Oral Argument Not Yet Scheduled

No. 16-71194

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

UNITE HERE! LOCAL 878

Intervenor

v.

REMINGTON LODGING & HOSPITALITY, LLC,
d/b/a THE SHERATON ANCHORAGE

Respondent

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce a final Board Decision and Order issued

against Remington Lodging and Hospitality, LLC, d/b/a The Sheraton Anchorage ("Remington") on September 15, 2015, reported at 363 NLRB No. 6. (ER 1-47.)[1]

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties. This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e), and venue is proper because the unfair labor practices occurred in Anchorage, Alaska. The Board filed its application for enforcement on April 25, 2016. This filing was timely, as the Act places no time limit on the institution of proceedings to enforce Board orders. UNITE HERE! Local 878 ("the Union"), the Charging Party before the Board, has intervened on behalf of the Board.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the Board is entitled to summary enforcement of the portions of its Order remedying the uncontested violations.

(2) Whether substantial evidence supports the Board's findings that Remington violated:

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[1] "ER" references are to the excerpts of record that Remington filed with the Court. "SER" references are to the Board's supplemental excerpts of record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to Remington's opening brief.

(a) Section 8(a)(3), (4) and (1) of the Act by disciplining and discharging employee Dexter Wray for engaging in union activities and participating in a Board proceeding; and

(b) Section 8(a)(3) and (1) of the Act by discharging employee Elda Buezo for engaging in union activities.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the Act are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

This case is yet another chapter in Remington's unlawful refusal to recognize and bargain with the Union, and its ongoing efforts to undermine employees' rights by unlawfully threatening and coercing them, disciplining and discharging them for their union activities and participation in Board proceedings, and unilaterally changing their terms and conditions of employment.

In *Remington Lodging & Hospitality, LLC*, 362 NLRB No. 123 (2015), 2015 WL 3814051 (incorporating the decision reported at 359 NLRB No. 95, 2013 WL 1771714), petition for review pending Case Nos. 15-71294, 15-72563 (9th Cir.) ("*Remington I*"), the Board found that, from the summer of 2009 through the summer of 2010, Remington committed numerous unfair labor practices. These violations included coercing employees into signing a petition to decertify the Union; unlawfully withdrawing recognition from the Union and refusing to bargain

with it based on the tainted petition; unilaterally changing employees' terms and conditions of employment; maintaining and enforcing unlawful work rules; and unlawfully disciplining and discharging several employees for engaging in union activities. Remington did not contest many of these violations in its exceptions before the Board or its opening brief to this Court in *Remington I.*

While the Company was committing some of the unfair labor practices found in *Remington I*, the Board's Acting General Counsel, acting on charges filed by the Union, issued a complaint in the instant case alleging that Remington had continued its pattern of unfair labor practices at the same hotel. Specifically, the complaint alleged that Remington violated Section 8(a)(1) of the Act by, among other actions, threatening and coercing employees, spying on their union activities, and maintaining and enforcing unlawfully overbroad work rules. The complaint also alleged that Remington violated Section 8(a)(3), (4) and (1) of the Act by, among other acts, disciplining and discharging union adherent Dexter Wray for his union support and testimony before the Board in *Remington I*, and by reducing the work hours of union adherent Elda Buezo and discharging her for her union advocacy. Finally, the complaint alleged that Remington violated Section 8(a)(5) and (1) of the Act by banning union representatives from entering hotel property, unilaterally changing employees' terms and conditions of employment, and

refusing to provide the Union with information relevant to its representational duties.

Following a hearing, an administrative law judge issued a decision dismissing one complaint allegation but otherwise finding that Remington violated the Act as alleged. Remington filed limited exceptions to the judge's findings. Specifically, it excepted only to his findings that it unlawfully disciplined and discharged Wray, unlawfully reduced Buezo's hours and discharged her, and unilaterally discontinued scheduling employees by seniority in the engineering department.[2] (ER 1 n.2; SER 1-3.) After considering these 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.

I. THE BOARD'S FINDINGS OF FACT

A. Background; Remington's Business and Its Collective-Bargaining Relationship with the Union

Remington operates the Sheraton Anchorage Hotel in Anchorage, Alaska. The Union has long represented a unit of approximately 180 hotel employees in various job classifications. Remington and the Union were parties to a collective-

[2] Among the many unfair-labor-practice findings that Remington failed to challenge in its exceptions is the judge's finding that it unilaterally stopped scheduling employees by seniority in other departments in addition to engineering.

bargaining agreement effective from March 1, 2005, to February 28, 2009 ("the 2005 Agreement") (ER 8; 337-83.) As the Board found in *Remington I*, and as noted above at pp. 3-4, shortly after the 2005 Agreement expired, Remington committed a range of unfair labor practices, including coercing employees into signing a petition to decertify the Union, withdrawing recognition from the Union based on the tainted petition, and making unilateral changes to employees' terms and conditions of employment. (ER 8-9.)

B. Remington Surveils Its Employees' Union Activities, Disciplines Them for Those Activities, and Bars Union Agents from Hotel Grounds

In the meantime, in early 2010, while the decertification petition and a rival pro-union petition were being circulated among employees, Remington engaged in other unlawful tactics as part of its antiunion campaign. Thus, several Remington managers, including Chief of Engineering Ed Emmsley, Sr. and Housekeeping Manager Eduardo Canas, substantially increased their presence in the employee cafeteria where union representatives regularly met with employees. (ER 10-11.) In March, Remington disciplined employee Fay Gavin for distributing union pins to employees. (ER 16.)

In April, Remington disciplined employees Ana Rodriguez, Audelia Hernandez, and Shirely Grimes for speaking to coworkers about the Union, and told Hernandez that her union activities were caught on camera. (ER 9-10, 19-21.)

Remington then refused the Union's request for information pertaining to grievances it had filed over the discipline of those employees. (ER 39-40). Also in April, Remington barred union representatives from entering hotel property without giving the Union notice or an opportunity to bargain. (ER 32-33.)

C. Remington Tells Wray that It Wants To Get Rid of Him Because of His Union Activities, Disciplines Him for a Coworker's Mistake in Overfilling a Pool, and Tells Him the Discipline Will Be Rescinded if He Signs the Decertification Petition

Dexter Way worked as an engineer performing electrical, maintenance, and plumbing work for Remington at the hotel from May 2008 until his discharge on October 27, 2010. Wray was an openly active member of the Union and its negotiating committee. He also participated in the Union's rallies at the hotel in 2010. (ER 21; SER 18-23.)

In March 2010, Wray's immediate supervisor, Chief of Engineering Emmsley, told Wray that Hotel General Manger Dennis Artiles wanted "to get rid of" Wray because of his union activity. (ER 21; SER 11-12.) On May 10, Remington issued Wray a written reprimand for a coworker's mistake in allowing a pool to overflow in the hotel lobby. Wray had been showing the coworker, a trainee named Sam, how to drain the pool when Wray was called away on another job involving a hotel-wide water shutdown. In Wray's absence, Sam independently and without Wray's knowledge took it upon himself to refill the pool even though Wray had not yet instructed him how to do so. Sam was never

written up for this incident. (ER 21; SER 26-30, ER 384.) About a week later, Emmsley approached Wray in the engineering shop and told him that if he signed the decertification petition, the pool-overflow reprimand would go away. (ER 21; SER 31-33.)

D. Remington Again Coerces Wray To Sign the Decertification Petition on Pain of Discharge, Refuses the Union's Information Requests, Conducts More Employee Surveillance, and Reduces the Hours of Pro-Union Employees; After Unlawfully Withdrawing Recognition, Remington Again Bans the Union from Its Premises, Makes Unilateral Changes, and Ceases Pension Contributions

As the Board found in *Remington I*, in mid-May, Remington unlawfully coerced employees into signing a petition to decertify the Union. This included Emmsley repeatedly soliciting Wray to sign, and threatening him with discharge if he did not comply. *Remington I*, 2013 WL 1771714, at *4, *118.

In June and July, Remington took a number of other actions against the Union and its supporters. On June 11, it refused the Union's request for information about employees' schedules. (ER 40.) On June 22, Emmsley and hotel security guards surveilled employees' participation in a bake sale on behalf of four coworkers who were unlawfully discharged in *Remington I*. (ER 11.) In July, Remington decreased the hours of pro-union restaurant employees. (ER 29-30.)

As the Board found in *Remington I*, on July 2 Remington unlawfully withdrew recognition from the Union based on the tainted decertification petition. *Remington I*, 2013 WL 1771714, at *4, *125. Remington then banned union representatives from the hotel premises. (ER 33-34.) It also eliminated its practice of scheduling banquet employees according to preference sheets; changed its sick leave and tardiness policies; and ceased making contributions to the union pension fund, all without notifying or bargaining with the Union. (ER 34-36.)

E. Remington Unilaterally Ceases Scheduling Work According to Employee Seniority, Surveils Wray's and Other Employees' Participation in a Rally To Support Four Discharged Coworkers, and Orders Employees To Remove Union Buttons

The 2005 Agreement provided that "seniority shall be the controlling consideration in determining shift changes, shift assignment, . . . [and] hours of work," and that seniority shall be by departments and job classifications within departments. (ER 34; 352-53.) Accordingly, in the absence of a new contract to succeed the 2005 Agreement, which expired in February 2009, Remington initially continued to follow seniority in setting the shifts and hours for banquet employees, engineers, housekeepers, porters, kitchen workers, and restaurant servers. (ER 34-35.) But after unlawfully withdrawing recognition from the Union on July 2, 2010, Remington ceased this practice without notifying or bargaining with the Union. Thus, Chief of Engineering Emmsley told Wray that seniority no longer mattered now that there was "no more union," and the managers in the other departments

likewise told their employees that Remington no longer followed seniority. (ER 34-35.)

On July 6, Wray and other employees spoke at a union rally in front of the hotel about the ongoing fight for a fair successor contract and the return to work of four coworkers who were unlawfully discharged in *Remington I*. Remington's security guards photographed and videotaped this gathering, which was also observed by Emmsley as well as General Manager Artiles and other hotel managers. (ER 11-12.) On July 7, Human Resources Director Jamie Fullenkamp and another Remington manager ordered employees to remove their union buttons, because Remington was "no longer union." (ER 12.)

F. Remington Disciplines Wray for a Single Instance of Swearing, But Tolerates Frequent Swearing By Other Employees and Its Managers

On July 7, Remington issued Wray a written discipline for a single instance of swearing. (ER 22; 385.) During the incident in question, Wray was talking to another employee in the "back of the house," in a corridor service area, when he stated, "I don't need to put up with this shit." Wray's two-way radio was on but he was not speaking into it. No hotel guests were nearby, but Spa Director Lorrain Park was 10-12 feet away and reported the incident to management. (ER 22; SER 34-46.)

This was the first time Wray had been reported for using profanity. Remington disciplined him even though swearing by other employees and managers, including in guest areas and public areas of the hotel, was common and often went unpunished. (ER 22; 105-24, 139-52, 192-94, SER 71-81, 142-43, 150-52, 155-56, 159-60.) Indeed, Park, the manager who reported Wray, received no formal discipline for calling an employee a "bull shitter" two weeks later in a hotel elevator. (ER 22; SER 49-52.)

G. Remington Again Surveils Employees, Increases the Shifts of Employees Who Signed the Decertification Petition, and Decreases the Shifts of Pro-Union Employees

In late July, Remington's security guards, together with Chief of Engineering Emmsley and other company officials, photographed and videotaped employees participating in a pro-union march involving an inflatable rat. In July and August, Remington rewarded four banquet employees who had signed the decertification petition with increased shifts, while it reduced the shifts of four pro-union banquet employees. (ER 27-29, 31-32.)

H. Chief of Engineering Emmsley Attempts To Influence Wray's Testimony in *Remington I* and Interrogates Employees About Their Union Sympathies and Signing the Decertification Petition

On August 23 and 24, General Manager Artiles was present in the courtroom when Wray gave testimony in *Remington I* about Chief of Engineering Emmsley coercing him into signing the decertification petition. On the morning before

Wray's August 24 testimony, Emmsley warned him not to "tell them about how I had got you to sign the decert form or else I will lose my job." Despite Emmsley's warning, Wray proceeded to give testimony adverse to Remington's and Emmsley's interests. (ER 13; SER 167-85.) In August and September, as the *Remington I* trial continued, Artiles and Emmsley interrogated employees about signing the decertification petition. (ER 13-14.)

I. After Attempting To Influence Wray's Testimony in *Remington I*, Remington Hastily Disciplines and Discharges Him for Gambling at Work Without Asking for His Side of the Story; It Then Gives Pro-Union Employee Fay Gavin a Poor Evaluation

On October 23, Wray arrived at work at 6:30 a.m., well before the start of his 7:00 a.m. shift. When he arrived, Security Guard Ed Emmsley, Jr. (Chief of Engineering Emmsley's son) asked Wray to use his personal laptop to transfer electronic play-money poker chips for Emmsley Jr. to use on a poker site. Wray agreed, went to the engineering shop, and turned on his laptop. Before his shift started, he used his home internet provider to go to the poker website. When Emmsley Jr. had not appeared online by 6:55 a.m., Wray left his laptop on and unattended in the engineering shop in order to begin his shift on time. Wray clocked in by 7:00 a.m. and began his work, performing tasks outside the shop. (ER 23; SER 54-58, 61.)

When Wray returned to the engineering shop around 9:00 a.m., he discovered that his laptop was missing. Later that morning, Wray asked Chief of

Engineering Emmsley if he had seen his laptop. Emmsley replied, "oh, that's your laptop. I'm going to have to send you home." When Wray asked why, Emmsley replied, "for gambling at work." Wray immediately explained that he had not done so, and he listed the variety of work tasks he had performed that morning while he was away from the engineering shop and his laptop. (ER 23; SER 63-66.)

On October 27, Human Resources Director Fullenkamp called Wray to a meeting with Chief of Engineering Emmsley and discharged Wray without asking him for his side of the story. She told Wray that she had to discharge him because it was his third write-up in six months (referring to the May and July write-ups discussed above). (ER 23; SER 66-68.) The discharge document stated, in relevant part, that company policy prohibited the use of personal devices and the conducting of personal business during work hours, as well as "gambling on company time or premises." (ER 23; SER 186.)

Remington then continued to target union supporters for reprisals. Thus, in late fall 2010, it reprimanded employee Fay Gavin and issued her a poor evaluation because of her union activities. (ER 17-19.)

J. Remington Instructs Elda Buezo To Cease Her Union Activities, and Discharges Yanira Medrano After She Joins Those Activities and Testifies Against Remington in *Remington I*; It then Reduces Buezo's Hours and Discharges Her After She Protests a Coworker's Suspension

Elda Buezo worked for Remington as a housekeeper from 1989 until her discharge on June 15, 2011. She worked the same regular, part-time schedule, Monday through Friday from 7:00 a.m. to noon, for 15 years until early 2011. (ER 25; SER 84-85, 105.) She was a member of the Union's negotiating committee from 2009 to 2011, attended union rallies in 2010, and wore a union pin at work. (ER 25; SER 85-87.) In addition, when coworker Ana Rodriguez was suspended by Remington in September 2010, Buezo spoke to coworkers and prepared and collected signatures on a petition, which she presented to Human Resources Director Fullenkamp on October 11, asking that Rodriguez be reinstated. (ER 25; SER 89-94, 139, 146-47, 189.)

Within a week of presenting the petition, Buezo was summoned to a meeting with Fullenkamp and Housekeeping Manager Canas. (ER 25; SER 95-97.) Fullenkamp stated, and subsequently documented in a memorandum, that Buezo "was not allowed to do anything inside the hotel related to the Union." (ER 25; SER 95-99, 193) (reaffirming that Buezo must limit her "union activities" to her "own time and off Remington property").

In late October, Remington discharged employee Yanira Medrano. This was a month after she testified in *Remington I* about Artiles threatening employees with reprisals if they did not sign the decertification petition, and about 10 days after she signed Buezo's petition protesting the suspension of Rodriguez. (ER 24-25.)

In February 2011, Remington, without first talking to Buezo, reassigned her from her regular duties on the 14th floor of the hotel. Housekeeping Manager Yolanda Hanna told Buezo this was because she was part-time and Remington needed someone who worked eight-hour shifts over the summer. Hanna did not, however, offer Buezo an eight-hour shift. (ER 25; SER 102-05.)

Then, with no further discussion, Buezo learned on April 15 that Remington had switched her to an "on call" schedule, which required her to call in each day at 7:00 a.m. to see if there was any work. When Buezo asked why, Fullenkamp replied that Buezo was now on call because Remington needed someone who worked eight-hour shifts. (ER 25; SER 106-11.) Buezo replied that she would work eight-hour shifts, if necessary. Despite her offer, Buezo remained in on-call status, and although she called in every morning through May 19, Remington only gave her five 5-hour shifts during that period. As a result of changing Buezo to on-call status, Remington reduced her work hours from 20 regular hours per week to about 20 irregular hours per month. During this time, Remington gave less senior employees regularly scheduled workweeks. (ER 26; SER 106-14.)

On May 20, Buezo learned that the mother of her long-time boyfriend was dying and immediately booked a flight to Montana where the mother lived. (ER 26; SER 118.) That night, Buezo called hotel housekeeping and human resources and left messages that she had to go to Montana on an emergency. (ER 26 & n.68; SER 118-20, 191, ER 223-24.) While in Montana, the mother died and Buezo attended her funeral. Upon her return to Anchorage on May 30, and in accordance with the dates of expected absence noted in her voicemails, Buezo called the hotel every morning for the next several days, but was told there was no work. (ER 26; SER 121-24.)

On June 6, Fullenkamp wrote an email to Corporate Vice President Nancy Hafner, asking if she could terminate Buezo. Hafner replied: "yes, tell her that by failing to show up – that we consider that she has voluntarily resigned her position. We are not term[inat]ing her – she resigned." (ER 26; 389.) In other words, Hafner instructed Fullenkamp to terminate Buezo but call it a resignation.

The next morning, when Buezo placed her regular call to the hotel, she was told to call Fullenkamp. Fullenkamp told Buezo that she had left without telling Remington. Buezo replied that she had left messages explaining that she had to leave town for an emergency. Fullenkamp replied that they needed to schedule a meeting and that Buezo had failed to fill out paperwork before leaving town.

Buezo said she did not know that she was supposed to do so before taking emergency leave. (ER 26; SER 124-28.)

After meetings were scheduled and cancelled, Fullenkamp suggested a phone meeting. Over the phone on June 15, Fullenkamp, following Corporate Vice President Hafner's instructions, told Buezo that since they could not meet and Buezo failed to fill out her paperwork before she left for Montana, Buezo had "resigned." (ER 26; SER 132-35.) Remington's termination form stated that Buezo was "involuntarily terminated" and ineligible for rehire. (ER 26; SER 192.)

K. Remington Maintains and Enforces Overbroad Work Rules Limiting Employees' Hotel Access and Solicitation of Union Support, and Threatens To Call the Police on Employees Who Distribute Union Literature

In October 2011, Remington threatened to call the police if employees did not cease their protected handbilling in front of the hotel. (ER 15-16.) It did so based on overbroad work rules that barred employees from distributing any literature in guest or work areas, from returning to the hotel after their working hours, and from leaving their work areas during their shifts, without prior authorization. (ER 14-15).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Miscimarra and McFerran) affirmed the administrative law judge's findings, often in the absence of exceptions. To begin, the Board agreed with the judge that

Remington violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), on several occasions when it unlawfully coerced employees' testimony in *Remington I*; threatened and interrogated them based on their union activities; surveilled those activities; and curtailed those activities by enforcing overbroad work rules. (ER 1-3, 40.) The Board also agreed with the judge that Remington violated Section 8(a)(3), (4) and (1) of the Act, 29 U.S.C. § 158(a)(3), (4), and (1), by disciplining, discharging and/or reducing the hours of employees, including Wray and Buezo, for their union activity and/or for participating in the *Remington I* proceeding. (ER 1-3, 40.) Finally, the Board agreed with the judge that Remington violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by unilaterally banning union representatives from the hotel; changing its sick leave policies; discontinuing its practice of scheduling employees according to seniority; ceasing to make pension fund contributions; and refusing to provide the Union with relevant requested information. (ER 1-3, 41-42.)

The Board ordered Remington 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 of the Act, 29 U.S.C. § 7. (ER 1-2.) Affirmatively, the Board's Order requires Remington to:

- Bargain with the Union before making changes to employees' terms and conditions of employment; rescind the changes it unlawfully made; and

make employees whole for losses suffered as a result of those changes (ER 3-4);[3]

- Grant union agents access to hotel grounds and furnish the Union with relevant requested information (ER 4);
- Offer full reinstatement to Wray, Buezo, and Yanira Medrano, and make them and four other employees whose shifts and hours were unlawfully reduced, whole for any loss of pay and benefits, plus interest (ER 4);
- Rescind the disciplines and/or poor appraisals it unlawfully issued to Wray and four other employees (ER 4);
- Remove from its files any reference to the unlawful disciplines, discharges and poor appraisals, and notify the affected employees that those actions will not be used against them (ER 4);
- Rescind or revise its unlawful work rules (ER 4); and
- Post a remedial notice and have it read aloud to assembled employees (ER 4-5).

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[3] On March 31, 2016, the Board issued an order (363 NLRB No. 140) granting the General Counsel's motion to clarify the portion of the Order providing for make-whole relief for employees impacted by the unilateral changes, and modifying the Order accordingly. (SER 5.) Remington did not challenge those modifications before the Board and does not contest them here.

SUMMARY OF ARGUMENT

1. Remington does not contest numerous Board findings that it violated Section 8(a)(1), (3), (4) and (5) of the Act. It is well-settled that the Board is entitled to summary enforcement of the portions of the Order that a party failed to challenge before the Board or in its opening brief.

2. Substantial evidence supports the Board's finding that Remington violated Section 8(a)(3), (4) and (1) of the Act by repeatedly disciplining, then discharging, Dexter Wray because of his union activity and his testimony in *Remington I*. In making that finding, the Board relied on undisputed evidence that Remington not only knew that Wray engaged in union activity and gave Board testimony, but also bore considerable animus against those activities. The timing of the adverse actions, as well as Remington's patently pretextual rationales, also strongly support the Board's finding that Remington acted against Wray because he supported and testified for the Union.

a. As to the first discipline, Remington effectively admitted its unlawful motive when Chief of Engineering Emmsley told Wray that General Manager Artiles wanted to "get rid" of Wray because of his union activities. Remington further exposed its unlawful motive through its many contemporaneous and uncontested violations. Further, Remington disciplined Wray not for any misdeed on his part, but for a coworker's mistake in allowing a hotel lobby pool to

overflow. The Board reasonably viewed this pretext as a "convenient excuse" to fulfill its recent promise to get rid of Wray. Remington attacks the administrative law judge's decision to credit Wray's version of events but fails to show that his testimony was hopelessly incredible.

b. Substantial evidence also supports the Board's finding that Remington unlawfully disciplined Wray a second time two months later. Once again, Remington's unlawful motive was exposed by its contemporaneous commission of uncontested unfair labor practices, and the timing of the discipline, just one day after unlawfully (and admittedly) surveilling his and other employees' participation in a union rally. The Board also rejected as pretextual Remington's claim that it disciplined Wray for a single instance of swearing, given the uncontroverted evidence that Remington regularly tolerated frequent swearing by employees and managers alike.

c. Substantial evidence also supports the Board's finding that Remington unlawfully disciplined Wray a third time, and then discharged him based on the trio of pretextual disciplinary actions. In addition to the suspicious timing of the final discipline and discharge—less than two months after Wray testified against the hotel in *Remington I*—there is striking evidence of unlawful motive. Indeed, Remington does not contest the Board's finding that it committed a host of unfair labor practices, including Chief of Engineering Emmsley

unlawfully soliciting Wray to alter his testimony in *Remington I*. When Wray refused, Remington responded with yet another disciplinary action, which culminated in Wray's discharge.

The Board reasonably rejected as false and therefore pretextual Remington's claim that it issued the final discipline and discharge because Wray had purportedly gambled during working hours. Wray's credited, uncontroverted testimony establishes that although he had left his laptop on a gaming website in the engineering room before starting work, he departed from the room to clock in for his shift and start work, and thereafter he did nothing untoward. Remington's rush to judgment in disciplining and discharging Wray without asking him for his side of the story further shows that it seized on the incident as a pretext to get rid of a known union supporter who had testified against the hotel.

3. Finally, substantial evidence supports the Board's finding that Remington violated Section 8(a)(3) and (1) of the Act by discharging Buezo because she too supported the Union. Remington exposed its unlawful motive through its contemporaneous uncontested violations, including unlawfully changing Buezo's schedule and reducing her work hours because she supported the Union. The Board reasonably rejected as false and therefore pretextual Remington's claim that Buezo voluntarily quit. Remington's assertion cannot be squared with the hotel's termination letter, which plainly stated that Remington

had discharged Buezo, nor with hotel managers' emails, where they admitted their plan to discharge Buezo and make it look like she had quit.

ARGUMENT

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

Despite the breadth and number of unfair labor practices that Remington committed in this case, its challenges are quite narrow. Remington only contests the Board's finding that it unlawfully disciplined and discharged Wray and then discharged Buezo. Remington, however, failed to challenge the many other violations found by the Board. It failed to contest a number of those findings in its exceptions before the Board, and waived challenges to others in its opening brief. Accordingly, as shown below, the Court should summarily enforce the portions of the Board's order that correspond to the uncontested violations.

Moreover, it has long been recognized that uncontested violations do not disappear simply because a party does not mention or contest them. Rather, they 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). Many of the uncontested violations support the Board's

challenged findings that Remington violated the Act by taking adverse actions against Wray and Buezo.

A. The Court Should Summarily Enforce Aspects of the Board's Order Addressing Violations that Remington Failed To Challenge in Its Exceptions Before the Board

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. §160(e). Accordingly, if a party fails to take specific exception to an administrative law judge's findings, appellate review of those findings is jurisdictionally barred. *See Woelke & Romero Framing, Inc., v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Legacy Health Sys.*, 662 F.3d 1124, 1126-27 (9th Cir. 2011).

Remington failed to file exceptions to nearly all of the judge's numerous unfair-labor-practice findings. (ER 1 n.2; SER 1-3.) Specifically, Remington did not challenge the judge's findings that it violated Section 8(a)(1) of the Act by:

- Maintaining and enforcing overbroad work rules limiting employee distribution of literature, solicitation of union support, and access to hotel grounds (ER 14-16, 41);
- Threatening to have police arrest employees engaged in union activities (ER 15-16, 41);

- Interrogating employees about their union activities and signing a decertification petition (ER 13-14, 41);
- Surveilling employees' union activities and creating the impression that it had placed them under surveillance (ER 9-12, 41);
- Coercing employee Dexter Wray regarding his testimony at the Board hearing in *Remington I* (ER 13, 41); and
- Instructing employees to remove their union buttons (ER 12, 41).

Likewise, Remington did not file exceptions challenging the judge's findings that it violated Section 8(a)(3) and (1) of the Act by:

- Disciplining employees other than Wray, reducing their hours, and giving them poor evaluations because they engaged in union activities (ER 16-21, 41); and
- Decreasing the shifts and the hours of employees who engaged in union activities, while increasing the shifts and hours of those who signed a decertification petition (ER 27-29, 31-32, 41).

Further, Remington did not except to the judge's finding that it violated Section 8(a)(3), (4) and (1) of the Act by discharging Yanira Medrano for her union activities and testimony in *Remington I* (ER 24-25, 41). Nor did Remington file exceptions challenging the judge's findings that it violated Section 8(a)(5) and (1) of the Act by unilaterally:

- Banning union representatives from the hotel (ER 32-34, 41-42);
- Changing its practices regarding the staffing and scheduling of banquet employees and reducing their compensation by reallocating their tips (ER 34, 37-39, 42);
- Changing its sick leave and tardiness policies (ER 35-36, 42);
- Ceasing contributions to the employee pension fund (ER 36, 42);
- Subcontracting bargaining unit work (ER 37, 42);
- Ceasing to assign work according to seniority in all departments except for engineering;[4] and
- Failing to provide the Union with relevant requested information (ER 39-42).

Accordingly, the foregoing findings are jurisdictionally barred from court review, and the Board is entitled to summary enforcement of the portions of its Order corresponding to those uncontested findings. *Plaza Auto Ctr., Inc. v. NLRB,* 664 F.3d 286, 295-96 (9th Cir. 2011).

[4] The Board found that Remington committed this violation in a number of different departments, including engineering. (ER 34-35.) As shown below at p. 27, although Remington filed an exception to the judge's finding that it made this change in the engineering department, it waived any challenge to that finding in its opening brief.

B. The Court Should Summarily Enforce Aspects of the Board's Order Remedying Violations that Remington Waived in Its Opening Brief

Additionally, Remington's opening brief fails to contest many of the remaining unfair labor practices. First, it does not challenge the Board's findings that it violated Section 8(a)(3) and (1) of the Act by changing Buezo's schedule from part-time to on-call and reducing her hours because of her union activities. (ER 25-27, 41.) The Board is, therefore, entitled to summary enforcement of the portions of its order remedying these uncontested findings. *See NLRB v. Advanced Stretchforming Int'l, Inc.*, 233 F.3d 1176, 1180 (9th Cir. 2000) (party that fails to sufficiently challenge an unfair-labor-practice finding in its opening brief abandons any such claim, and the Board is entitled to summary enforcement of the corresponding aspects of its order); *accord Legacy Health Sys.*, 662 F.3d at 1126; *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (issues not raised in a party's opening brief are deemed waived); Fed. R. App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief).

Second, Remington waived any challenge to the Board's finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to follow seniority in the engineering department. As shown above at pp. 5 n.2, 26, the Board found that Remington violated the Act by unilaterally ignoring seniority in setting shifts and hours in a number of departments, and Section 10(e) of the Act

bars Remington from challenging that finding with respect to all departments save for engineering. With respect to the engineering department, moreover, because Remington's opening brief does not contest the Board's finding that it unlawfully disregarded seniority there, it has waived that challenge.[5] Remington does not challenge that finding by complaining that the judge erred in crediting Wray's testimony that Chief of Engineering Emmsley cut his hours from 40 to 32 per week in July 2010. (Br. 29-30.) The judge did not rely on that testimony in finding that Remington unlawfully stopped following seniority in the engineering department. (ER 34-35.) Instead, the judge cited that testimony in dismissing a different complaint allegation (that Remington had unlawfully assigned engineering work to non-unit employees). (ER 35.) Moreover, the number of hours Wray lost in July has no bearing on the finding that Remington (Br. 1) professes to challenge—namely, that it unilaterally ceased assigning shifts and hours based on seniority. Instead, the unilateral change finding is based on credited testimony that Remington does not challenge—i.e., Wray's unrebutted testimony that Emmsley told him seniority no longer mattered now that there was "no more union," as well

[5] Although Remington identifies this as an issue in its Issue Statement (Br. 1), its brief contains no argument on that point. It is settled that merely identifying an issue, without actually arguing it, is insufficient to preserve the issue for review. *Retlaw Broad. Co.*, 53 F.3d at 1005 n.1 (issue "summarily mentioned in [party's] opening brief" but not "fully briefed" is waived).

as undisputed testimony that managers in the other departments likewise told their employees that Remington no longer followed seniority. (ER 35.)

Thus, Remington has waived any relevant argument challenging the Board's finding that it violated Section 8(a)(5) and (1) of the Act by unilaterally ceasing to follow seniority in the engineering department. Given Remington's failure to contest that finding in its opening brief, the Court should summarily enforce the portions of the Board's Order addressing the uncontested finding.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT REMINGTON VIOLATED SECTION 8(a)(3), (4), AND (1) OF THE ACT BY DISCIPLINING AND DISCHARGING DEXTER WRAY, AND 8(a)(3) AND (1) BY DISCHARGING ELDA BEUZO

A. Standard of Review and Applicable Principles

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. *See* 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir. 1997). 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 Corp.*, 340 U.S. at 488. This Court will not reverse the Board's credibility determinations unless they are "inherently incredible or patently unreasonable." *Retlaw Broad. Co.*, 53 F.3d at 1006. The Board's interpretation and application of the Act will be upheld provided it is rational and

consistent with the Act. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *Retlaw Broad. Co.*, 53 F.3d at 1006.

Section 7 of the Act guarantees employees the right to "form, join, or assist labor organizations . . . for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(3) of the Act safeguards that right by prohibiting "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). Thus, an employer violates Section 8(a)(3) of the Act by taking adverse employment actions against an employee because of his union activity. *Healthcare Employees Union v. NLRB*, 463 F.3d 909, 922 (9th Cir. 2006). Similarly, Section 8(a)(4) of the Act (29 U.S.C. 158(a)(4)) makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under th[e] Act." Accordingly, an employer violates Section 8(a)(4) by retaliating against an employee for providing testimony at a Board proceeding. *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 818 (7th Cir. 2005); *Royal Development Co., Ltd. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).[6]

[6] A violation of Section 8(a)(3) or (4) creates a derivative violation of Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), which makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases, articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). Under this test, if substantial evidence supports the Board's finding that an employee's union activity or Board testimony was a "motivating factor" in the adverse employment action, the Court must affirm that conclusion unless the record as a whole should have compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the protected activity. *See Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-03; *accord Frankl v. HTH Corp.*, 693 F.3d 1051, 1062 (9th Cir. 2012); *NLRB v. Mike Yourosek & Sons, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995). An employer necessarily fails to prove that it would have taken the adverse action against an employee absent his protected activity when the record shows that the stated justification for the action did not exist or was not in fact relied upon—i.e., if "there is a reasonable basis for believing it 'furnished the excuse rather than the reason'" for the action. *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted); *accord Healthcare Employees*

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the rights guaranteed in section 7 [of the Act]." *See Metro Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Union, 463 F.3d at 922 (collecting cases); *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230-32 (D.C. Cir. 1995).

The Board may rely on direct evidence to establish unlawful motive, and, because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980); *see also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) ("Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving."). Evidence showing an unlawful motive includes the employer's knowledge of and hostility toward union activities, as revealed by its commission of other unfair labor practices; the timing of the adverse action; its deviation from customary practices, inconsistent enforcement of work rules, or disparate treatment of employees; and reliance on shifting or pretextual explanations. *Healthcare Employees Union*, 463 F.3d at 920-22; *Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1015 (9th Cir. 1999); *New Breed Leasing*, 111 F.3d at 1465; *Humes Elec., Inc. v. NLRB*, 715 F.2d 468, 471 (9th Cir. 1983).

Courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C.

Cir. 2000); *accord Clear Pine Mouldings*, 632 F.2d at 726 (the determination of motive is "particularly within the purview of the Board").

B. Substantial Evidence Supports the Board's Findings that Remington Disciplined and Discharged Wray for Supporting the Union and Testifying Against the Hotel

1. Remington unlawfully disciplined Wray on May 10 for his union support, not for the pool-overflow incident

Substantial evidence supports the Board's finding that union animus was a motivating factor in Remington's decision to discipline Wray on May 10 for a coworker's mistake in allowing a pool to overflow. (ER 21-22.) First, this is a rare case where direct evidence shows the employer's unlawful motive. Thus, Remington does not dispute that, in March 2010, Chief of Engineering Emmsley warned Wray that General Manager Artiles wanted to "get rid of" him because of his union activities. As this Court has held, threats "to get rid of" union advocates are tantamount to "an outright confession of unlawful discrimination." *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980) (quoting *NLRB v. Ferguson*, 257 F.2d 88, 92 (5th Cir. 1958)); *accord Int'l Brotherhood of Boilermakers v. NLRB*, 127 F.3d 1300, 1308 (11th Cir. 1997) (finding of unlawful motive was supported by employer's statement that discharged employee was on "supervision's 'hit list'"). Indeed, Emmsley then effectively confirmed Remington's unlawful motive about a week later when he told Wray that the pool-overflow write up would go away if he signed the decertification petition.

Second, the timing of Wray's discipline—less than two months after Remington threatened to get rid of Wray, and shortly after committing numerous uncontested unfair labor practices—further supports the Board's finding of unlawful motive. *See Healthcare Employees Union*, 463 F.3d at 919-21 (issuing discipline close in time to threats and other unfair labor practices supports finding of unlawful motive) (collecting cases). Thus, from early 2010 through April 2010, Remington admittedly surveilled its employees' union activities and punished them for distributing union pins or asking their coworkers to support the Union. (ER 9-12, 19-21); *see* pp. 5-7, 24-26 (discussing these uncontested violations). This is the same employer, moreover, that had recently committed several other uncontested violations in *Remington I*. *See* pp. 3, 6, 8-9 (discussing those violations committed in early 2010). This included Emmsley unlawfully coercing Wray into signing the decertification petition and threatening to discharge him if he refused in May, close in time to the discipline here. *Remington I*, 2013 WL 1771714, at *4, *118.

The Board also reasonably found that Remington manufactured a pretext when it claimed that it disciplined Wray for the pool-overflow incident. As the Board explained, Remington blamed him for the overflow even though there is no evidence that he caused it. (ER 21.) Indeed, the unrebutted evidence shows that trainee employee Sam, acting without Wray's knowledge, took it upon himself to refill pool while Wray was called away on other work. Accordingly, the Board

reasonably viewed the pool-overflow incident as "a convenient excuse" for Remington to carry out Emmsley's recent warning that management wanted to get rid of Wray because he supported the Union. (ER 21-22.) An employer's resort to such pretext may prove its unlawful motive because, if the Board "finds that the stated motive for a discharge is false, [it] certainly can infer . . . that the [true] motive is one that the employer desires to conceal—an unlawful motive." *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Remington provides no basis for disturbing the Board's well-supported finding. For example, it fails to undermine the judge's reasonable decision to credit Wray's unrebutted testimony that Sam, the trainee, had refilled the pool independently and without Wray's knowledge. Remington fleetingly suggests (Br. 31) that this was Wray's "unsupported speculation," but fails to show that it was patently unreasonable for the judge to credit his unrebutted testimony. In any event, the material fact remains that there is no evidence to support Remington's dubious claim (Br. 31) that Wray was responsible, regardless of whether it was Sam, or someone else, who caused the pool to overflow without Wray's knowledge.[7]

[7] Contrary to Remington's further suggestion (Br. 31), the fact that Wray had not shown Sam how to refill the pool does not undermine the finding of pretext. Instead, that fact is consistent with the judge's finding, based on Wray's unrebutted testimony, that he did not know that Sam (or anyone else) was refilling the pool.

Nor should the Court be detained by Remington's baseless claim (Br. 31-32) that Wray "lied" when he testified that Emmsley refused his request for a union representative when Wray received the pool-overflow discipline on May 10, because Remington did not withdraw union recognition until July 2. As an initial matter, Remington fails to explain how that testimony would require the Court to displace the Board's well-supported finding that Remington disciplined Wray in retaliation for supporting the Union. In any event, the judge reasonably explained that Wray was at worst unclear as to when Emmsley denied his request for union representation. (ER 13; SER 31.) This was hardly the bold "lie" that Remington makes it out to be. Remington thus fails to show, as it must, that it was patently unreasonable for the judge to credit Wray's unrebutted testimony about the events leading to the pool-overflow incident and his discipline.

2. Remington unlawfully disciplined Wray on July 7 for his union support, not for swearing

Substantial evidence also supports the Board's finding (ER 22-23) that Wray's support for the Union was a motivating factor in Remington's disciplining Wray a second time on July 7, this time purportedly for swearing. (He told a coworker, while they were in a corridor service area, that he didn't need "to put up with this shit.") As shown, Wray's open union support, and Remington's awareness of and hostility towards it, are well established. The Board's finding of unlawful motive is also supported by timing of the discipline, which was meted out

on the same day that Remington admittedly violated the Act by directing employees to remove their union buttons, and the day after admittedly surveilling employees at a union rally where Wray spoke. Indeed, Remington issued the discipline shortly after committing numerous other uncontested violations, including discriminating against employees by decreasing their hours because of their union support.

The Board also reasonably rejected as pretextual Remington's claim that it disciplined Wray for swearing, not for his union activity. As the Board observed (ER 22-23), the credited and unrebutted testimony of several employees established that they frequently swore while on duty, often in front of their supervisors and sometimes in guest or public areas, without being punished. Moreover, employees Buezo and Rodriguez repeatedly complained to Housekeeping Director Canas that employee Lumni Deskaj was swearing in guest areas. (ER 22; 145-51.) For example, in February 2010, Rodriquez reported to Canas that she heard Deskaj repeatedly say "shit" and "motherfucker" on his cellphone in a hallway just outside guest rooms. And, in the summer of 2010, Rodriguez informed Canas that Deskaj was continuing to swear loudly in guest areas. Yet, Deskaj was not disciplined for these reported incidents.

The foregoing evidence belies Remington's claim (Br. 37 & n.5) that no employee complained to management about employees using profanity in guest

areas or public areas. Moreover, the disparity in Remington's decision to discipline Wray but not Deskaj is striking. Unlike Wray's single reported use of a profanity, Deskaj was repeatedly reported for swearing, sometimes at his coworkers, in or near guest areas. *See Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1015 (9th Cir. 1999) (employer's disparate or inconsistent enforcement of rule supports finding of unlawful motive for adverse action); *accord Frankl v. HTH Corp.*, 693 F.3d 1051, 1063 (9th Cir. 2012) (unlawful motive may be found where employers were "looking for reasons to discipline [a prounion employee] and contoured [their] rules to suit their needs").[8]

In addition, Remington's supervisors and managers repeatedly swore at the hotel, often in or near guest areas and in a more severe manner than Wray, without receiving formal discipline. (ER 22; SER 71-81, 142-43, 151, 159, ER 105-24, 139-44.) For example, around the summer of 2010, Housekeeping Manager Canas said "motherfucker" and "cunt" in Spanish to employees on multiple occasions, at least once near a female employee who was working in a public guest room. (ER 22; SER 142-43, 159, ER 139-44.) Also during the summer of 2010, General Manager Artiles yelled "what the hell is going on?" into his radio in the hotel

[8] Remington gains no ground in observing (Br. 35-36) that Deskaj was disciplined for two other instances of swearing in December 2009 and November 2010. As discussed below, this shows that Remington was "at best" inconsistent in enforcing its policy regarding the use of profanity. (ER 22-23.)

lobby. (ER 22; 105-09.)[9] Moreover, the very manager who reported Wray for swearing, Lorraine Park, had herself been reported to management for swearing in an elevator on July 23, 2010, but received no formal discipline for it. (ER 22; SER 49-52, ER 422.)[10]

Thus, as the Board aptly put it, "[a]t best [Remington] was inconsistent in enforcing its policy regarding use of profanity, at worst it encouraged profanity through the example of its managers and supervisors." (ER 23.) Yet, as shown, Remington treated open union supporter Wray differently—and suddenly enforced its rules more strictly—when it disciplined him for the one time he was reported for swearing.[11] *See Healthcare Employees Union*, 463 F.3d at 920-21 (unlawful

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[9] Remington blithely attempts to distinguish this as one-time swearing in an "emergency" situation. (Br. 36). However, it offers no such justification for the numerous other instances in which it ignored profanity by employees and managers in or near guest areas. Indeed, its attempted distinction highlights the disparity in punishing Wray for his first reported instance of swearing. In this regard, Wray's single use of profanity is less egregious than the multiple instances for which Housekeeping Manager Canas escaped consequence. Unlike Wray, Canas was a manager who swore at or around the employees he supervised, and he used particularly harsh (even sexually harassing) profanity in doing so.

[10] While Remington suggests (Br. 11-12) that it informally disciplined Park in a July 23 memorandum for her use of profanity, the document is devoid of any adverse consequences. (ER 22; 422.) This is unlike the "formal" notice issued to Wray, which warns that any additional infraction may result in "further disciplinary action up to and including termination." (ER 385.)

[11] Remington gains no ground in claiming (Br. 34) that Wray "lied" when he testified that he uttered the swearword "in the back of the house." Remington contends that this characterization falsely placed the incident in a nonpublic area.

motive shown by employer's seizing on long-tolerated problems to act against union supporters). Accordingly, the Board reasonably found that Remington's "discipline of Wray for use of profanity was a pretext to disguise its true object of trying to get rid of union adherent Wray." In so doing, Remington violated Section 8(a)(3) and (1) of the Act. (ER 23.)

3. Remington unlawfully disciplined and discharged Wray for his union support and Board testimony in *Remington I*, not for purportedly gambling during work hours

Remington disciplined and discharged Wray on October 27, purportedly for using the hotel's internet access to gamble online during work hours. Substantial evidence, however, supports the Board's finding that Remington's stated reason for targeting Wray was a pretext that masked its true motive—namely, to make good on its threat to get rid of a union supporter who had testified against the hotel in *Remington I*. (ER 2, 23-24.)

As shown, Remington's knowledge of and animus towards Wray's open union support is well documented and uncontroverted. Indeed, Chief of Engineering Emmsley admittedly told Wray that General Manager Artiles wanted

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Wray did not lie. As the judge explained, Wray said the incident occurred in the "back of the house" near a first floor service area in a hallway, and he was never asked what he meant by "back of the house." (ER 13; SER 44.) Nor was there any evidence or testimony contradicting Wray's statement. Remington thus fails to provide any grounds for reversing the judge's decision to credit that testimony. In any event, as shown, Remington routinely turned a blind eye when other employees and managers swore in or near guest areas.

to get rid of him because of his union activities. Remington also knew that in late August, Wray had given testimony adverse to its interests in *Remington I*, as Artiles was in the courtroom when he testified. Moreover, Remington does not dispute that on the second day he was called to testify, Emmsley unlawfully attempted to influence his testimony by telling him not to mention Emmsley soliciting him to sign the decertification petition. Wray, however, refused to alter his testimony, and barely two months later, Emmsley and Human Resources Director Fullenkamp told Wray that he was being disciplined and discharged, purportedly for using his laptop and the hotel network to gamble during his working hours. They did so without ever asking Wray for his side of the story.

The suspicious timing of Wray's final discipline and discharge is thus another factor supporting the Board's finding that Wray's union activity and Board testimony motivated Remington to get rid of him. As shown above, Remington took both actions just two months after Emmsley unsuccessfully tried to coerce Wray's testimony in *Remington I*, and within months of threatening to get rid of him for his union activity and disciplining him twice based on pretextual grounds. Wray's final discipline and discharge also followed on the heels of a litany of other uncontested unfair labor practices committed by Remington.

Particularly in this context, the Board also reasonably found that Remington's rush to judgment in disciplining and discharging Wray, without

asking for his side of the story, exposes its unlawful motive and the pretextual nature of its stated reason for the discharge. *See American Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980) (employer's rush to judgment in disciplining employee after only a "cursory investigation" is evidence of pretext and unlawful motive); *accord Healthcare Employees Union*, 463 F.3d at 922 ("[A] flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an anti-union motivation.") (internal quotation marks omitted). Remington told Wray that he was terminated for gambling on his laptop during work hours and using the company network to do it. As the Board observed, even a cursory investigation would have revealed that Wray had used his private internet connection, not Remington's, to log on that morning, and had not used his laptop, for gambling or otherwise, during work hours. (ER 2, 23-24.)

In response, Remington offers nothing that warrants disturbing the Board's well-supported findings. Remington asserts that the Board erred in finding a "rush to judgment" in discharging Wray, and that a "complete view of the record" and "common sense" show otherwise. (Br. 38.) However, it cites no record evidence or case law to support its bare-bones assertion.

Although Remington attacks the administrative law judge's determination to credit Wray's uncontroverted testimony about his actions that morning, it fails to show that the ruling was patently unreasonable. For example, Remington attempts

to manufacture testimonial conflicts where none exist in order to claim (Br. 39-41) that Wray "obviously lie[d]" about whether he was playing poker on the morning of October 23. In his testimony, Wray denied gambling that morning, and explained that he merely used his own internet provider to log onto the poker website before his shift started, to transfer play-money chips to a coworker. (ER 13, 24; SER 54-59). His uncontroverted testimony also establishes that when it came time to start his 7:00 a.m. shift, he simply left his laptop alone in the engineering room, clocked in, and proceeded to perform his work. (ER 23; SER 56-59.) Although he acknowledged, in a statement he gave to a union representative, that he had been "playing poker," the judge reasonably found that this acknowledgment did not constitute a lie or contradict his testimony that he did nothing improper after starting his shift. (ER 13, 24; SER 80-81.) As the judge accurately observed, Wray's statement does not explain—and no one asked him at trial—what he meant by "playing poker." Thus, as the judge noted, it was likely that Wray's statement referred to the fact that, as he consistently testified, he had logged onto a poker website before his shift started in an attempt to transfer play money to a coworker.[12] *See* ER 13, 24; SER 80-81 (Wray's statement asserts that

[12] Moreover, as the judge noted, the coworker, Ed Emmsley, Jr., the son of Chief of Engineering Emmsley, was never called as a witness by Remington to rebut Wray's assertions. Thus, the judge reasonably drew an adverse influence that if called, Emmsley Jr. would have testified adversely to Remington. (ER 13). *See*

he "arrived at the hotel at 6:30 a.m. [before his 7:00 a.m. shift]" and "since he was there early he opened up his computer and started playing poker on it.")

Nor, as Remington claims (Br. 39-41), was the judge compelled to find that Wray was gambling or playing on his laptop during work hours based on Emmsley's email report about what he allegedly saw on surveillance tapes, which Remington failed to produce.[13] According to Emmsley's report, the cameras merely showed that Wray entered and exited the engineering room between 6:58 and 8:54 a.m. As Remington admits (Br. 41), however, no one, including Emmsley, claimed to see Wray gambling or otherwise using his computer during that time. (ER 13, 24; SER 194.) In short, Emmsley's report does not undermine Wray's testimony that he did not gamble or use his laptop after clocking in to start his shift. Particularly in these circumstances, the judge reasonably credited Wray's testimony over the contrary assertions made by Emmsley, who did not even claim to actually see Wray gambling or using his laptop during work hours.

Underwriters Labs, Inc. v. NLRB, 147 F.3d 1048, 1054 (9th Cir. 1998) ("when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge"; whether to draw such an inference lies "within the discretion of the fact finder").

[13] Emmsley was the only source of what the cameras allegedly revealed. Remington did not provide the surveillance tapes, claiming that all of the video cameras had been removed from the hotel as of the time of trial and no tapes could be found. (ER 24 & n.57; SER 164.)

The judge's demeanor-based findings also support his decision to credit Wray. As the judge noted, "[w]hile Wray was not a well-spoken man, his answers had the ring of truth to it"; Emmsley, in contrast, was "given to rote answers to conveniently provide cover for [Remington's] defense." (ER 13.) The judge's jaundiced view of Emmsley's suppositions is confirmed by his unlawful attempt to get Wray to hide the truth when he was called to testify in *Remington I*. In sum, the judge reasonably resolved any conflict in the testimony based on his assessment of the witnesses' demeanor and apparent biases, and, like the judge in *Remington I*, credited Wray over Emmsley's bare assertions. (ER 13.)

Finally, the record does not compel the Board to credit Remington's suggested inference (Br. 40-41) that Wray must have been gambling or playing on his laptop during work hours because the laptop screen remained on and logged-in to the poker site. As the judge observed, the engineering rooms were open to a host of other people who could have struck a key to turn the screen on. (ER 24.) In sum, while Remington may proffer an alternative view of the facts, it fails to prove that substantial evidence does not support the Board's finding that the hotel disciplined and discharged Wray on pretextual grounds, and that the hotel's true motive was to get rid of a union supporter who had testified against his employer in *Remington I*.

C. Substantial Evidence Supports the Board's Finding that Remington Violated Section 8(a)(3) and (1) of the Act by Discharging Elda Buezo Because of Her Union Activities

The record evidence amply supports the Board's finding that, on June 15, 2011, Remington unlawfully discharged Buezo because of her support for the Union. Buezo's open union activity, as well as Remington's knowledge of and animus against it, are well established. Thus, in the fall of 2010, Buezo—who, like Wray, had testified against the hotel in *Remington I*—presented Human Resources Director Fullenkamp with a petition signed by coworkers to support a suspended coworker. Fullenkamp responded by summoning Buezo to a meeting to tell her to cease such activities. Remington's many contemporaneous, uncontested violations—some targeting Buezo—likewise support the Board's finding of unlawful motive. For example, Remington does not dispute that, in April 2011, it unlawfully discriminated against Buezo by changing her schedule from regular part-time to on-call, thereby significantly reducing her hours, because she supported the Union. Remington's unlawful motive is also exposed by the suspicious timing of discharging her just two months later.

The Board also reasonably rejected as false and therefore pretextual Remington's claim that it did not discharge Buezo because she had voluntarily quit. That transparent pretext is flatly contradicted by Remington's termination letter, which plainly stated that it had "involuntarily terminated" Buezo. (ER 26;

SER 192.) Remington's failed subterfuge is also exposed by an email exchange shortly before Buezo's discharge, in which Corporate Vice President Hafner squarely told Fullenkamp to terminate Buezo and make it look like she had quit. (ER 26; 389.) In these circumstances, the utter falsity of Remington's claim that Buezo quit supports the Board's inference that its true motive is one it "desire[d] to conceal—an unlawful motive." *Shattuck Denn Mining Co.*, 362 F.2d at 470. The Board's decision to reject Remington's pretextual claim that Buezo quit is particularly sound in light of the uncontested finding that Remington also relied on pretext to justify its unlawful changes to her schedule and hours. (ER 27.)

Remington offers nothing that warrants disturbing the Board's well-supported findings. For example, it strains credulity in claiming (Br. 53-55) that the Hafner-Fullenkamp emails are ambiguous. There is no ambiguity—and even if there were, Remington fails to show that the Board's view is unreasonable. Fullenkamp asked Hafner if she could terminate Buezo, and Hafner clearly replied: "yes, tell her that by failing to show up – that we consider that she has voluntarily resigned her position." To remove any ambiguity, Hafner repeated: "We are not term[inat]ing her – she resigned." (ER 26; 389.) In other words, Hafner instructed Fullenkamp to terminate Buezo but call it a voluntary resignation.[14]

[14] Moreover, it is ironic that Remington, the party that possessed the documents in question, complains that the email chain is incomplete regarding what "this" means

Remington forfeits its last stitch of credibility in claiming that Buezo's testimony confirms that she voluntarily resigned. (Br. 50-51.) To support this view, it relies solely on how, after Fullenkamp stated that she considered Buezo to have resigned, Buezo replied "ok, ok." (ER 92.) This was not the clear statement of voluntary resignation that Remington makes it out to be. Rather, this was likely nothing more than Buezo's acknowledgement of Fullenkamp's announcement of a decision that Remington had already made. And, as shown, Remington's view is negated by its own documentation stating that it discharged Buezo. Thus, the record does not compel the Board to accept Remington's strained reading.

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when Fullenkamp asked Hafner if she could terminate Buezo for "this." (Br. 53-55.) In any event, as shown, the meaning of the exchange is clear.

CONCLUSION

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

STATEMENT OF RELATED CASES

Board counsel are not aware of any related cases pending in this Circuit other than the case identified by Remington in its Statement of Related Cases, *National Labor Relations Board v. Remington Lodging & Hospitality, LLC d/b/a the Sheraton Anchorage*; Case Nos. 15-71924, 15-72563 & 15-73259.

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National Labor Relations Board
December 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
and	)	
	)	
UNITE HERE! LOCAL 878	)	No. 16-71194
	)	
Intervenor	)	Board Case No.
	)	19-CA-032599
v.	)	
	)	
REMINGTON LODGING & HOSPITALITY, LLC, d/b/a THE SHERATON ANCHORAGE	)	
	)	
Respondent	)	

STATUTORY ADDENDUM

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Section 8(a)(3) ii
Section 8(a)(4) ii
Section 8(a)(5) ii
Section 10(a) ii
Section 10(e) iii

Section 7 of the Act (29 U.S.C. § 157) provides in relevant part:

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

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer--

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district,

respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-71194

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is 11,100 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature of Attorney or Unrepresented Litigant: s/Linda Dreeben

Date: Dec 21, 2016

("s/" plus typed name is acceptable for electronically-filed documents)

UNITED STATES COURT OF APPEALS
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NATIONAL LABOR RELATIONS BOARD	)	
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v.	)	
	)	
REMINGTON LODGING & HOSPITALITY, LLC, d/b/a THE SHERATON ANCHORAGE	)	
	)	
Respondent	)	

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I hereby certify that on December 21, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated at Washington, DC
this 21st day of December, 2016