiate from that,” among others, was unlawful threat of futility), *enforced*, 400 F.3d 920, 925-27 (D.C. Cir. 2005); *Regency Serv. Carts, Inc.*, 325 NLRB 617, 623 n.16 (1998) (statement “that there would be no one coming in and telling [employer] how to run his business” was implied threat of futility); *Acme Datsun*, 263 NLRB 570, 576 (1982) (statements that employer had paid off the National Labor Relations Board and would do so again and that “I hold the keys to this place and there is no outsider ever coming in this place” were implied threats of futility), *enforced mem.*, 716 F.2d 889 (3d Cir. 1983).

amply illustrate the Board's ability to recognize an ambiguous statement when it sees one. The Board is uniquely competent "in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *See Gissel*, 395 U.S. at 620. Here, the Board exercised that competence, and, given the content of the Employee Rights document and the context of the exchange, reasonably found Negroni's coercive message to be "clear." (ROA. 513.)

The Company's further assertion (Br. 37) that Negroni's remarks were permissible because there was no accompanying threat to ensure futility, again ignores the totality of the circumstances. Negroni coupled his threat of futility with "an employer's ultimate threat" (ROA. 513), reminding Aceves that the Company, and not the Union, pays his check (ROA. 33). The futility of asserting Section 7 rights, coupled with the reminder of employees' economic dependence on the Company, amply support the Board's finding that Negroni's statement violated the Act. *Cf. Brown & Root*, 333 F.3d at 635 (stating, in finding statement lawful, that "employees could not reasonably conclude [employer] was threatening reprisals for their support of the union"). Moreover, the Company's later proclamations to its employees that it would bargain in good faith (Br. 37 (citing ROA. 310, 367)), even if true, do not neutralize Negroni's direct and personal threats to Aceves.

2. The Company unlawfully threatened Contreras with futility

As with the Aceves threat, the Board's finding (ROA. 515) that Negroni threatened Contreras with futility is amply supported by the credited evidence. *See* pp. 17-19, 29-30, 33. During a coercive questioning, Contreras presented Negroni with the Employee Rights document. Negroni responded by saying, "this is useless. The Company has its own policies." (ROA.514-15; ROA. 62, 266.) The Board found Negroni's message to Contreras was "that it was futile for him and his coworkers to assert their Section 7 rights to join or support the Union." (ROA. 515.) The Board reasonably found this threat violated Section 8(a)(1) of the Act.

The Company's argument (Br. 43) that Negroni's statement was lawful because it was unaccompanied by a threat is meritless. Once again, the Company ignores the totality of the circumstances. As discussed above, Negroni's threat of futility came on the heels of his warning Contreras that he hoped "the [C]ompany won't hear what you're saying" (ROA. 60), implying "adverse consequences" (ROA. 515) for defending the Union and for criticizing the Company's labor consultants.

The Company next unconvincingly contends (Br. 44-45) that Negroni's comments, particularly his reference to company policies and the Company's hearing Contreras' remarks, were too ambiguous to violate the Act. *See* pp. 36-37.

In doing so, the Company effectively asks the Court to “reweigh the evidence,” *El Paso Elec.*, 681 F.3d at 655, and to “displace the Board’s choice between [] fairly conflicting views,” *Universal Camera*, 340 U.S. at 488. For example, the Company claims (Br. 44) that the company polices or statements in the record demonstrate its commitment to respecting employees’ rights, citing only the May 16 slide deck. But the Company’s arguments ignore several credited statements in the record directly proving otherwise. (See ROA. 511 n.1, 513, 514; ROA. 31-33, 55-56, 59-62, 72, 83.) Likewise, the Company’s claim (Br. 44-45) that a better interpretation of Negroni’s remarks is that he was simply expressing the Company’s “disappointment” in Contreras’ union support merely asserts another possible, albeit implausible, inference.⁹ In asking the Court to adopt its interpretation, the Company ignores well-settled precedent that the “responsibility for conducting this inquiry resides primarily with the [B]oard,” and that a “reviewing court will not disturb the [B]oard’s findings” when, as here, they are supported by substantial evidence. *Laredo Coca Cola Bottling Co.*, 613 F.2d at 1341 (citing *Universal Camera*, 340 U.S. at 488).

⁹ The Company’s proffered interpretation does not necessarily render Negroni’s statement less threatening. See, e.g., *Print Fulfillment Servs. LLC*, 361 NLRB No. 144, 2014 WL 7189245, at *1-2 & n.4 (Dec. 16, 2014) (finding that employer’s stated disappointment in employee’s union support can, in certain circumstances, place reasonable employee in fear that such disappointment “could manifest itself in subsequent reprisals” and citing cases).

E. The Company Violated Section 8(a)(1) by Unlawfully Threatening To Reduce Its Employees' Wages

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) when it threatened employees with wage reductions if they voted for the Union. (ROA. 514.) An employer's "statement or prediction rises to the level of a[n unlawful] threat if, under the totality of the circumstances, 'the employees could reasonably conclude that the employer is threatening economic reprisals if they support the Union.'" *Tellepsen Pipeline*, 320 F.3d at 562 (citation omitted); accord *TRW-United Greenfield Div.*, 637 F.2d at 418. Thus, an employer's threat to reduce wages or benefits in the event of unionization, without tying such losses to the collective-bargaining process or to "economic necessities or other objective facts" violates Section 8(a)(1) of the Act. *President Riverboat Casinos*, 329 NLRB at 77; accord *Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 485 (5th Cir. 2001) (Employer's "statements that a union presence at the plant might result in reduction of wages, hours, overtime, and job security crossed the line from merely predicting economic consequences of unionization to threats of reprisal, because there was no lawful explanation based on objective facts as to why such a loss of benefits would occur." (internal quotation marks and citation omitted)).

1. Ortiz unlawfully threatened employees that the Company “of course” could and had “the right” to reduce their wages if they voted for the Union

The Board’s finding that the Company unlawfully threatened employees with wage reductions if they voted for the Union is amply supported by the credited testimony of Contreras and Urquiza. (ROA. 514.) Ortiz opened the May 16 captive audience meeting by stating that “the Union was not good. That they only want the employees’ money.” He then responded to Contreras’ question about whether wages would be reduced: “Lino [Contreras], of course, if the Union wins, the Company could reduce your wages.” (ROA. 514; ROA. 55, 72, 83). *See President Riverboat Casinos*, 329 NLRB at 77 (finding violation of Section 8(a)(1) where employer “said, in response to an employee’s question whether wages would go down if the union were voted in, that this was ‘a possibility’”). At that time, Ortiz made no reference to the collective bargaining process, nor did Ortiz provide any objective evidence supporting his link between unionization and wage reductions. *See Gissel*, 395 U.S. at 618. To the contrary, Ortiz maximized his statement’s coercive impact, capitalizing on “the economic dependence of the employees on their employers,” *see id.*, by reminding Contreras and the gathered employees, “who pays your salary? . . . The Company, right? Therefore, the Company has the right to reduce your salary.” (ROA. 513-14; ROA. 55-56, 83.)

The Company, in focusing (Br. 23) on Ortiz’ phrasing the threat as something the Company “could” do, rather than something the Company “would” or “will” do, conveniently ignores Ortiz’ later statement that the Company has “the right” to reduce wages if the employees voted to unionize. But even if Ortiz’ threat were phrased as a possibility rather than a certainty, it nevertheless violates the Act under the circumstances here. *See, e.g., Tellepsen Pipeline*, 320 F.3d at 562-63 (finding statements that third party *could* terminate company’s contract and employees *could possibly* lose jobs if union won were unlawful); *TRW-United Greenfield Div*, 637 F.2d at 420 (finding threat that company *could* close down plant and write it off as tax loss if unionized was unlawful); *NLRB v. Mangurian’s, Inc.*, 566 F.2d 463, 466 (5th Cir. 1978) (finding statement “that if the union got in, the union *could possibly* cause the company to go out of business” was unlawful (emphasis added)); *Metro One Loss Prevention Servs. Grp. (Guard Div. NY), Inc.*, 356 NLRB No. 20, 2010 WL 4762307, at *1 (Nov. 8, 2010) (finding statement that “[i]t *could* be worse; it *could* get much worse in the event the [u]nion comes in” was unlawful (emphasis added)).

The cases the Company cites (Br. 21-22) do not mandate a different result. In each, the employer’s remarks were found lawful because they directly referenced the possibility of employees’ losing wages or benefits through collective bargaining, rather than, as here, relaying “the message that the employer

would unilaterally” issue economic reprisals for their union support. *Histacount Corp.*, 278 NLRB 681, 689 (1986). The Board’s decision in *Stumpf Motor Company*, 208 NLRB 431 (1974), cited by the Company, illustrates that distinction. There, the Board found certain employer statements lawful because they referenced possible loss of benefits through collective bargaining, but it found other employer statements unlawful because they implied unilateral economic reprisals. *Id.* at 431-32. Here, not only did Ortiz fail to reference bargaining or negotiations in his extemporaneous remarks, but he also suggested to employees that because the Company pays their salaries, it has the unilateral right to reduce them. (ROA. 513-14; ROA. 55-56, 83.)

The Company’s assertion (Br. 23-27), that Ortiz’ remarks were lawful because his presentation touched on collective bargaining is also meritless. Although Ortiz may have read through the slides (ROA. 514), some of which reference bargaining or negotiations (ROA. 301-02, 309, 341-43, 354), the Board reasonably found that, in doing so, he “never specifically corrected or rescinded his earlier unlawful statement” (ROA. 514). Indeed, Ortiz’ simple recitation of the slides’ “supposedly neutral,” *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 926 (D.C. Cir. 2005), language, could not mitigate the coercive tendency of his extemporaneous and emphatic responses to Contreras’ question about the possibility of wage reductions, *see Federated Logistics & Operations*, 340 NLRB

255, 256 (2003) (finding that employer's threats violated Section 8(a)(1) despite being made during slide presentation that referenced collective bargaining because "any lawful message in the power-point presentation . . . to employees was counteracted" by employer's express threats), *enforced*, 400 F.3d at 925-27. To be sure, an employer who threatens employees in response to their union activity is not automatically absolved by also referring to collective bargaining or negotiations. *See TRW-United Greenfield Div.*, 637 F.2d at 421 (finding employer's threats to bargain from scratch not mitigated by "occasional assurances that all benefits would be negotiable and could either go up, down, or remain the same"); *Consol. Biscuit Co.*, 346 NLRB 1175, 1175 & n.5, 1210 (2006) ("Although [employer] did say that bargaining was a 'give and take situation,' his comment that employees would probably lose specific benefits in the end negated the lawful aspects of his address."), *enforced*, 301 F. App'x 411, 434 (6th Cir. 2008). For, as the Board has previously noted, "[a]n employee might reasonably be influenced more by a coercive statement than by a different noncoercive statement, in order to avoid any adverse consequences." *Federated Logistics*, 340 NLRB at 256.

Here, the Board plainly considered, and rejected, the possibility that the scripted presentation somehow mitigated Ortiz' coercive remarks. (ROA. 514.) Ortiz' extemporaneous comments sent a clear message to the employees that their

wages could be endangered, not because of the uncertainties of the bargaining process, but simply because they selected the Union as their bargaining representative. *See Federated Logistics*, 340 NLRB at 255.

2. The Board reasonably credited Contreras' and Urquiza's testimony as to Ortiz' coercive statements

The Company's remaining arguments (Br. 9-12, 24-25) again challenge the Board's well-supported credibility findings. In crediting Contreras' and Urquiza's accounts of Ortiz' extemporaneous comments, the Board found it significant (ROA. 514) that Contreras' testimony that Ortiz threatened employees at the meeting was largely corroborated by that of Urquiza (*compare* ROA. 55-56 (Contreras), *with* ROA. 82-83 (Urquiza)). Both employees testified that Ortiz opened the meeting by criticizing the Union and by stating that it only wanted employees' money. (ROA. 513; ROA. 55, 82.) Both employees testified that Ortiz stated that if the Union wins, the Company could reduce employees' wages or salaries. (ROA. 513; ROA. 55, 83.) And both employees testified that after Contreras expressed incredulity about the possibility of reduced wages, Ortiz responded that the Company "had the right to" or was able to do so because the Company pays the employees' salaries. (ROA. 513; ROA. 55-56, ROA. 83.)

Given that corroborated testimony, it was likewise reasonable for the Board to discredit and find "hard to believe" Ortiz' claim that he "remained mute other than reading slide text" during the May 16 meeting. (ROA. 514.) Not only is it

implausible that Ortiz, the meeting's presenter, would say nothing other than that in the scripted slide presentation, but Perez, who witnessed the meeting, conceded that during the meeting Ortiz responded to a number of questions from Contreras. (ROA. 171-75.) Thus, in discrediting Ortiz' assertion that he stuck solely to the script (ROA. 102, 104-05), the Board's finding that "there was more colloquy between Ortiz and Contreras than simple slide reading" (ROA. 514) is amply supported.

There is no merit to the Company's argument (Br. 9-12, 24-25) that Contreras' and Urquiza's testimony is unreliable because of minor inconsistencies in their testimony. *See NLRB v. Am. Art Indus., Inc.*, 415 F.2d 1223, 1227 (5th Cir. 1969) (upholding Board's credibility findings despite inconsistencies in testimony because "inconsistencies deal[t] largely with collateral matters and [did] little more than demonstrate the fallibility of memory and well known difficulties in judicial proof"); *accord Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1006 (D.C. Cir. 1998) (upholding credibility determinations despite "certain inconsistencies and minor contradictions" in testimony about "matters other than the relevant question"). For example, the Company takes great pains to argue (Br. 9-12) that the employees' testimony is unreliable because they could not remember the specifics of the May 16 slide show, despite it being one of several company presentations on unionization that Contreras and Urquiza were required

to attend in the months leading up to the election (ROA. 65, 80). The Company also makes much (Br. 24-25) of the timing of Ortiz' threat, claiming that Urquiza contradicted Contreras on this point.¹⁰ Although the judge stated that Ortiz' unlawful comments "appear to have occurred at the beginning of the meeting and prior to the slide presentation" (ROA. 514), the timing is largely irrelevant, as Ortiz clearly made extemporaneous statements at some point during the meeting (ROA. 513-14; ROA. 55-56, 82-83, 171-75). The Company's effort to invoke minor discrepancies, on matters irrelevant to the unlawful threats, as a basis for overturning the judge's credibility determinations is far from convincing.

II. THE COMPANY'S PROCEDURAL AND EVIDENTIARY CHALLENGES ARE WITHOUT MERIT

The Company claims that the administrative law judge erred in requiring its bilingual witness, Ortiz, to testify in English (Br. 5, 15, 45-47) and in refusing to admit certain irrelevant evidence (Br. 50-52). Procedural and evidentiary decisions are within the judge's discretion, and the Court reviews such rulings for abuse of discretion. *See Marathon LeTourneau Co., Longview Div. v. NLRB*, 699 F.2d 248, 254 (5th Cir. 1983); *accord Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267,

¹⁰ Although Urquiza initially testified that the meeting "started with some projections," the Company ignores part of Urquiza's testimony. When asked what Ortiz said at the beginning of the meeting, Urquiza responded that Ortiz made the unlawful statements described above. (ROA. 82.)

1273 & n.1 (D.C. Cir. 2012) (citation omitted). As demonstrated below, the Company's arguments fail to demonstrate that the judge abused his discretion.

A. The Judge's Requirement that Ortiz Testify in English Was Well Within His Discretion

The administrative law judge, with Board approval, did not abuse his discretion in requiring Ortiz to testify in English.¹¹ (ROA. 511 n.1; ROA. 95-96.)

The decision whether to allow an interpreter during an unfair-labor-practice proceeding is within the judge's discretion.¹² *See Yaohan U.S.A. Corp.*, 319 NLRB 424, 424 n.2 (1995) (affirming judge's refusal to provide a Spanish language translator for one witness and permitting some questioning of Korean-speaking witness in English), *enforced*, 121 F.3d 720, 720 (9th Cir. 1997); *cf.*

NLRB v. Del Rey Tortilleria, Inc., 787 F.2d 1118, 1121-22 (7th Cir. 1986) (finding

¹¹ The Company's suggestion (Br. 5, 15, 18) that the judge was inequitable in allowing the General Counsel's witnesses to testify in Spanish is misleading. General Counsel witnesses Aceves and Urquiza testified in Spanish, through the interpreter. (ROA. 22, 75.) Aceves testified that he knew only "[a] little" English. (ROA. 22.) General Counsel witness Contreras testified in English, except when the judge asked him to testify in Spanish as to conversations that were in Spanish. (ROA. 54-56, 59, 61-62.) The record indicates that company witness Bravo also testified in Spanish, through the interpreter. (*See* ROA. 188-90, 197, 199.)

¹² The Board does not disagree with the Company's (Br. 46) statement that witnesses in Board proceedings should be allowed translation assistance when there is a limitation imposed by language difficulty. Indeed, here the judge expressly left open the possibility that Ortiz could have a translator if he had difficulty testifying in English. (ROA. 95-96.) Ortiz, however, testified without apparent difficulty, and neither the Company nor Ortiz subsequently requested a translator. (ROA. 511 n.1.)

judge, who “very competently monitored the translation process,” was “best suited to assess credibility and to resolve conflicts in testimony”); *George Joseph Orchard Siding, Inc.*, 325 NLRB 252, 252 (1998) (stating that “the power to appoint interpreters is inherent in the administrative law judge’s duties and powers to regulate the course of the hearing”); *Domsey Trading Corp.*, 325 NLRB 429, 431 (1998) (similar). Here, the Board was well within its discretion in finding that the judge “gave due consideration to Ortiz’ ability to understand and communicate in English.” (ROA. 511 n.1.) Indeed, his ruling merely asked Ortiz to attempt to testify in English, and if it appeared that Ortiz was having difficulty, they would “switch over to the translation.” (ROA. 96.)

In upholding the judge’s ruling, the Board reasonably found that “[t]here was no evidence that Ortiz demonstrated such difficulty, nor were there subsequent requests by Ortiz or [the Company’s] counsel for translation assistance.” (ROA. 511 n.1.) Indeed, the Company concedes (Br. 7) that Ortiz is bilingual, and Ortiz testified that he is “very good” at translating documents from English to Spanish because has been translating for 18-19 years (ROA. 126).

Conveniently, the Company now suggests (Br. 25, 47) that Ortiz’ testimony would have been consistent if he had been allowed to testify in Spanish. But, as the Board found, the Company did not renew its objection during Ortiz’ testimony, nor did it attempt to clear up any inconsistencies through redirect examination.

(ROA. 511 n.1.) Contrary to the Company’s suggestion (Br. 46-47), the judge based his credibility findings on those inconsistencies, not on any difficulty Ortiz had in testifying in English (ROA. 514). *See Wild Oats Markets, Inc.*, 339 NLRB 81, 84 (2003) (although noting that witnesses had difficulty testifying in English, basing credibility findings on “internal inconsistencies in their individual testimony and inconsistencies among them”); *Daikichi Corp.*, 335 NLRB 622, 623 (2001) (noting that “a witness’ difficulties with English should not hastily be equated with unreliability or incompetence”), *enforced*, 56 F. App’x 516 (D.C. Cir. 2003).

B. The Judge Did Not Abuse His Discretion in Excluding Evidence that Is Irrelevant and Not Based on Witnesses’ Personal Knowledge

Likewise, the Board approved the administrative law judge’s exclusion of irrelevant and speculative evidence. (ROA. 511 n.1.) “[S]o far as practicable,” the Board conducts its proceedings in accordance with the Federal Rules of Evidence. 29 U.S.C. § 160(b); *accord* 29 C.F.R. §§ 101.10(a), 102.39; *Roundy’s Inc. v. NLRB*, 674 F.3d 638, 648 (7th Cir. 2012). Thus, “[e]vidence must be relevant.” *Marathon LeTourneau Co.*, 699 F.2d at 253 (citing Fed. R. Evid. 402); *see also* Fed. R. Evid. 401. And “[a] witness may testify to a matter only if . . . the witness has personal knowledge of the matter.” Fed. R. Evid. 602; *accord Mammoth Mountain Ski Area*, 342 NLRB 837, 845 (2004) (excluding testimony based on witness’ lack of personal knowledge).

Here, the judge acted well within his discretion in excluding the testimony of four company witnesses. The additional witnesses “would have testified . . . that there was a petition to ask the union to withdraw,” that they signed the petition, and that “they never heard consultants – the labor consultants that have been involved in the instant case – question or make any alleged [Section] 8(a)(1) statements to them.” (ROA. 213-14 (judge summarizing Company’s offer of proof).)

Testimony regarding the employees’ petition opposing the Union has no bearing on whether the Company committed the violations here. *Cf. Cintas Corp. v. NLRB*, 589 F.3d 905, 913-14 (8th Cir. 2009) (concluding that the Board did not abuse its discretion in upholding judge’s ruling not to admit evidence of union’s national corporate campaign because it was not relevant to employer’s unfair labor practices committed against individual employees). Even if the employees were to testify that they, personally, were not chilled by the Company’s conduct (Br. 51), it is well settled that Section 8(a)(1) requires no proof that the coercive statements actually chilled employees’ exercise of their Section 7 rights. *See* p. 15. Moreover, their purported negative opinions about the Union simply do not make it “more or less probable” that Negroni and Ortiz unlawfully interrogated or threatened different employees on the three occasions outlined above. *See* Fed. R. Evid. 401.

Likewise, the employees' testimony that they were not personally interrogated or threatened is irrelevant to the violations here. Nor were they alleged to have been present during the Aceves interrogation and threat, the Contreras interrogation and threat, or the May 16 captive audience meeting. (*See* ROA. 209-14 (discussing offer of proof).) Thus, the Board acted well within its discretion in finding that "none of these employees had personal knowledge of the statements alleged to violate the Act." (ROA. 511 n.1.) Any testimony regarding the relevant interrogations and threats would have been based on rumor or conjecture and was properly excluded.

For similar reasons, the Board acted within its discretion in upholding the judge's exclusion of witness Andrew Ivey's testimony along with proposed exhibits, such as the petition (ROA. 406-27) and letter to the Union (ROA. 428) requesting its withdrawal. Like the four witnesses, the purported substance of Ivey's testimony regarding the petition (*see* ROA. 210 (summarizing Ivey's anticipated testimony)), and the rejected exhibits, if presented, would have no tendency to make the Company's coercive statements more or less probable. Ivey was not alleged to have witnessed the coercive statements at issue, so he would have no personal knowledge for his supposed testimony that employees knew that the Company was not violating the law. (Br. 51.) Because the proffered evidence is not relevant to the alleged violations, the Company failed to show prejudice in

its exclusion. *See, e.g., Marathon LeTourneau*, 699 F.2d at 254 (finding that employer suffered no prejudice from exclusion of evidence).

For that reason, the Company's reliance (Br. 51-52) on *Federal-Mogul Corporation* is misplaced. There, the judge allowed the union to introduce into evidence "all of the speeches, statements, circulars, and campaign material made and distributed by the [c]ompany, but . . . refused to admit into evidence, with one exception, the circulars, statements, cartoons, and campaign materials distributed by the [u]nion." 566 F.2d at 1254. The court found that the judge erred in refusing to admit the campaign literature offered by the employer because it was directly relevant "to establish the responsive nature of its own language." *Id.* Here, as discussed above, the rejected evidence has no tendency to make the alleged violations more or less probable, and the proffered witnesses have no personal knowledge of the coercive statements at issue.

Finally, the Company's constant refrain (*see, e.g.,* Br. 51) that it was the Union, and not the Company, that was interfering with employees' Section 7 rights is another attempt to distract the Court from the Company's violations and should be viewed with skepticism. As the Supreme Court has cautioned, albeit in a different context, "[t]here is nothing unreasonable in giving a short leash to the employer as vindicator of its employees' organizational freedom." *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (rejecting employer's

argument that its employees' Section 7 rights compelled the Court to allow the employer to disavow its collective bargaining agreement). Any evidence of such interference, if it exists, is not relevant to the violations here.¹³

III. THE BOARD'S REMEDIAL ORDER IS WELL WITHIN ITS BROAD REMEDIAL DISCRETION

In Section 10(c) of the Act, Congress conferred upon the Board the power to remedy unfair labor practices. That power includes the authority to order a violator of the Act "to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of" the Act. 29 U.S.C. § 160(c). The Board's remedial power under Section 10(c) is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citation omitted). Accordingly, the Supreme Court has held that courts must enforce the Board's chosen remedy "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 537 (5th Cir. 1969); *United Food & Commercial Workers Union*, 447 F.3d 821, 827 (D.C. Cir. 2006).

¹³ The appropriate avenue for the Company to litigate any claims it might have against the Union would be to file charges with the Board.

The Board orders special remedies when unfair labor practices are “so numerous, pervasive, and outrageous that such remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found.”¹⁴ *Federated Logistics*, 340 NLRB at 256 (internal quotation marks and citation omitted); *accord Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enforced*, 273 F. App’x 32, 39 (2d Cir. 2008). One such remedy is to require a public reading of the notice to employees. As the Court recognizes, “[f]or repeated violations persisted in despite intervening declarations of illegality, the Board is warranted in impliedly concluding that such conduct has created a chill atmosphere of fear and, further, in recognizing that the reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance.” *J.P. Stevens & Co.*, 417 F.2d at 540; *see Excel Case Ready*, 334 NLRB 4, 5 (2001) (Public notice reading ensures “that the important information set forth in the notice is disseminated to all employees, including those who do not consult the [employer’s] bulletin boards.”)

¹⁴ The Company’s attempt (Br. 50) to distinguish *Federated Logistics* is unavailing. Contrary to the Company’s assertion that nothing “remotely similar” happened there, the Board in *Federated Logistics* found unlawful interrogations, threats of futility, and threats to reduce benefits during a union organizing campaign. 340 NLRB at 255-58, 264, 266-68. Although the Board also found violations not present here, it correspondingly ordered additional special remedies including a broad cease and desist order and a requirement that the employer supply certain information to the union. *Id.* at 257-58.

The Board's Order, requiring a public reading of the remedial notice in English and Spanish, is well within its broad discretion. As the Board reasonably found, the Company "has engaged in repeated unfair labor practices over a 2-year period of time," including in *UNF West I*, "threats of termination, coercive interrogation, threats that engaging in Section 7 activity would result in loss of benefits, and threats that working conditions would not improve if employees exercised right[s] under the Act." (ROA. 515.) And the Company has continued with similar violations here, again shortly before a scheduled election. The Company's repeated violations of the Act necessitate the notice reading to enable its employees to exercise their Section 7 rights free of coercion and to "restore the laboratory conditions necessary for a fair election." *Federated Logistics*, 340 NLRB at 257 n.8; *see also Heartland Human Servs.*, 360 NLRB No. 101, 2014 WL 2002984, at *4 & n.4 (May 15, 2014) (finding notice reading necessary to dispel effects of serious and persistent unfair labor practices committed by recidivist employer); *U.S. Serv. Indus., Inc.*, 319 NLRB 231, 232 (1995) (finding notice reading, among other special remedies, necessary to "dissipate as much as possible the lingering atmosphere of fear created by" recidivist employer), *enforced*, 107 F.3d 923, 923 (D.C. Cir. 1997).

The Company's very arguments (Br. 47-50) that the remedy is inappropriate, amply illustrate why the notice reading is necessary. Several times the Company

refers to the 2012 violations as “allegations” (Br. 4-5 n.4, 47, 50) despite their being found by the Board and upheld by the D.C. Circuit. Moreover, the Company consistently denigrates the seriousness of the present violations as “isolated,” “he said she said,” or “run of the mill” allegations (Br. 4-5 n.4, 5, 34, 39, 44, 47, 48, 51), even though they involve interrogating and threatening employees in the weeks leading up to an election.

The Company attempts to further downplay its violations by surprisingly suggesting (Br. 48-49) that its interrogation of, and threats to, employees had no tendency to chill their support for the Union. Although a limited number of employees were personally interrogated or directly witnessed the threats, the “chilling effect” is not necessarily so limited. *Cf. Sturgis Newport Bus. Forms, Inc. v. NLRB*, 563 F.2d 1252, 1257 (5th Cir. 1977) (noting, in finding unlawful interrogations and statements, that “supervisors could expect employee discussions of their remarks to extend the impact of their statements to other workers”). Confusingly, the Company claims (Br. 49, 51) that the judge’s “chilling effect” finding (ROA. 515) is unsupported because a majority of employees did not vote for the Union in 2012, and a majority did not plan to vote for the Union in 2014. But that alleged lack of support could equally show that the Company’s unlawful conduct prior to and after each election “chilled employee support for the Union.” (ROA. 515.) Given the Company’s recidivism, and the tendency of its conduct to

interfere with employees' Section 7 rights during the union organizing campaign, the Board was well within its discretion in finding that a public notice reading will best "assure employees of their rights and [the Company's] obligations under the Act." (ROA. 515.)

CONCLUSION

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
June 2016

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FOR THE FIFTH CIRCUIT**

UNF WEST, INCORPORATED,	*
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Petitioner/Cross-Respondent	*
	* No. 16-60124
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 21-CA-129446
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,504 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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