Oral Argument Not Yet Scheduled

No. 16-60106

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REMINGTON LODGING & HOSPITALITY, 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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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the 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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ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on a petition filed by Remington Lodging & Hospitality, LLC (the Company) to review, and the cross-application of the National Labor Relations Board (the Board) to enforce, a Board Order issued against the Company on February 12, 2016, reported at 363 NLRB No. 112. (Vol.

III, 1496-1518.)[1] The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (the Act) (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce.

This Court has jurisdiction over this appeal because the Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). Venue is proper under Section 10(f) because the Company transacts business in Texas. The Company filed its petition for review on February 22, 2016. The Board filed its cross-application for enforcement on March 8, 2016. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the Board is entitled to summary enforcement of the unchallenged portions of its Order?

(2) Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by subcontracting its housekeeping work because of its employees' union activities?

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[1] All record references are to the administrative record filed with the Court on April 4, 2016. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

(3) Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Margaret Loiacono because it believed she had engaged in protected activity and would continue to do so?

STATEMENT OF THE CASE

After investigation of a charge filed by Local 947, United Service Workers Union, International Union of Journeymen and Allied Trades (the Union), the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by subcontracting its housekeeping work to Hospitality Staffing Services (HSS), by discriminatorily refusing to rehire the incumbent housekeeping staff after the subcontract ended 2 months later, and by discriminatorily discharging employee Margaret Loiacono. The complaint also alleged that the Company separately violated Section 8(a)(1) when several supervisors threatened and interrogated employees about their union activity on 12 separate occasions throughout a 4-month period. At the hearing, the Acting General Counsel amended the complaint to add an allegation that the Company also violated Section 8(a)(1) by distributing

campaign literature that threatened employees with more onerous working conditions if they selected the Union as their representative.[2]

Following a hearing, an administrative law judge issued a decision finding that the Company violated the Act as alleged.[3] After considering the Company's exceptions, the Board issued a decision affirming the judge's unfair labor practice findings and adopting his recommended order with slight modification. The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below, pp. 5-17.

On April 26, 2013, in a separate but related action, the Board's Regional Director for Region 29 filed for a preliminary injunction against the Company, under Section 10(j) of the Act (29 U.S.C. § 160(j)), in the Eastern District of New York. The district court found reasonable cause to believe that the Company had violated the Act but denied the injunction on the grounds that it was not just and proper.[4] The district court subsequently entered a consent judgment ordering the Company to cease-and-desist from its unlawful conduct. The Board and the

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[2] The Complaint also included other allegations against HSS, which were ultimately settled. (ROA 1508 n.1.) The administrative law judge dismissed other allegations involving the Company's campaign literature; those allegations are not at issue here.

[3] The judge found that Loiacono's discharge violated Section 8(a)(1), not Section 8(a)(3) and (1) as alleged.

[4] *Paulsen ex rel. NLRB v. Remington Lodging & Hospitality, LLC*, No. 13 Civ. 2539, 2013 WL 4119006, at *9-13 (E.D.N.Y. Aug. 14, 2013).

Company filed appeals, and the Second Circuit affirmed in part and reversed in part.[5] The court found reasonable cause to believe the Company had violated the Act, but that reinstating the housekeeping employees would not be just and proper because it would not restore the status quo in light of the passage of time and the Company's offers of reinstatement to several housekeepers. However, the court ordered the Company to reinstate Loiacono.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Business

The Company manages over 70 hotels. In December 2011, the Company took over management from the Hyatt Company of the Hyatt Regency Long Island in Hauppauge, New York (the Hotel). Before the Company took over, Hyatt had subcontracted out the 40-employee housekeeping department to Hospitality Staffing Solutions (HSS). (ROA 1509; 405.) The Hotel had suffered low guest-satisfaction scores under Hyatt's and HSS's management, which in part led to the Hotel owners' decision to use the Company's services. (ROA 1509; 471.)

When it took over, the Company ended the subcontract with HSS and directly hired all of the housekeepers, including the housekeeping supervisors. This decision was in keeping with the Company's "general preference" to directly employ its staff. (ROA 1509; 471.) The Company "never contracts out *all*

[5] *Paulsen ex rel. NLRB v. Remington Lodging & Hosp., LLC*, 773 F.3d 462 (2014).

housekeeping work," preferring either to directly employ all housekeepers or contract for a supplemental force. (ROA 1509, 1509 n.2; 472.) After the Company terminated the subcontract to HSS, HSS closed its Long Island office and did not keep any staff or contracts in the local labor market. (ROA 1512; 425.)

B. The Union's Campaign Starts; Supervisors Respond by Interrogating Housekeepers about the Union, Prompting Employees to Cancel a Union Meeting

In April 2012, union representative Jose Vega started visiting the Hotel once or twice a week. During his visits, he handed out business cards and spoke with several employees, including Veronica Flores, who became his primary liaison with the housekeeping employees. Flores eventually set an initial union meeting date for June 10. (ROA 1509; 102-03.)

Sometime in May 2012, after Vega had started visiting the Hotel, Supervisor Percida Rosero approached housekeeper Ninfa Palacios and asked her if she had been asked to participate in a union meeting. Palacios responded that she knew nothing and had not been invited to any meeting. Rosero then stated that "there were some rumors of a union meeting going on." (ROA 1510; 230-32.)

In early June, Andrew Arpino, the director of housekeeping, called Flores into his office and asked her if she knew anything about a union. When Flores responded that she knew nothing, Arpino told her to let him know if she heard anything. He also showed her Vega's business card, which he said another

employee had given to him. (ROA 1510; 123-124, 131.) Shortly after this interrogation, Flores, believing that the Company knew about the Union, contacted Vega and cancelled the June 10 union meeting. (ROA 1509; 103).

C. The Union Campaign Continues and the Company Explores Subcontracting the Housekeeping Work

In mid-to-late June, shortly after Flores cancelled the union meeting, the Company began to explore the possibility of subcontracting the housekeeping department staffing. (ROA 1496-97; 415.) On June 28, Manager Sileshi Mengiste emailed several Company officials, including CEO Mark Sharkey, to discuss the purported reasons for subcontracting, including reducing workers' compensation and potential healthcare costs, ensuring adequate hiring and recruiting, and minimizing overtime. (ROA 1510; 953-54.) CEO Sharkey instructed Mengiste to contact HSS about subcontracting the housekeeping staff. (ROA 1510; 960.)

About June 29, Mengiste informed HSS President and HSS CEO Rick Holliday that he wanted to subcontract the staff "the next day." (ROA 1511; 410-11.) Holliday responded that HSS would need more time to reopen its Long Island office. (ROA 1511; 410-11.) HSS also asked the Company if there was any union activity at the Hotel. The Company responded in a July 1 email, explaining that union organizing at hotels in Long Island "has been in play for many years and has also heated up in the past year." (ROA 1497 n.7, 1511; 949.) The Company warned HSS that union activity "was something to be aware of." (ROA 1497 n.7,

1511; 949.) The Company and HSS spent most of July negotiating the contract. (ROA 1511; 941-50.)

D. The Company Continues To Interrogate and Threaten Employees

While it pursued subcontracting, the Company continued to interrogate employees about their union activity. In late June, Flores had a conversation with Arpino in his office, during which Arpino showed her a picture of a man on his computer and asked her if it was Vega. Flores replied that it was not. (ROA 1510; 125-26.)

In early July, the Union campaign began to heat up. Vega continued to visit the Hotel. On July 4, he held a meeting with employees at which four employees signed authorization cards. Seven others signed authorization cards in the following week. (ROA 1511; 104, 305-06.)

The Company increased its anti-union efforts. In July, Supervisor Rosero approached Flores and told her that the Union "was trying to get into the Hotel," and that "this was impossible," because the Union "would take money away from everyone" and would not work with anybody who was not documented. (ROA 1510; 129-30.) In early August, Human Resources Manager Osiris Arango called employee Delia Berti Reyes Granados into her office and asked if two people from the Union had spoken with her. When Granados said they had not, Arango asked

her what benefits the Union had offered. Granados replied that she did not know. (ROA 1513; 309.)

Also in early August, Flores overheard Rosero telling another employee that employees would be dismissed if they talked to the Union and that the Union would not work with anybody who was undocumented. (ROA 15; 130.)

E. Responding to Continued Union Activity, the Company, Despite the Increased Cost, Subcontracts the Housekeeping Work and Tells the Housekeepers that They Have To Apply to HSS for Employment; HSS Rehires Most but not All of the Employees

The Company and HSS finally executed an agreement on August 16, effective August 21. (ROA 1512; 950.) The subcontract required the transfer of all housekeeping staff to HSS, but the Company retained its two housekeeping supervisors and the Housekeeping Director. HSS committed to hiring at least one new supervisor for the housekeeping staff. (ROA 1511; 942-43.)

The agreement also included a penalty clause that required the Company to pay to HSS a half year's wages for any HSS employee that the Company hired following the contract's termination. The agreement also provided significantly higher wages for both new hires and returning employees. (ROA 1511; 942-43.) The subcontract ultimately proved more expensive than directly employing the housekeeping staff. (ROA 1511; 675.)

On August 20, the day before the subcontract went into effect, the Company informed housekeeping employees that HSS was taking over the housekeeping

functions. It instructed housekeepers that if they wished to work for HSS, they had to fill out employment applications. (ROA 1511; 148, 202, 449.) The housekeepers also had to pass a drug test, background test, and HSS's E-Verify system.[6] (ROA 1511; 148, 202, 449.) Most, but not all, housekeepers did as instructed and were hired. (ROA 449-50.)

Also on August 20, the Union, having obtained 25 signed authorization cards, filed a representation petition seeking to have an election among the Company's housekeeping employees. (ROA 1511; 917.) The Union later withdrew that petition and filed a second one naming both the Company and HSS as employers. (ROA 1511; 937.)

F. The Company Continues To Interrogate and Threaten Employees

Throughout late August and September, the Union continued to solicit authorization cards from employees, and the Company responded with increased threats and interrogations. (ROA 1512; 305-06.) On August 21, the day that the subcontract started, employee Maritza Torres asked Supervisor Rosero "what was going on," and Rosero responded that the subcontract "was happening because of the Union." (ROA 1513; 275.) Rosero added that "other things" might also change. (ROA 1513; 275.)

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[6] E-Verify is a federal system that employers can use to see if a new hire's social security number matches the number on file with the Social Security Administration. (ROA 1511 n.6.)

In late August, after the employees began working for HSS, Human Resources Manager Arango called several employees into her office and interrogated them about the Union. She asked housekeeper Josefina Portillo what she knew about the Union. (ROA 1513; 381.) She also asked employee Noris Gutierrez if Gutierrez knew of any employees who were talking to the Union. When Gutierrez replied that she did not, Arango warned that "the Union was not good." (ROA 18; 176.) In mid-September, Rosero asked employee Ana Salgado if she was going to a union meeting. When Salgado stated that she did not know about the meeting, Rosero informed Salgado that HSS had found out about the meeting. (ROA 1514; 246-47.)

Later in September, Arango interrogated two more employees. She asked Reina Trejo if she "would go with the Union or stay with the hotel." When Trejo gave an equivocal response, Arango told Trejo that the Union was "two-faced" and "would take a percentage of what she earned." (ROA 1514; 296, 303.) Arango also asked employee Francis Lopez if Lopez knew what the Union was, what other employees were saying about the Union, and whether Lopez had signed an authorization card. Arango informed Lopez during their conversation that if the Union won, the Company would "fire everybody." (ROA 1514; 287.)

G. HSS Terminates the Contract; the Company Refuses To Rehire the Incumbent Housekeepers and Instead Secretly Recruits and Trains an Entirely New Staff

On September 19, HSS CEO Holliday informed the Company that, effective October 19, HSS would terminate the contract. Holliday told the Company that HSS was waiving the contract's penalty clause. (ROA 1513; 440-43.) This waiver meant that HSS, which had no other local operation to place the employees, waived any restriction on the Company retaining the employees upon termination of the subcontract.

When the Company learned about the cancellation, it recruited an entirely new housekeeping staff. The Company then secretly trained this staff at another hotel. (ROA 1513; 451-52.) In the meantime, on October 16, the Union filed an amended representation petition naming the Company and HSS as employers. (ROA 1511; 937.)

The Company did not inform the housekeepers that HSS had cancelled the contract until October 19, the day that the contract ended. That day, the Company told all the housekeeping employees that they were fired and would not be rehired. Instead, the Company replaced the employees with the staff that it had secretly trained over the previous month. (ROA 1513; 251, 289.)

H. The Company Discharges Employee Margaret Loiacono Shortly After She Complains About Its Anti-Union Campaign Materials

Margaret Loiacono started working for the Company as a Lobby Ambassador in September 2012, while the Union campaign was underway. Her duties included greeting and assisting guests. Occasionally, she also drove hotel guests in a company van. (ROA 1515; 344-45.) She was initially hired under a 120-day probationary period that would end in mid-January. (ROA 1516; 366.)

As part of its anti-union campaign during the fall of 2012, the Company produced various propaganda. This included distributing a pie chart to each employee purporting to set forth the employees' total compensation, including benefits, and how it was apportioned. (ROA 932.) In late December 2012, when the Union's second representation petition was pending, Housekeeping Director Arpino called Loiacono to his office. Arpino handed her the chart, and stated that while "[the Company] was giving employees a certain amount of money, . . . they couldn't guarantee anything with a union." (ROA 1515; 352.) Loiacono replied that Arpino did not have to explain, because she had previously been a member of a New York State employee union. Also during this conversation, Arpino told Loiacono that her work and attitude had improved and that she was doing a good job. (ROA 1515; 352.)

On December 30, Loiacono left her post for about 10 minutes to speak with housekeeping supervisor Yohenna Borrero. Loiacono complained that the chart

incorrectly included a uniform-cleaning allowance as part of her compensation even though Loiacono did not wear a uniform. (ROA 1499; 344.) Loiacono asked Borrero if her chart was also incorrect and suggested that Borrero check her chart. (ROA 1515; 344.)

The same day, Loiacono asked to speak with General Manager Jeff Rostek. The two went into Rostek's office, and Loiacono repeated her concern that the pie chart did not adequately reflect her compensation because it included the uniform-cleaning allowance. (ROA 1515; 355.) Loiacono also pointed out that other employees' pie charts might also be inaccurate. For example, the charts included health insurance costs, but not all employees received health insurance. Loiacono asked Rostek who made the charts, and suggested that the Company correct them. Rostek stated that he would "look into it." (ROA 1515; 356.) Later that day, Rostek held a conversation with Loiacono and two other employees in the lobby. He stated that it would "take a long time to get a union contract" and that there was no guarantee that employees would get a raise. (ROA 1515; 358.) He also stated that even if employees got "a contract and stuff," the Company would not have to honor it. (ROA 1515; 358.)

The next day, Arpino, after receiving Borrero's statement about her conversation with Loiacono, emailed Rostek an extensive summary of that conversation. In the email, Arpino stated that Loiacono had complained that she

should be paid the value of the uniform-cleaning allowance in cash. Arpino also stated that Loiacono had claimed that "putting things [in the chart] that employees are not getting" was "lying to the people and . . . against the law." (ROA 1515; 1115.) Arpino also mentioned that Loiacono had spoken with an employee, referred to as "Ken," about the pie charts, and that Loiacono "was waiting for Ken to talk to Rostek." (ROA 1515; 1115.) The email finally relates that Loiacono had threatened to bring the Hotel to court regarding her pay rate. (ROA 1516; 1115.)

On January 2, 2013, shortly before her probationary period was over, the Company terminated Loiacono. Her termination report states that on December 30, Loiacono was "outside of her work area ignoring her duties as Lobby Ambassador [and was] not engaged in work activities while in the Housekeeping office with Yohenna [Borrero]." (ROA 1516; 933.) The report also states that Arpino and Rostek had spoken with Loiacono about her attitude in the past, and that "no improvement has been observed." (ROA 1516; 933.) Finally, the report details a December 11 incident, where Loiacono had complained about an issue with the light inside the Hotel's van that she occasionally had to drive. The Company had not previously disciplined Loiacono. (ROA 362-63.)

I. The Company's Anti-Union Leaflet

In January 2013, while the Union's second representation petition was pending, the Company continued its anti-union campaign and distributed a leaflet

to employees. In relevant part, the leaflet, styled as "Frequently Asked Questions," asks if "the enforcement of work rules [will] change if the Union is voted in," and replies:

> *YES! The rules would be applied and enforced more strictly. Right now, managers have a lot of flexibility and room to be fair. We believe in "extra chances" (except for very serious violations). In a Union hotel, that would go away. The rules would have to be enforced* ***very*** *rigidly. That's just the way it is in "union" companies—employers are* ***afraid*** *of "doing favors";* ***afraid*** *of being flexible.* (ROA 1514; 1105.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Member Hirozawa, Member Miscimarra concurring in part and dissenting in part) affirmed the judge's findings. The Board adopted the judge's findings that the Company violated Section 8(a)(1) on 12 separate occasions from May through September when it unlawfully threatened or interrogated employees due to their union activities.[7] (ROA 1496 n.1.) The Board unanimously adopted the judge's finding that the Company's campaign literature included an unlawful threat to more strictly apply work rules if the Union won the election. (ROA 1496 n.1.)

The Board majority found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) by discharging its entire housekeeping staff and

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[7] Member Miscimarra agreed regarding three of the Section 8(a)(1) violations, but found it unnecessary to pass on the legality of the remaining violations because it would not affect the remedy. (ROA 6 n.5.)

subcontracting their work to HSS because of the housekeepers' union activity. (ROA 1496-18.) The Board unanimously found that the Company further violated Section 8(a)(3) and (1) when it discriminatorily refused to rehire the housekeeping employees when HSS terminated the subcontract. (ROA 1498-19.) The Board majority further found that the Company violated Section 8(a)(1) when it discharged Loiacono because it believed she had engaged in protected, concerted activity and would continue to do so. (ROA 1499-1500.)

The Board ordered the Company to cease-and-desist from the unfair-labor practices found, and from in any other manner restraining, coercing, or interfering with employees' exercise of their rights under Section 7, 29 U.S.C. §7. (ROA 1501, 1517.) Affirmatively, the Board's Order requires the Company to offer full reinstatement to all housekeeping employees it employed as of August 20 or October 19, and make them whole for any loss of pay or benefits, plus interest. It also requires the Company to reinstate Loiacono and make her whole. Finally, the Order requires the Company to post a remedial notice.

SUMMARY OF ARGUMENT

The Company does not contest the Board's findings that it violated Section 8(a)(1) on 12 separate occasions by unlawfully interrogating or threatening employees due to their union activity, that it violated Section 8(a)(3) and (1) by refusing to rehire housekeeping employees because of their union activity, or that it

violated Section 8(a)(1) by distributing anti-union campaign materials that threatened employees with more strictly enforced work rules. The Court should therefore summarily enforce the portions of the Board's Order related to those violations.

Substantial evidence supports the Board's finding that the Company violated the Act by subcontracting its housekeeping work to HSS in response to the housekeepers' union activity. The Board, applying its well-established *Wright Line* analysis, found that the Company was unlawfully motivated. In making that finding, the Board relied on evidence that housekeepers engaged in union activity, the Company knew of it, and the Company bore animus against that activity. The Company generally knew of union activity in area hotels. Its two coercive interrogations of housekeepers, including the primary union contact, demonstrate at least a suspicion of union activity. Moreover, the close timing between its subcontracting decision and the start of the employees' union activity strongly supports the Board's knowledge finding. In addition to supporting knowledge, the Company's contemporaneous unlawful interrogations and hasty effort to subcontract also evidence anti-union animus, as do the numerous uncontested violations.

The Board also properly rejected the Company's affirmative defense that it would have subcontracted all housekeeping work absent the housekeepers' union

activity. The subcontract contradicts the Company's general preference to directly employ housekeepers, and it had not taken such a drastic step in any of the other 70 hotels it manages. Moreover, the Board properly found that the Company's low guest-satisfaction scores, which had persisted for months, did not prompt the subcontract, but instead the employees' union activity, which had just begun, did. Finally, the Board correctly rejected the Company's contention that potential cost savings motivated its decision because the subcontract actually increased the Company's costs.

Substantial evidence also supports the Board's finding that Company unlawfully discharged Lobby Ambassador Margaret Loiacono because it believed she had engaged in protected activity and would continue to do so. Shortly before her discharge, the Company's housekeeping director emailed upper management and alerted them that Loiacono had discussed the anti-union materials with another employee, stated that she was due higher wages, and accused the Company of lying to its employees. The email also stated that Loiacono and another employee had future plans to discuss pay with management, and that Loiacono had threatened to sue the Company. The Board reasonably found that those statements led the Company to believe that Loiacono had engaged in protected activity, and that its discharge of Loiacono, occurring just three days after she criticized the Company's propaganda, was a pre-emptive strike against future protected activity.

Finally, the Board reasonably rejected the Company's alternative explanation for Loiacono's discharge. Her short-term absence from her workstation did not violate any work rule, and three days before her discharge, the Company had told Loiacono that she was doing a good job.

STANDARD OF REVIEW

"The standard of review of the Board's findings of fact and application of the law is deferential." *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). The Board's findings of fact are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence is "such relevant evidence that a reasonable mind would accept to support a conclusion." *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (internal quotation marks and citation omitted). Thus, the Court will not disturb the Board's findings "simply because the evidence may also reasonably support other inferences or because [the Court] might well have reached a different result had the matter come before [it] de novo." *NLRB v. Universal Packing & Gasket Co.*, 379 F.2d 269, 270 (5th Cir. 1967); *accord Poly-America, Inc. v. NLRB*, 260 F.3d 465, 476 (5th Cir. 2001). Finally, "[i]n determining whether the Board's factual findings are supported by the record, [the Court does] not make credibility

determinations or reweigh the evidence." *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007).

ARGUMENT

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

Before the Court, the Company contests only two of the Board's findings: that its subcontract of housekeeping work to HSS violated Section 8(a)(3) and (1), and that it discharged employee Margaret Loiacono in violation of Section 8(a)(1) because it believed that she had engaged in protected activity and would continue to do the same. The Company does not contest the Board's finding that it violated Section 8(a)(3) and (1) by discriminatorily refusing to rehire its housekeeping staff. (ROA 1498-99.) It also does not contest the Board's findings that it violated Section 8(a)(1) on 12 separate occasions when it threatened or interrogated employees due to their union activity. (ROA 1496, n.1.) The uncontested threats and interrogations include:

- Supervisor Percida Rosero's late May interrogation of housekeeper Ninfa Palacios (p. 6, ROA 1510);
- Supervisor Andrew Arpino's interrogation of housekeeper Veronica Flores in early June (p. 6-7, ROA 1510);
- Arpino's late June interrogation of Flores, when he showed her a picture and asked if it was union representative Vega (p. 8, ROA 1510);

- Rosero's July statement to Flores that the Union "would not work with someone who was not undocumented" (p. 8, ROA 1510);
- Rosero's August statement that employees "would be dismissed if they talked to the Union" and that the Union would not work with undocumented workers (p. 9, ROA 1510);
- Rosero's late August statement to housekeeper Maritza Torres that the Company had subcontracted work to HSS "because of the Union" (p. 10, ROA 1513);
- Rosero's September interrogation of housekeeper Ana Salgado and statement that HSS had found out about a union meeting (p. 11, ROA 1514);
- Human Resources Manager Osiris Arango's early August interrogation, when she asked Delia Berti Reyes Granados if two people from the Union had spoken with her (p. 9, ROA 1513);
- Arango's late August interrogation of Josefina Portillo (p. 11, ROA 1513);
- Arango's late August interrogation of Noris Gutierrez, when she asked Gutierrez if she knew anything about the Union and stated that the Union is "not good" (p. 11, ROA 1513);

- Arango's late September interrogation of Francis Lopez and threat that the Company "would fire everybody" (p. 11, ROA 1514); and,
- Arango's late September coercive interrogation of Reina Trejo and statement that the Union was "two-faced." (p. 11, ROA 1514.)

Finally, the Company does not contest the Board's finding that it violated Section 8(a)(1) when it distributed campaign literature threatening employees with stricter enforcement of work rules if employees chose union representation.

Rule 28 of the Federal Rules of Appellate Procedure provides that a petitioner's brief must contain "the [petitioner's] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [petitioner] relies." Fed. R. App. P. 28(a)(8)(A). Per Rule 28, a petitioner "abandons all issues not raised and argued in its *initial* brief on appeal." *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (emphasis in original).

This Court's precedent "establishe[s] that when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement." *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008). The Board, therefore, is entitled to summary enforcement of the portions of its Order corresponding to its numerous uncontested findings. *See El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 658 (5th Cir. 2012) (explaining that "a party's failure to challenge the Board's findings in its

initial brief results in waiver of those issues," making summary enforcement appropriate).[8] Moreover, courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the [remaining] issues are considered." *NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982). *Accord U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc). *See also NLRB v. Pace Manor Lines, Inc.*, 703 F.2d 28, 29 (2d Cir. 1983) ("It is against the background [of uncontested violations] that we consider the Board's remaining findings.").

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY SUBCONTRACTING ITS HOUSEKEEPING WORK BECAUSE OF THE EMPLOYEES' UNION ACTIVITIES

Ample evidence supports the Board's finding that the employees' union activity motivated the Company's subcontract decision and therefore that it was unlawful. It is undisputed that the Company strongly prefers to directly employ its staff. Yet on the heels of discovering the Union's campaign to organize its

[8] Although in its statement of facts, the Company spills much ink illuminating some of the supposed reasons for its discriminatory refusal to rehire its housekeepers on October 19, the Company has not sufficiently raised the issue to the Court. (Br. 18-21.) Such assertions "alluded to . . . in the statement of facts" without any supporting argument are considered waived. *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154, 1161 n.** (D.C. Cir. 2000). A party must do more than "merely mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

housekeeping employees, and shortly after interrogating its employees about that campaign, the Company decided to subcontract its housekeeping work. Given the timing of the decision and the Company's demonstrated animus towards the employees' union activity, the Board properly found that the Company's subcontract decision was unlawfully motivated. The Company claims that low guest satisfaction scores and financial costs established legitimate business reasons for its decision. But the Company awarded the contract to HSS, which had previously proved unable to improve scores. Moreover, the contract, which required higher wages and benefits, actually increased the Company's costs. Given these circumstances, the Board properly rejected these grounds as mere pretext. As we show below, substantial evidence supports the Board's findings.

A. Applicable Principles

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 or other mutual aid or protection . . . ." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." 29 U.S.C. § 158(a)(1).

Section 8(a)(3) of the Act bans "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by "discharging employees because of their union activity." *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 186 (5th Cir. 1988). Although the protections of Section 8(a)(3) and Section 8(a)(1) "are not coterminous, a violation of [the former] constitutes a derivative violation of [the latter]." *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Whether an employer's adverse action violates the Act often requires determining the employer's motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the Board test for determining motivation in unlawful-discrimination cases first articulated in *Wright Line*, 254 NLRB 1083, 1088-89 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that employees' protected activity was a "motivating factor" in an employer's decision to take adverse action, that adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of any protected activity. *See Transportation Management*, 462 U.S. at 397, 401-03. If the lawful reasons advanced by the employer for its actions are a pretext—that is, if the reasons either

did not exist or were not in fact relied on—the employer's burden has not been met, and the inquiry is logically at an end. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enforced mem.*, 705 F 2d 799 (6th Cir, 1982).

Under *Wright Line*, the elements required to support a showing of anti-union motivation are "union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). "[S]uch knowledge may be inferred from circumstantial evidence." *Texas Aluminum Co. v. NLRB*, 435 F.2d 917, 919 (5th Cir. 1970). Similarly, proof of animus does not require direct evidence, but may be established by circumstantial evidence. *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 465 (5th Cir. 2001.) Finally, even "[where] the record does permit a competing, perhaps even equal, inference of a legitimate basis" for the adverse action, the Board may "reasonably infer an improper motivation given the timing of the discipline and the circumstances of the employer's antiunion campaign." *NLRB v. Brookwood Furniture, Div. of U.S. Indust.*, 701 F.2d 452, 467 (5th Cir. 1983).

Courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); *accord Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980) (the determination of motive is "particularly within the

purview of the Board"). "Once the Board has inferred an illegal motive for an employment decision, this court 'may not lightly displace the Board's factual finding of discriminatory intent.'" *Texas World Serv. Co. v. NLRB*, 928 F.2d 1426, 1435 (5th Cir. 1991), *quoting Brookwood Furniture*, 701 F.2d at 464.

B. The Housekeepers' Nascent Unionization Drive Was a Motivating Factor in the Company's Outsourcing Decision

Substantial evidence supports the Board's finding that the employees were engaged in union activity, the Company knew about that activity, and that it harbored animus against that activity. The Company does not dispute that the housekeeping employees were engaged in union activity, and it does not does not challenge the Board's finding that contemporaneous unfair labor practices and timing evidence anti-union animus. Instead, it primarily contends that the evidence fails to show that the Company knew about the activity or that it outsourced the housekeeping department because of that activity. The Board, however, properly rejected those arguments.

1. The employees engaged in union activity and the Company knew about that activity

It is undisputed that the housekeeping employees engaged in union activity. Vega began visiting the Hotel in April, distributing authorization cards, and talking to employees about the Union. He continued to visit regularly in the following months. Soon thereafter, employee Veronica Flores became Vega's liaison at the

Hotel, and together they planned a June 10 union meeting with employees. (ROA 1497, n.7, 1509.)

The record also supports the Board's finding that the Company knew of its employees' union activity by June 28, the first time it contacted HSS about the subcontract. In making this finding, the Board reasonably relied on the Company's interrogations, the timing of the decision, and the Company's statement to HSS that union activity was underway in the surrounding area.

In the month before the Company's decision to outsource its housekeeping work, two supervisors, Rosero and Arpino, interrogated employees about their union activities. In late May, Rosero, specifically referencing "some rumors" she had heard about a union meeting, asked employee Ninfa Palacios if she "knew anything" about the meeting. (ROA 1510.) Then, sometime before June 10, Arpino asked Flores, the Union's primary employee liaison, whether she knew anything about the Union and showed her Vega's business card. (ROA 1510.) Following this conversation, Flores, concerned that the Company knew of the upcoming meeting, contacted Vega to cancel it. Given the reference to rumors of a scheduled meeting and the display of Vega's card, ample evidence supports the Board's finding that these interrogations "demonstrate, at the very least, a suspicion that employees were engaging in union activity." (ROA 1497, n.7.) *See, e.g.*, *Evenflow Transp., Inc.*, 358 NLRB 695, 697 (2012), *incorporated by*

reference 361 NLRB No. 160 (2014) (finding that "repeated interrogations . . . can confirm general knowledge" of a unionization campaign amid other circumstantial evidence).

The Board also relied on the timing of the subcontract decision and the Company's acknowledgement of local union activity to support its knowledge finding. Notably, the Company began exploring outsourcing soon after it interrogated its employees and just 2 weeks after the union meeting was cancelled. The Company's initial attempts were marked by extreme haste; on June 29, the Company told HSS that it wanted the subcontract to take place "the next day," an obviously impractical timeframe. (ROA 1511.) Moreover, the Company acknowledged in a July 1 email to HSS that union organizing "had been in play for many years" and had "heated up on the island." (ROA 1497, n.7.) Given these circumstances, the Board reasonably found that the Company knew of the housekeepers' union activity.

The Company (Br. 33) contends that the interrogations alone are insufficient to show knowledge of union activity. But the Company misreads the Board's decision. The Board did not rely solely on the two interrogations. As explained above, the Board examined the totality of the circumstances, including the interrogation of employees (one of whom was the primary union contact at the

Hotel), the timing of the decision, and the Company's admitted knowledge of union activity at hotels in the general vicinity.

The Company (Br. 33) faults the Board for relying on *Kajima Engineering & Construction, Inc.*, 331 NLRB 1604, 1604 (2000), to support its finding that the interrogations demonstrated knowledge. In that case, the union had filed a representation petition and the employer therefore knew, regardless of the interrogations, that the employees had engaged in union activity. The Board, however, has consistently found that "repeated interrogations . . . can confirm general knowledge" of a unionization campaign amid other circumstantial evidence. *Evenflow Transp.*, 358 NLRB at 697. Here, the question is whether the Company knew of *any* union activity among housekeepers. In this context, *Kajima* supports the proposition that an unlawful interrogation can constitute circumstantial evidence that an employer knows of union activity, and this Court has made clear that "knowledge may be inferred from circumstantial evidence." *Texas Aluminum*, 435 F.2d at 919. Moreover, the Company cannot refute the other circumstantial evidence demonstrating knowledge—timing and animus. *See Metro Networks, Inc. & Am. Fed'n of Radio & Television Artists*, 336 NLRB 63, 65 (2001) (employer's contemporaneous Section 8(a)(1) violations demonstrates knowledge of union activity). *See also Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd. mem*. 97 F.3d 1448 (4th Cir. 1996) (Board may infer

knowledge from circumstantial evidence including timing, general knowledge of union activity, animus, and disparate treatment).

The Company further posits that the Board was wrong to rely on the interrogations because they did not reveal any useful information regarding union activity. Specifically, the Company contends that "there is no evidence that Arpino or Rosero knew or were advised that *any employee* supported the Union or engaged in union activity." (Br. 31, *quoting* ROA 1501.) But the record belies this claim, as the evidence shows that the supervisors were learning about the employees' union activity. Rosero, when interrogating Palacios, specifically referenced "some rumors" of an upcoming union meeting. (ROA 1510.) Moreover, Arpino singled out Flores, Vega's primary contract, for his two June interrogations, and, when asking her about the Union, showed her Vega's picture. Notably, neither Rosero nor Arpino testified at the hearing, rendering Palacio's and Flores' accounts of these interrogations uncontroverted. (ROA 1510.)

Finally, the Company argues that union activity was too "low-key" and "secretive" for discovery. (Br. 32.) But this Court has found knowledge of union activity in circumstances far less compelling than here. In *Russell-Newman Manufacturing Co. v. NLRB*, a union organizer, in an attempt to update expired authorization cards, had visited the employer's plant during a 2-week period and "conducted some additional organizational activity." 406 F. 2d 1280, 1283 (5th

Cir. 1969). Despite no direct evidence that any manager had witnessed this activity, this Court upheld the Board's finding that the employer knew its employees were engaged in a renewed organizational drive. In contrast, the evidence in this case demonstrating knowledge is quite strong. Specifically, it is undisputed that against the backdrop of increased organizing at hotels in the locality, a union organizer made regular visits to the Hotel that culminated in signed authorization cards and a scheduled meeting with employees, prompting multiple interrogations by different supervisors about union activity.

2. The Company harbored animus against its employees' union activities

In finding that the Company harbored anti-union animus, the Board relied on the timing of the Company's decision and its uncontested interrogations and other violations. (ROA 1497 n.6.) Substantial evidence fully supports that finding.

The timing of the subcontract decision, coming so close to the discovery of union activity, strongly supports the Board's finding of animus. This Court has found similar timing to be circumstantial evidence of anti-union animus. *See Electronic Data Systems. Corp. v. NLRB*, 985 F.2d 801, 805 (5th Cir. 1993) (timing of subcontract decision just a month after union organizing started supports animus finding). Here, the Company's sudden urgency to subcontract "the next day," when the problems supposedly prompting the request (low guest satisfaction scores and rising costs) had existed since it started managing the Hotel, is

suspicious. The housekeepers' union activity, unlike the Company's lingering customer-satisfaction problems, had just begun, and provides a far more compelling reason for the Company's sudden action. *See Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 920–21 (9th Cir. 2006) (finding anti-union animus where there was "no obvious precipitating event for the subcontracting decision" other than union activity, and employer's subcontract decision occurred the same month that union's campaign started).

Moreover, the Company has admitted to unlawfully interrogating employees in the weeks preceding its initial decision to explore subcontracting. Such contemporaneous unfair labor practices further evidence anti-union animus. *See Gaetano & Associates Inc. v. NLRB*, 183 F. App'x 17, 22 (2d Cir. 2006) (finding that "the [c]ompany's numerous unfair labor practices in response to the union campaign gave rise to the inference that the decision to subcontract soon after the employees engaged in protected activity was motivated by anti-union animus"). And as the Board noted, Supervisor Rosero's behavior the day that the housekeeping employees were transferred to HSS further demonstrates animus. (ROA 1497 n.6.) That day, when employee Maritza asked Rosero "what was going on," Rosero responded that the transfer "was happening because of the Union." (ROA 1510, 1513.) *See TCB Systems, Inc.*, 355 NLRB 883, 885 (2010),

enfd. mem. 448 Fed. Appx. 993 (11th Cir. 2011) (inferring that supervisor knows reason for adverse action and that supervisor's explanation evidences animus.)

The Company's other numerous, serious and uncontested unfair labor practices also support the Board's animus finding. Those unlawful acts include a dozen interrogations and threats, starting just before the decision to subcontract and continuing throughout the rest of the Union's campaign. In addition to those undisputed violations, the Company added to its already lengthy list of unlawful behavior by refusing to rehire its housekeeping employees when the subcontract ended, behavior that the dissenting Board member characterized as "egregious misconduct." (ROA 1501.) Despite having access to a completely trained and familiar work force, the Company hired and trained an entirely new staff and, with no notice to employees, summarily discharged the entire housekeeping unit, giving them no opportunity to apply for a position. As noted above, p. 21, the Company does not challenge the Board's finding that the employees' union activity motivated its refusal to rehire. That admission further supports the Board's finding that the decision to outsource the employees—put into effect just 2 months before the refusal to re-hire—was likewise unlawfully motivated. *See NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212 (2d. Cir. 1980) (subcontracting and ultimate discharge of employees in the face of unionization is a "hallmark" violation and is

"reasonably . . . calculated to have a coercive effect on employees and to remain in their memories for a long period of time").

The Company tries to refute the Board's animus finding by claiming that because it remained a "joint employer" with HSS following the subcontract, the Company would have had to bargain with the Union, thereby dispelling any conclusion that it was trying to avoid the Union.[9] (Br. 35-36.) But the Company's joint-employer status is of little relevance to the Board's animus finding, and the Company's argument ignores the context within which the subcontract occurred. As the Board pointed out, employees did not know that the Company's bargaining obligation remained intact following the subcontract. (ROA 1498.) Instead, the employees "were told their work was being outsourced, and they were required to reapply for employment with HSS." (ROA 1498 n.10.) Indeed, the Company provided employees with only a one-day notice of its decision, and not all employees were hired by HSS. (ROA 1498 n.8.) Thus, in the employees' minds, the Company had just ended their employment relationship, regardless of whether it remained a "joint employer" with HSS.

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[9] Under Board precedent, the obligation to bargain with the employees' certified representative applies to joint employers, which the Board defines as any two or more employers who share control of their employees' terms and conditions. *See generally BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

In such circumstances, a reasonable employee would understand the subcontract, which resulted in the termination of all housekeepers, as retaliation for their union activity. *See Farrago Corp.*, 318 NLRB 359, 361-62 (1995) (finding anti-union animus motivated subcontracting decision that occurred a month after union's certification and amid several contemporary violations of Section 8(a)(1)). Moreover, the matter of joint employment remained in dispute until the judge determined the issue. (ROA 1513, n.9.) The Company's argument thus boils down to a claim that the Board can only find anti-union motivation if a particular action eliminates an employer's duty to bargain. The Board rightly rejected this premise.

Finally, in its opening brief, the Company contends, for the first time, that the subcontracting did not violate Section 8(a)(3) because there was no evidence showing that the decision "encouraged or discouraged" employees' union organization efforts. (Br. 34-37.) This Court lacks jurisdiction to address the Company's argument that it never brought before the Board. *See* 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 . . . to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing*, 456 U.S. at 665 (1982) (stating Section 10(e) of the NLRA precludes court of appeals from reviewing claim not raised to the Board). Before the Board, the

Company contended that its decision was not unlawfully motivated because it remained a joint employer, and it would have outsourced the housekeeping staffing regardless of their union activity. (ROA 1478.) It did not contend that the subcontracting was lawful because it did not encourage or discourage union membership. *See, e.g., Gulf States Mfg. Inc. v. NLRB*, 704 F. 2d 1390, 1396 (5th Cir. 1983) (noting that there is "a basic procedural problem" when an employer raises an issue to the court not first raised to the Board).

The dissent's discussion of whether the subcontracting discouraged union membership does not excuse the Company's failure to raise the issue at the proper time in the Board's proceedings. *See. United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1954) (objections to agency proceedings should "be made while it has opportunity for correction in order to raise issues reviewable by the courts"). Moreover, the Company "had full opportunity" to present this argument to the Board in a motion for reconsideration. *See Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (holding that dissent's discussion of back pay-tolling issue did not satisfy Section 10(e)'s requirement because employer could have raised issue in a motion for reconsideration); *Old Wick Materials, Inc. v. NLRB*, 732 F.2d 339, 343 (3d Cir. 1984) (refusing to consider employer's challenge to Board's grant of default judgment despite the Board's discussion of the merits of the case in response to dissent). Here, where the

Company failed to raise to the Board, either in its exceptions or in a motion for reconsideration, whether the subcontract had a discouraging effect on union activity, this Court lacks jurisdiction to consider its argument.

In any event, the Company's argument, which relies solely on precedent pre-dating *Wright Line*, misstates the law. Simply put, "the Act does not require specific, independent evidence of a tendency to encourage or discourage union membership," and a "subjective finding of encouragement or discouragement has never been required." (ROA 1498.) As the Board explained, "under *Wright Line*, . . . if the General Counsel establishes that the discharges were motivated by antiunion animus, and the employer has not shown that it would have taken the same action in the absence of union activity, the violation has been established as a matter of black-letter law." (ROA 1498.) If ultimately a discriminatee suffers little or no harm, "that goes to the remedy, not to whether there was a violation." (ROA 1498.) And, as the Board noted (ROA 1498 n.8), there was no question of discouragement here. Soon after employees began union activity, they were told that their jobs would be outsourced, and that they would need to reapply to HSS for their positions. (ROA 1498 n.10.) Not all employees were rehired. (ROA 1498 n.8, 1511.) Under those circumstances, the Board correctly found that the Company's decision was unlawfully motivated by its employees' union activity.

C. The Company Would not Have Subcontracted Housekeeping Staffing Absent the Housekeepers' Unionization Drive

The Company contends that it subcontracted the housekeeping staff, which it had not done in any of the other 70 hotels it manages and which contravenes its "general preference" toward directly employing staff, because of business reasons, not the housekeepers' union activity. (Br. 28-31.) Specifically, the Company contends that its low guest-satisfaction scores forced it to subcontract to HSS. It also contends that potential cost savings motivated its decision. But as the Board reasonably found, those reasons are mere pretext and the Company "failed to prove that it would have subcontracted the work even absent the employees' union activity." (ROA 1497, 1498.)

The evidence controverts the Company's claim that its low guest-satisfaction scores motivated the outsourcing. As the Board observed, the low scores had persisted since the Company took over managing the Hotel in December 2011. (ROA 1497.) The record reveals no evidence that either Hyatt or the Hotel's owners contacted the Company to discuss these low scores. (ROA 1512.) There is likewise no evidence that scores were better when HSS previously staffed the housekeeping department. Indeed, the Company's own witness, Executive Vice President of Operations Evan Studer, acknowledged that the low scores under HSS led to the Company's December 2011 decision not to retain HSS when it took over the Hotel. (ROA 471.) It defies reason to expect that the Company would

subcontract housekeeping staffing back to HSS because of low customer satisfaction scores, when HSS had not received any higher scores when it staffed the housekeeping department just six months earlier. As the Board aptly stated, "[i]f HSS had not been successful before December 2011, why would Remington assume that HSS would be more successful now?" (ROA 1512.)

The Company admitted that it had low guest-satisfaction scores "not because employees were lazy or incompetent, but rather because [the Company] simply could not employ enough workers to get the job done right." (ROA 1512.) Thus, the Company claimed it needed HSS's resources to recruit additional employees. (ROA 1510.) But as the Board noted, at the time of the subcontract, HSS no longer operated in Long Island, had no staff in that area, and had no contacts with the local labor market. (ROA 1512.) Moreover, when the subcontract ended just two months later, the Company had no difficulty secretly recruiting and training an entire staff of replacement housekeepers. (ROA 1513.)

The Company's claim that subcontracting was necessary to contain its costs and reduce the effect of the Affordable Care Act (ACA) is equally meritless. Manager Mengiste initially presented subcontracting to the Company's management as a way to "improve the [H]otel's financial position." (ROA 1510.) But the facts belie the claim that subcontracting would contain costs. As the Board found, "it is conceded that [the Company]'s cost for utilizing HSS to perform this

function was higher than [the Company]'s existing cost." (ROA 1511.) Indeed, when it became clear that subcontracting would actually increase costs, the Company, undeterred by the rising cost, continued with its plan. Although the Company now claims (Br. 29-30) the subcontracting was an "investment" which would necessarily require an initial outlay of money, Mengiste's initial pitch did not explain that the Company would potentially have to absorb those increased costs. Thus, rather than an investment in cost savings, the Company's subcontract decision was instead an investment in nipping the employee's union activity in the bud.

As to the Company's concerns that subcontracting would address "the exposure to increased healthcare costs" (ROA 1510) expected under the ACA, the Board properly rejected this claim as "somewhat bogus." (ROA 1511, n.7.) As the Board explained, the ACA would not begin take effect for a substantial period of time and "would not really affect an employer that already was providing health insurance to its employees." (ROA 1511, n.7.) Moreover, the ACA took effect nationwide, but the Hotel was the only hotel out of the 70 or more that the Company managed where it decided to subcontract all housekeeping work. Accordingly, the Company has not met its burden of showing that it would have subcontracted the housekeeping staffing regardless of the housekeepers' union

activity. Therefore, the Company violated Section 8(a)(3) when it subcontracted the housekeeping staff because of the housekeepers' union activity.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY DISCHARGING EMPLOYEE MARGARET LOIACONO BECAUSE IT BELIEVED SHE HAD ENGAGED IN PROTECTED ACTIVITY AND WOULD CONTINUE TO DO SO

In addition to its repeated threats and interrogations and the discharge of all housekeepers and subsequent refusal to rehire them, the Company's anti-union campaign included various propaganda, including a pie chart purporting to set forth employees' total compensation. Lobby Ambassador Margaret Loiacono criticized the chart several times to both her supervisor and manger. The Company discharged Loiacono just three days later, on the pretext that she had been away from her workstation. But the Board properly rejected that argument, and found that the Company discharged Loiacono because it believed she had engaged in protected concerted activity and it wanted to prevent her from becoming "a potential thorn in the [Company's] side when it came to other campaign literature that it intended to use." (ROA 1514.)

A. An Employer Violates the Act When It Takes Adverse Action Against an Employee Based on the Mistaken Belief that the Employee Has Engaged in Protected Activity and When It Acts To Prevent Future Protected Activity

As stated above, p. 25, 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 or other mutual aid or protection . . . ." 29 U.S.C. § 157. In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise of [those] rights." 29 U.S.C. § 158(a)(1).

An employer violates Section 8(a)(1) by disciplining, discharging, or taking other adverse action against an employee because of that employee's protected or union activities. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). Where motivation for an adverse employment action is disputed, the *Wright Line* analysis, discussed above pp. 26-28, is appropriate. *Id.*

An employer's discharge of an employee is unlawful even if an employee has not engaged in protected, concerted conduct, but the employer acts on its "*mistaken* belief that [the employee] has engaged in union or other protected, concerted activity." *Dayton Hudson Dep't Store Co.*, 324 NLRB 33, 35 (1997). The Board has long held, with court approval, that an employer violates Section 8(a)(1) when it takes adverse action against an employee based on its belief that

the employee engaged in protected Section 7 activity, and that such a belief alone is sufficient to establish an unlawful motive. *See, e.g., U.S. Serv. Indus.*, 314 NLRB 30, 30 (1994), *enforced mem.*, 80 F.3d 558 (D.C. Cir. 1996) (action taken on the belief that employee engaged in protected concerted activity was unlawful).

For example, as the Supreme Court explained in upholding a Board finding that an employee was unlawfully discharged for his union membership (a protected Section 7 right), the discharge was unlawfully motivated because the employer "believed, mistakenly it would seem, that [employee] was a [union] member." *NLRB v. Link-Belt Co.*, 311 U.S. 584, 589-90 (1941). Similarly, as the First Circuit has stated, "proof of an unfair labor practice does not require proof of actual [protected] activity; it is sufficient if the employer was motivated by suspected [protected] activity in discharging the employee[]." *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993). *See also Metro. Orthopedic Ass'n*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees . . . because of [the employer]'s belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act."); *San Juan Lumber Co.*, 144 NLRB 108, 108 n.1 (1963) (employer's discharge of employees based on its belief that employees engaged in suspected protected activity was unlawful).

Both the policies underlying Sections 7 and 8(a)(1) and the plain text of Section 8(a)(1) provide a compelling rationale for an employer's belief to be sufficient to prove an unlawful motive. *Parexel Int'l*, 356 NLRB 516, 517 (2011). By discharging an employee it believes, rightly or wrongly, to have engaged in protected activity, the employer sends the message that such activity will not be tolerated. *San Juan Lumber*, 144 NLRB at 108 n.1. As the Board has explained, "even if the employer misjudged what the fired employee had done," the result is that "other employees are discouraged from engaging in such activity in the future." *JCR Hotel v. NLRB*, 342 F. 3d 837, 841 (8th Cir. 2003). *See also DaimlerChrysler v. NLRB*, 288 F.3d 434, 444 (D.C. Cir. 2002) (it is unlawful for employer to "threaten discipline for any future" protected activity). Such an effect fully satisfies the requirement of Section 8(a)(1) that conduct must "interfere with, restrain, or coerce" employees in the exercise of statutory rights to be unlawful because the statute does not require actual proof of restraint or coercion. *See Radio Officers v. NLRB*, 347 U.S. 17, 51 (1954). In other words, what is definitive on motive "is not what the employee did, but rather the employer's intent." *Parexel Int'l*, 356 NLRB at 519.

Moreover, the discharge of an employee to prevent them from engaging in future protected activity also violates the Act. *Id*. at 517. *See also Dover Energy, Inc. v. NLRB*, 818 F.3d 725, 730 (D.C. 2016) ("'[T]he Board has often held that an

employer violates the Act when it acts to prevent future protected activity.'") (quoting *Parexel*, 356 NLRB at 519). Such preemptive action restricts an employee's right to engage in Section 7 activity, and has "the effect of keeping other employees in the dark" about their rights. *Parexel*, 356 NLRB at 519. And the abrupt discharge of an employee believed to be on the verge of engaging in protected activity "may well . . . persuad[e] other employees to scuttle the plan" to engage in such activity themselves. *Greater Omaha Packing Co. v. NLRB*, 790 F.3d 816, 822 (8th Cir. 2015).

B. The Company Discharged Loiacono Based on Its Mistaken Belief that She Had Engaged in Protected Activity and as a Pre-Emptive Strike against Future Activity

The Board reasonably found that the Company discharged Loiacono because it believed she had engaged in protected, concerted activity, and its prompt discharge ensured that she would not do so again. (ROA 1499-1500.) On December 30, Loiacono, after receiving the Company's pie chart, spoke to Supervisor Borrero and Manager Rostek about the chart's various inaccuracies, particularly its erroneous information that she received a uniform allowance. (ROA 1499.) "Sufficiently concerned" by Loiacono's behavior, Housekeeping Director Arpino sent "high-level management" an email on December 31 recounting Loiacono's conversation with Borrero. (*Id.*) Using "emphatic and colorful" terms, the email noted Loiacono's claims that she was entitled to

additional wages, that she was "waiting to speak with [Manager] Jeff [Rostek]" about it, and that the Company was "lying to the people." (ROA 1515-16.) Notably, the email also included a claim that Loiacono had spoken to another employee, named "Ken," about the pie chart's discrepancies, and that Loiacono was waiting for Ken to discuss the issue with Manager Rostek. (ROA 1499, 1515.) Finally, the email noted that Loiacono had threatened to sue the Company. (*Id*.) The Company discharged Loiacono just two days later. The Company's conduct demonstrates that it viewed Loiacono "as a potential obstacle in relation to their own election campaign propaganda" and acted quickly to remove that obstacle. (ROA 1516.) In the context of the Company's vociferous and illegal anti-union campaign, the Board's finding is reasonable.

The Company contends (Br. 38) Loiacono's discharge was not unlawful because she was not engaged in protected, concerted activity. But as discussed above, p. 46, the focus of the Board's inquiry "is not what the employee did, but rather the employer's intent." *Parexel*, 356 NLRB at 519. Thus, whether Loiacono actually engaged in protected, concerted activity is not relevant to the analysis.

The Company, attempting to distinguish *Parexel*, argues that "there is no evidence that [it]. . . believed Loiacono had engaged in protected concerted activity[.]" (Br. 40, quoting ROA 1507.) But there is ample evidence that the

Company believed that she had done so and that she intended to continue. Arpino's email details Loiacono's multiple complaints about not receiving the uniform allowance, and that she had communicated with another employee, named Ken, about the pie chart discrepancies. (ROA 1499.) In addition to noting this past activity, the email also notes Loiacono and Ken's future plan to discuss the issue with General Manager Rostek in the coming days, and Loiacono's plan to sue the Company. Moreover, the Company knew that Loiacono was familiar with unionization, having been a member of another union. (ROA 1515.) Finally, the discharge, just three days after Loiacono first raised the issue, demonstrates that the Company's action was a pre-emptive strike against any future activity. In short, the evidence supports the Board's finding that "[r]egardless of whether Loiacono's initial complaints constituted Section 7 activity . . . the [Company] believed Loiacono would speak out against the [Company's] position in the campaign and would incite others to do the same." (ROA 1499.)

The Company, citing *Dayton Hudson Department*, 324 NLRB 33 (1997), contends that because Loiacono broke a work rule by leaving her post, the discharge was lawful, regardless of whether it believed she had engaged in protected activity. (Br. 39.) But the Company misreads *Dayton*. There, although the discharged employee performed her job as required, the employer discharged her on the mistaken belief that the employee was trying to "get the union brewing

again." *Dayton*, 324 NLRB at 34. In finding the discharge unlawful, the Board focused its analysis on "the employer's perception and [whether] the employer was motivated to act based on that perception." *Id*. at 35. The Board did not, contrary to the Company's assertion, consider whether the discharged employee broke a work rule. In any event, there is no evidence, other than the Company's bald assertion, that Loiacono broke any work rule when she left her work station.

C. The Company Cannot Demonstrate that Absent Its Mistaken Belief, It Would Have Discharged Loiacono

The Company claims (Br. 39) that it discharged Loiacono because she left her work station and was not performing her tasks as required. But the record does not support this claim, and the Board properly rejected it. (ROA 1500.)

Although Loiacono briefly left her work station to talk with Supervisor Borrero, the record does not support the Company's claim that it discharged her for that reason. Notably, Borrero did not tell Loiacono to return to her post during their conversation. Moreover, just 2 days earlier when Arpino discussed the pie chart with Loiacono, he stated that her work had improved and that she was doing a good job. (ROA 1515.) Then, with no warning, the Company discharged her.

Before the Board, the Company pointed to two instances of lobby ambassador misconduct that resulted in discharge, and claims that it acted similarly in discharging Loiacono. The Board properly rejected those incidences as comparators because they involved "markedly different" conduct from Loiacono.

Specifically, the Company discharged those other lobby ambassadors for ignoring guests while engaged in a sports conversation. (ROA 1500.) Loiacono simply left her work station for ten minutes and spoke with a supervisor about the pie chart that management had presented to her. In those circumstances, the Company's actions gave employees the clear message that questioning their anti-union materials would result in discharge, and the Board properly found the discharge unlawful.

CONCLUSION

The Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board
August 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REMINGTON LODGING & HOSPITALITY, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 16-60106
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	29-CA-093850
	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 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 parties or their counsel of record through the CM/ECF system.

/s/Linda Dreeben
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Dated at Washington, DC
this 24th day of August, 2016

UNITED STATES COURT OF APPEALS
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	)	
Respondent/Cross-Petitioner	)	
	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,386 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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