

Nos. 16-3328 & 16-3509

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

SOUTHERN BAKERIES, 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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SUMMARY OF THE CASE

After a majority of the Company's employees voted to keep their union representation in 2009, the Company waged a sustained campaign of unlawful conduct to coerce them to change their minds. Over a period of months, the Company repeatedly threatened plant closure and other calamities if employees kept the Union and promised higher wages if they abandoned it. It ordered employees to report union activities and interrogated and punished union supporters. And it repeatedly prevented employees from meeting with the Union in the plant as they always had.

Predictably, the Company succeeded in swaying employee opinion: while it was unlawfully depriving employees of in-plant access to their Union, employees signed petitions to end union representation. The Company seized on the disaffection it had caused by withdrawing recognition from the Union and giving employees the raise it had promised. Applying settled law, the Board properly issued an order preventing the Company from benefiting from its unlawful conduct and requiring it to recognize and bargain with its employees' chosen representative.

The Board agrees that oral argument will aid the Court in understanding why the Company's course of conduct violated the Act and precluded it from withdrawing recognition. The Board submits that 15 minutes per side will suffice.

TABLE OF CONTENTS

| Headings | Page(s) |
|---|----------------|
| Jurisdictional statement..... | 1 |
| Statement of the issues..... | 2 |
| Statement of the case..... | 4 |
| I. The Board’s findings of fact | 4 |
| A. The Company purchases a union-represented facility; employees vote to retain the Union; the Company attempts to oust it..... | 4 |
| B. The Company restricts union access to the plant | 6 |
| C. The Company threatens an employee; while the Union is banned from the facility, an employee circulates a third decertification petition, and an election is scheduled..... | 7 |
| D. The Company temporarily restores union access; union representatives discover new surveillance cameras in the break area and a barrier between break rooms | 8 |
| E. The Company threatens that if employees retain the Union, jobs will be lost, the plant will close, and bargaining will be futile; promises benefits if employees decertify the Union; coercively disparages the Union; promulgates a rule requiring employees to report “harassment” in relation to the decertification campaign; and again bans the Union from the facility | 9 |
| F. Charges are filed, the election is postponed, and the Company again prevents the Union from meeting with employees..... | 13 |
| G. The Company interrogates and disciplines employees for their union activities and promises better wages without the Union..... | 14 |
| H. The Company suspends and issues a final warning to Marks..... | 16 |

TABLE OF CONTENTS

| Headings-Cont'd | Page(s) |
|---|----------------|
| I. While the Union is excluded, an antiunion petition circulates; the Company withdraws recognition and fulfills its promise to raise wages | 16 |
| II. The Board's conclusions and order | 17 |
| Summary of argument..... | 20 |
| Standard of review | 23 |
| Argument..... | 24 |
| I. The Court should grant summary enforcement of many portions of the Board's Order | 24 |
| A. Numerous uncontested Board findings are not properly before the Court | 24 |
| B. The Company contests other findings only with meritless credibility challenges | 26 |
| C. The Company challenges other findings only on notice grounds, which the Board reasonably rejected | 29 |
| II. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) by coercing employees in numerous respects | 31 |
| A. The Company unlawfully created the impression that employees' interactions with the Union were under surveillance | 32 |
| B. The Company unlawfully threatened employees with plant closure and futility, and promised benefits..... | 33 |
| C. The Company unlawfully disparaged the Union..... | 40 |
| D. The Company promulgated an unlawful rule..... | 43 |

TABLE OF CONTENTS

| Headings-Cont'd | Page(s) |
|---|----------------|
| III. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) by investigating and disciplining Phillips and Marks for their union activity | 46 |
| IV. Substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) by unilaterally restricting employee access to the Union | 49 |
| V. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) by withdrawing recognition based on a petition tainted by its own unlawful conduct and then making unilateral changes..... | 53 |
| Conclusion | 65 |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|----------------|
| <i>Ahlberg v. Chrysler Corp.</i> , 481 F.3d 630 (8th Cir. 2007) | 24 |
| <i>Aqua Cool</i> , 332 NLRB 95 (2000) | 38 |
| <i>Ardsley Bus Corp., Inc.</i> , 357 NLRB 1009 (2011) | 57 |
| <i>AT Sys. West</i> , 341 NLRB 57 (2004) | 56 |
| <i>Bank of St. Louis v. NLRB</i> , 456 F.2d 1234 (8th Cir. 1982) | 2, 44 |
| <i>Boulder City Hosp., Inc.</i> , 355 NLRB 1247 (2010) | 45 |
| <i>Campo Slacks, Inc.</i> , 250 NLRB 420 (1980), <i>enforced mem.</i> , 659 F.2d 1069 (3rd Cir. 1981) | 3, 50 |
| <i>Care One at Madison Ave., LLC v. NLRB</i> , 832 F.3d 351 (D.C. Cir. 2016) | 44, 46 |
| <i>Cellnet Comm., Inc. v. FCC</i> , 149 F.3d 429 (6th Cir. 1998) | 26 |
| <i>Champion Enters., Inc.</i> , 350 NLRB 788 (2007) | 45 |
| <i>Chemvet Labs, Inc. v. NLRB</i> , 497 F.2d 445 (8th Cir. 1974) | 58 |
| <i>Cintas Corp. v. NLRB</i> , 589 F.3d 905 (8th Cir. 2009) | 29, 33, 46, 48 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|--|-------------------|
| <i>Columbia Portland Cement Co. v. NLRB</i> , 979 F.2d 460 (6th Cir. 1992) | 3, 54, 55, 61, 64 |
| <i>Concepts & Designs, Inc.</i> , 318 NLRB 948 (1995), <i>enforced</i> , 101 F.3d 1243 (8th Cir. 1996) | 33 |
| <i>Coronet Foods, Inc. v. NLRB</i> , 981 F.2d 1284 (D.C. Cir. 1993)..... | 63 |
| <i>De Queen Gen. Hosp.</i> , 264 NLRB 480 (1982), <i>enforced</i> , 744 F.2d 612 (8th Cir. 1984) | 26, 36, 38 |
| <i>DeQueen Gen. Hosp. v. NLRB</i> , 744 F.2d 612 (8th Cir. 1984) | 31 |
| <i>East Bay Automotive Council v. NLRB</i> , 483 F.3d 628 (9th Cir. 2007) | 60 |
| <i>Eldeco, Inc. v. NLRB</i> , 132 F.3d 1007 (4th Cir. 1997) | 29 |
| <i>Eldorado Tool</i> , 325 NLRB 222 (1997)..... | 35, 41, 43 |
| <i>Fabric Warehouse</i> , 294 NLRB 189 (1989), <i>enforced mem. sub nom.</i> , <i>Hancock Fabrics v. NLRB</i> , 902 F.2d 28 (4th Cir. 1990)..... | 60 |
| <i>Frankl v. HTH Corp.</i> , 693 F.3d 1051 (9th Cir. 2012) | 49 |
| <i>Fred Meyer Stores</i> , 362 NLRB No. 82, 2015 WL 1956201 (Apr. 30, 2015) | 40, 53 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>Frontier Hotel & Casino</i> , 309 NLRB 761 (1992), <i>enfd. sub nom.</i> , <i>NLRB v. Unbelievable, Inc.</i> , 71 F.3d 1434 (9th Cir. 1995)..... | 51 |
| <i>Goya Foods</i> , 347 NLRB 1118 (2006), <i>enforced</i> , 525 F.3d 1117 (11th Cir. 2008) | 57 |
| <i>Granite City Steel Co.</i> , 167 NLRB 310 (1967) | 50 |
| <i>Hall v. NLRB</i> , 941 F.2d 684 (8th Cir. 1991) | 47, 49 |
| <i>Harper & Row Publishers</i> , 196 NLRB 343 (1972) , <i>enforced</i> , 476 F.2d 430 (8th Cir. 1973) | 39 |
| <i>Harper & Row Publishers, Inc. v. NLRB</i> , 476 F.2d 430 (8th Cir. 1973) | 28 |
| <i>Hawkins-Hawkins Co.</i> , 289 NLRB 1423 (1988)..... | 44 |
| <i>Holiday Inn of Chicago-S.</i> , 209 NLRB 11(1974)..... | 42 |
| <i>Homer D. Bronson Co.</i> , 349 NLRB 512 (2007) | 35 |
| <i>Iplli, Inc.</i> , 321 NLRB 463 (1996) | 42 |
| <i>J.P. Stevens & Co. v. NLRB</i> , 638 F.2d 676 (4th Cir. 1980) | 33 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>JCR Hotel, Inc. v. NLRB</i> , 342 F.3d 837 (8th Cir. 2003) | 23 |
| <i>Labor Ready, Inc.</i> , 327 NLRB 1055 (1999), <i>enforced</i> , 253 F.3d 195 (4th Cir. 2001) | 32 |
| <i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), <i>enforced mem.</i> , 203 F.3d 52 (D.C. Cir. 1999)..... | 43 |
| <i>Levitz Furniture Co.</i> , 333 NLRB 717 (2001) | 53, 54 |
| <i>Lexus of Concord, Inc.</i> , 343 NLRB 851 (2004) | 56 |
| <i>Liberty House Nursing Homes</i> , 245 NLRB 1194 (1979)..... | 44 |
| <i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004) | 43, 45 |
| <i>Manna Pro Partners, L.P. v. NLRB</i> , 986 F.2d 1346 (10th Cir. 1993) | 61 |
| <i>Master Slack Corp.</i> , 271 NLRB 78 (1984) | 54, 57, 61, 64 |
| <i>McGraw-Edison Co. v. NLRB</i> , 419 F.2d 67 (8th Cir. 1969) | 30 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>McKinney v. Southern Bakeries, LLC</i> , 786 F.3d 1119 (8th Cir. 2015)..... | 63, 64 |
| <i>Mesker Door, Inc.</i> , 357 NLRB 591 (2011) | 37, 56 |
| <i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983)..... | 46 |
| <i>Midland National Life Insurance</i> , 263 NLRB 127 (1982) | 42, 43 |
| <i>Miller Waste Mills, Inc.</i> , 334 NLRB 466 (2001), <i>enforced</i> , 315 F.3d 951 (8th Cir. 2003) | 3, 55, 63 |
| <i>NLRB v. A.W. Thompson, Inc.</i> , 449 F.2d 1333 (5th Cir. 1971) | 61 |
| <i>NLRB v. Arkema, Inc.</i> , 710 F.3d 308 (5th Cir. 2013)..... | 45 |
| <i>NLRB v. Arrow Specialties, Inc.</i> , 437 F.2d 522 (8th Cir. 1971) | 57 |
| <i>NLRB v. BASF Wyandotte Corp.</i> , 798 F.2d 849 (5th Cir. 1986) | 49 |
| <i>NLRB v. Bolivar-Tees, Inc.</i> , 551 F.3d 722 (8th Cir. 2008) | 26 |
| <i>NLRB v. Broyhill Co.</i> , 514 F.2d 655 (8th Cir. 1975) | 31 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|--|------------------------|
| <i>NLRB v. C.J. Pearson Co.</i> , 420 F.2d 695 (1st Cir. 1969)..... | 35 |
| <i>NLRB v. Chem Fab Corp.</i> , 691 F.2d 1252 (8th Cir. 1982) | 27, 32, 48, 59 |
| <i>NLRB v. Cornerstone Builders, Inc.</i> , 963 F.2d 1075 (8th Cir. 1992) | 24 |
| <i>NLRB v. Garry Mfg. Co.</i> , 630 F.2d 934 (3d Cir. 1980) | 34, 35, 38, 39, 48, 58 |
| <i>NLRB v. Gen. Fabrications Corp.</i> , 222 F.3d 218 (6th Cir. 2000) | 31 |
| <i>NLRB v. Gerbes Super Markets, Inc.</i> , 436 F.2d 19 (8th Cir. 1971) | 37 |
| <i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)..... | 2, 33, 34, 35, 42 |
| <i>NLRB v. Hardesty Co., Inc.</i> , 308 F.3d 859 (8th Cir. 2002) | 60 |
| <i>NLRB v. Hi-Tech Cable Corp.</i> , 128 F.3d 271 (5th Cir. 1997) | 54, 58 |
| <i>NLRB v. Mark I Tune-Up Ctrs., Inc.</i> , 691 F.2d 415 (8th Cir. 1982) | 36 |
| <i>NLRB v. Midwest Hanger Co.</i> , 474 F.2d 1155 (8th Cir. 1973) | 26 |
| <i>NLRB v. Miller Waste Mills</i> , 315 F.3d 951 (8th Cir. 2003) | 41, 64 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>NLRB v. Monson Trucking, Inc.</i> , 204 F.3d 822 (8th Cir. 2000) | 26 |
| <i>NLRB v. Ne. Okla. City Mfg. Co.</i> , 631 F.2d 669 (10th Cir. 1980) | 3, 50, 53 |
| <i>NLRB v. Noll Motors, Inc.</i> , 433 F.2d 853 (8th Cir. 1970) | 2, 33, 34, 39 |
| <i>NLRB v. Pittsburgh S.S. Co.</i> , 337 U.S. 656 (1949)..... | 29 |
| <i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013) | 3, 23, 47, 48 |
| <i>NLRB v. Rockline Indus., Inc.</i> , 412 F.3d 962 (8th Cir. 2005) | 2, 24, 47 |
| <i>NLRB v. Spotlight Co.</i> , 462 F.2d 18 (8th Cir. 1972) | 33, 59 |
| <i>NLRB v. Sunnyland Packing Co.</i> , 557 F.2d 1157 (5th Cir. 1977) | 29, 30 |
| <i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983)..... | 46, 47 |
| <i>NLRB v. Williams Enters., Inc.</i> , 50 F.3d 1280 (4th Cir. 1995) | 3, 55, 58, 59 |
| <i>Patsy Bee, Inc. v. NLRB</i> , 654 F.2d 515 (8th Cir. 1981) | 36 |
| <i>Penn Tank Lines, Inc.</i> , 336 NLRB 1066 (2001)..... | 58 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>Pilot Freight Carriers, Inc.</i> , 223 NLRB 286 (1976), enforced, 604 F.2d 375 (5th Cir. 1979) | 37 |
| <i>Pub. Serv. Co. of N.M. v. NLRB</i> , __ F.3d __, 2016 WL 7368625 (D.C. Cir. Dec. 20, 2016) | 53 |
| <i>Radisson Plaza Minneapolis</i> , 307 NLRB 94 (1992), enforced, 987 F.2d 1376 (8th Cir. 1993) | 58 |
| <i>Radisson Plaza Minneapolis v. NLRB</i> , 987 F.2d 1376 (8th Cir. 1993) | 54 |
| <i>Rockwell Int’l Corp. v. NLRB</i> , 814 F.2d 1530 (11th Cir. 1987) | 28 |
| <i>Ron Tirapelli Ford, Inc. v. NLRB</i> , 987 F.2d 433 (7th Cir. 1993) | 62, 63 |
| <i>Ryder Truck Rental</i> , 341 NLRB 761 (2004), enforced, 401 F.3d 815 (7th Cir. 2005) | 44 |
| <i>Seton Co.</i> , 332 NLRB 979 (2000) | 33 |
| <i>SFO Good-Nite Inn, LLC v. NLRB</i> , 700 F.3d 1 (D.C. Cir. 2012) | 28 |
| <i>St. John’s Mercy Health Sys. v. NLRB</i> , 436 F.3d 843 (8th Cir. 2006) | 46 |
| <i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), enforced, 188 F.2d 362 (3d Cir. 1951) | 29 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|---|----------------|
| <i>Stevens Creek Chrysler Jeep Dodge, Inc.</i> , 357 NLRB 633 (2011), <i>enforced sub nom.</i> , <i>Matthew Enter. Inc. v. NLRB</i> , 498 F. App'x 45 (D.C. Cir. 2012)..... | 59 |
| <i>Taylor Chair Co.</i> , 292 NLRB 658 (1989), <i>aff'd mem.</i> , 899 F.2d 12 (5th Cir. 1990) | 39 |
| <i>Tenneco Auto. Inc. v. NLRB</i> , 716 F.3d 640 (D.C. Cir. 2013)..... | 56, 61 |
| <i>Terrell Mach. Co. v. NLRB</i> , 427 F.2d 1088 (4th Cir. 1970) | 62 |
| <i>Tony Silva Painting, Co.</i> , 322 NLRB 989 (1997) | 41 |
| <i>Turtle Bay Resorts</i> , 353 NLRB 1242 (2009), <i>incorporated by reference</i> , 355 NLRB 706 (2010), <i>enforced</i> , 452 F. App'x 433 (5th Cir. 2011) | 41 |
| <i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)..... | 23 |
| <i>V&S ProGalv, Inc. v. NLRB</i> , 168 F.3d 270 (6th Cir. 1999) | 54, 59, 60 |
| <i>W&M Props. of Conn., Inc. v. NLRB</i> , 514 F.3d 1341 (D.C. Cir. 2008)..... | 42 |
| <i>W.F. Hall Printing Co.</i> , 250 NLRB 803 (1980) | 45 |
| <i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)..... | 24 |

TABLE OF AUTHORITIES

| Cases -Cont'd | Page(s) |
|--|--|
| <i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981)..... | 21, 46 |
| <i>York Prods., Inc. v. NLRB</i> , 881 F.2d 542 (8th Cir. 1989) | 47, 49 |
| Statutes: | |
| National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.) | |
| Section 7 (29 U.S.C. § 157) | 31, 43, 45, 59 |
| Section 8(a)(1) (29 U.S.C. § 158(a)(1)).... | 2, 3, 17, 18, 31, 32, 33, 42, 43, 46, 49, 53 |
| Section 8(a)(3) (29 U.S.C. § 158(a)(3))..... | 3, 18, 46 |
| Section 8(a)(5) (29 U.S.C. § 158(a)(5))..... | 3, 18, 19, 46, 49, 50, 53, 54 |
| Section 10(a) (29 U.S.C. § 160(a)) | 2 |
| Section 10(e) (29 U.S.C. § 160(e)) | 2, 24, 42 |
| Section 10(f) (29 U.S.C. § 160(f)) | 2 |
| Section 10(j) (29 U.S.C. § 160(j))..... | 63 |
| Miscellaneous: | |
| Board Case 26-RD-081637 Decision and Order, http://apps.nlr.gov/link/document.aspx/09031d4581677d90 (Mar. 31, 2014) | 13 |
| Letter, http://apps.nlr.gov/link/document.aspx/09031d458220d4b3 (Exhibit 3) (Sept. 6, 2016)..... | 13 |
| Order, http://apps.nlr.gov/link/document.aspx/09031d45822d602f (Dec. 9, 2016) | 13 |
| <i>Maker of Twinkies May Go Out of Business</i> , Washington Post, 2012 WLNR 24390261 (Nov. 16, 2012)..... | 36 |
| <i>Future of Hostess Hangs on Ultimatum to Strikers</i> , Kansas City Star, 2012 WLNR 24261404 (Nov. 14, 2012)..... | 36 |

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition of Southern Bakeries, LLC to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order finding that the Company committed numerous unfair labor practices. The Order issued on August 4, 2016, and is reported at 364 NLRB No.

64. (JA.1404-39.)¹ The Company filed its petition for review on August 10, 2016. The Board filed its cross-application for enforcement on August 26. Both filings were timely; the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (“the Act”), imposes no time limit on them.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes it to prevent unfair labor practices affecting commerce. The Board’s Order is final. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is proper because the unfair labor practices occurred in Hope, Arkansas.

STATEMENT OF THE ISSUES

1. Whether the Court should grant summary enforcement of many portions of the Board’s Order because they are uncontested or insufficiently challenged.

NLRB v. Rockline Indus., Inc., 412 F.3d 962 (8th Cir. 2005)

2. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by threatening and otherwise coercing employees.

NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)

Bank of St. Louis v. NLRB, 456 F.2d 1234 (8th Cir. 1982) (per curiam)

NLRB v. Noll Motors, Inc., 433 F.2d 853 (8th Cir. 1970)

¹ “JA” refers to the joint appendix; “Br.” refers to the Company’s brief.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by disciplining employees Sandra Phillips and Lorraine Marks for their union activities.

NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013)

4. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally restricting the Union's right to communicate with employees in the plant.

NLRB v. Ne. Okla. City Mfg. Co., 631 F.2d 669 (10th Cir. 1980)

Campo Slacks, Inc., 250 NLRB 420 (1980), *enforced mem.*, 659 F.2d 1069 (3rd Cir. 1981)

5. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain with it based on an antiunion petition tainted by the Company's unfair labor practices.

NLRB v. Williams Enters., Inc., 50 F.3d 1280 (4th Cir. 1995)

Columbia Portland Cement Co. v. NLRB, 979 F.2d 460 (6th Cir. 1992)

Miller Waste Mills, Inc., 334 NLRB 466 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003)

STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a complaint against the Company alleging numerous violations of the Act. (JA.366-82.) Following a hearing, an administrative law judge issued a decision and recommended order largely finding that the Company violated the Act as alleged. (JA.1422-39,1205-42.) After considering exceptions to the judge's decision filed by the Company and the General Counsel, the Board issued its Decision and Order affirming, as modified, the judge's findings and recommended order. (JA.1404.)

I. THE BOARD'S FINDINGS OF FACT

A. **The Company Purchases a Union-Represented Facility; Employees Vote to Retain the Union; the Company Attempts To Oust It**

For decades, the Union has represented a unit of approximately 200 production and sanitation workers at a commercial bakery in Hope, Arkansas. (JA.1423;3-4,267.) In 2005, the Company purchased the facility from Meyer's Bakeries after its bankruptcy, and recognized the Union as the employees' exclusive collective-bargaining representative. (JA.1404,1423;5,993.)

In 2009, an employee petitioned the Board for an election to decertify the Union. (JA.2.) In a Board-conducted, secret-ballot election, a majority of the employees voted to retain the Union as their collective-bargaining representative.

(JA.2,79.) The parties thereafter entered into a new collective-bargaining agreement effective from February 8, 2010, to February 8, 2012.

(JA.1423;8,442,447-77.) Near the contract's end, in December 2011, an employee circulated a second decertification petition. (JA.1423;409-10,411-18.)

In January 2012, as negotiations for a new contract began (JA.10-11), company human resources manager Linda Burke and director of manufacturing Dan Banks told a new employee that he should ignore anyone who tried to talk to him about the Union because "they're . . . trying to get rid of the Union."

(JA.1429;224.) "[I]f you want to get paid more," they instructed him, "then ignore everybody who's in the Union." (JA.1429;224.)

The Board's Regional Director, after an investigation, concluded that the Company had unlawfully promoted the December 2011 petition. (JA.1423;409.) In accordance with Board law and practice, the Director dismissed the petition in March 2012. (JA.1423;409.) The Company settled a complaint alleging that it had violated the Act by supporting the decertification effort. (JA.411-18.)

B. The Company Restricts Union Access to the Plant

Until 2012, the Union enjoyed an unrestricted right to meet with employees at the facility after providing the Company notice of its intention to visit. (JA.20; 11-13,1028-31.)² During those visits, the Union explored potential grievances, helped new employees join the Union, informed employees of upcoming union meetings, or discussed other employee concerns. (JA.1423;15-17,155.)

On March 8, 2012, the Company announced that the Union could only visit the facility to handle grievances. (JA.1423;1037.) Later that month, when the Union notified the Company that it intended to visit, the Company denied access. (JA.1423-24;1040-41.) On March 19, the Company stated that it would “consider visitation” only if the Union disclosed the specific grievances it was investigating and the names of employees with whom it planned to meet. (JA.1043.) The Union objected, noting that the collective-bargaining agreement did not require it to disclose that information and that the parties’ past practice had permitted broader access. (JA.1423;396.)

On March 20, the Company allowed the Union limited access, but prohibited it from meeting with employees in its customary place—in the break rooms where employees relaxed and ate. (JA.1424;1043,1048-49.) Instead, the Company

² The collective-bargaining agreement granted the Union the right, after providing notice, “to enter the production and sanitation departments for the purpose of seeing that the Agreement is being observed” and to engage in “visitation” in the “break room area.” (JA.1423;449-50.)

insisted that the Union's representative, Cesar Calderon, remain in a corridor outside those rooms, in a cubicle wedged among the vending machines.

(JA.1424;19-22,30-31,73,84-86,397.) The Company required Calderon to identify employees he wanted to see so that a company official could escort them into the cubicle, and threatened to call the police if he visited employees in the usual place.

(JA.1424;22-27,125.)

On March 23, citing anonymous complaints of "harassment," the Company banned Calderon from the facility. (JA.1424;33-34,1159.) Calderon had not, in fact, harassed anyone. (JA.1424;28-29.) In July, the Company denied the requests of another union representative, David Woods, to meet with employees in the break area in Calderon's stead. (JA.126,128,130-31.)

C. The Company Threatens an Employee; While the Union Is Banned from the Facility, an Employee Circulates a Third Decertification Petition, and an Election Is Scheduled

In 2012, supervisor Kenny White approached employee and union member Christopher Contreras and told him to sign a decertification petition if he wanted "better benefits and higher wages." (JA.1429;227.) White warned that "if they did not get the Union out, then this facility would go down like Hostess."

(JA.1430;228.) White later asked Contreras why he wanted to pay union dues each month just to shut down the plant, and said he could "get rid of [Contreras] at any time." (JA.1430;228-29.)

In May, while union representatives were still excluded from the facility, an employee filed a third petition with the Board to decertify the Union. (JA.1424; 259,1160.) The Director scheduled an election for February 7, 2013. (JA.226, 445.)

D. The Company Temporarily Restores Union Access; Union Representatives Discover New Surveillance Cameras in the Break Area and a Barrier Between Break Rooms

In late 2012, as part of a settlement of unfair-labor-practice charges, the Company agreed to allow the Union back into the facility. (JA.1424;35-36,76.) The Company, however, told the Union it would be restricted to the smaller of two break rooms, and that it could not solicit employees or discuss the upcoming election. (JA.1424;132-34,1064-65.) It also reinstated the requirement that the Union disclose issues it needed to investigate and name employees it needed to talk to. (JA.1425;1074,1092,1094.) The Company threatened to ban the Union from the premises if it did not abide by those restrictions, and to have any union representative who entered company premises without permission arrested. (JA.1425;1065,1094.)

On January 8, 2013, when union representatives visited the break area for the first time in over nine months, they discovered that the Company had installed surveillance cameras there. (JA.1424-25&n.12;38-40,135,442-43.) The Company had also replaced Plexiglas windows between the small and large break rooms with

plywood. (JA.1424-25;39-46,135-38,145-46,443.) The Company did not notify or offer to bargain with the Union before making either change. (JA.1424-25;39-40.)

E. The Company Threatens that if Employees Retain the Union, Jobs Will Be Lost, the Plant Will Close, and Bargaining Will Be Futile; Promises Benefits if Employees Decertify the Union; Coercively Disparages the Union; Promulgates a Rule Requiring Employees To Report “Harassment” in Relation to the Decertification Campaign; and Again Bans the Union from the Facility

As the scheduled decertification election approached, the Company ramped up its antiunion campaign. On January 17, three weeks before the election date, it disseminated a memorandum reminding employees that they had lost their jobs when the Company’s predecessor, Meyer’s, closed in 2005. (JA.1405-07,1425;993-97.) Regarding ongoing contract negotiations, the memorandum stated that if the parties reached impasse, the Company would be free to implement its final offer, and “[a]ll the [U]nion could do is reject the contract terms and call a strike (as they recently did at Hostess Bakeries).” (JA.994-95.) Indeed, it stated, “[t]he union appears to have plans to take our employees out on strike here in Hope, same as they recently did at Hostess, where over 18,000 jobs were lost and 33 bakeries and retail outlets closed.” (JA.995.) It cited no basis for that claim.

Throughout the memorandum, the Company accused the Union of making “false,” “misleading,” and “incredible” claims to “frighten” employees. (JA.994-97.) And after noting that the Company employed a “large number of Latino

employees,” the memorandum asserted that the Union had “discriminat[ed] against Hispanics through targeted grievance allegations.” (JA.997.)

On January 23, February 1, and February 5, Ledbetter held a series of mandatory meetings with groups of 150 to 170 unit employees, where he delivered 5 speeches accompanied by slides. (JA.1407-08,1425-27;967-92.) At the opening meetings, he instructed employees, “[i]f any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately so we can address the problem, just as we always have.” (JA.576,612.)

Throughout his speeches, Ledbetter communicated to employees that the Union intended to strike—and that a strike would cost them their jobs. He stated that unions had “strangled” companies in various industries “to death” (JA.1407;572,585), and urged employees to “look at what happened to Meyer’s Bakeries and most recently at Hostess” (JA.573,589). There, he said, a “strike by the [Union] resulted in the loss of over [18,000] jobs, the liquidation of 33 bakeries and over 500 bakery stores. That is one of the reasons why we do not want a union here.” (JA.573,589. *Accord* JA.623,676.) He returned repeatedly to the job losses following the Hostess strike and the Union’s plans to similarly strike, warning that the Union “plans to deal with [the Company] in the same way as Hostess with a strike and/or boycotts,” and that “[the Union]’s strike closed Hostess” and “[o]ver

18,000 people are without jobs.” (JA.689-90,692,708,731. *Accord* JA.691,695, 722,765,885,917-19.)

Strikes, he said, “hold a real threat of backfiring. And when they backfire, employees and their families are often the ones who get hurt. Hostess’ closure is a good example.” (JA.690,720-21. *Accord* JA.694,751,886,923.) He stated that strikes and boycotts can “seriously threaten[]” job security by causing lost business, which “means loss of profits, which generally means loss of jobs.” (JA.694,763,695,766. *Accord* JA.694,754.) By putting economic pressure on the Company in the past, Ledbetter stated, the Union had “put your jobs on the line.” (JA.782,816. *Accord* JA.781-82,814-15.) And, he reiterated, “[t]hey appear ready to again put our jobs at risk if they continue to represent you after the election.” (JA.782,816.) Bringing the message home, Ledbetter reminded employees of their experience under Meyer’s, and “the fear and uncertainty of being a failing company and knowing your jobs were in jeopardy” before “Meyer’s went out of business.” (JA.890.) Job security, he said, “is really the basic issue you will be voting on in this election.” (JA.889,944.)

Aside from strikes, Ledbetter stated that the Union “drags our Company down in so many ways.” (JA.572,585. *Accord* JA.783,821.) He explained that “the money spent dealing with the union in terms of potential boycotts, bargaining, adjudicating grievances and responding to complaints and possible arbitrations and

potential strikes means less money that is available for wage and benefit increases.” (JA.885,912.) And, he stated, “the more money a company spends on a union, the less money it has to provide safe, steady and secure good-paying jobs for its employees.” (JA.783,823.) He also said that “continuing to be represented by the [Union] could only hurt our changes of long-term success.” (JA.575,608.) He warned that if employees retained the Union, even those who chose not to pay dues would be “plagued by the increased costs the [C]ompany has to bear in dealing with a union.” (JA.574-75,606-07. *Accord* JA.620,850,884,908.)

Ledbetter also made clear that employees could gain nothing with the Union. “No union,” he said, “can provide you with higher wages, better benefits or job security.” (JA.573,600,602,891,952.) He said “unions are free to promise away,” but “the union has no power to make its promises come true.” (JA.1407;616,629-31,634. *Accord* JA.575,608,690,884,909.) He added that in collective bargaining, “all the union can do is ask and all the union can get is what the Company will agree to give.” (JA.1407;618,644. *Accord* JA.689,702,883,904.)

Finally, Ledbetter conveyed that the Company would reward employees for decertifying the Union. He repeatedly emphasized that the Company’s nonunion employees had received higher pay increases than union-represented employees. (JA.574,603,619,620,646,650,654-62,891,954-56.) That was so, he explained, because “we have incurred tens of thousands of dollars in legal fees that have left

us with less money to put into the pockets of our unionized employees than we have been able to give to our non-union workforce.” (JA.620. *Accord* JA.885, 912.) Similarly, he noted that “the money that is spent on bargaining and grievances and otherwise dealing with the union is money that is simply not otherwise available to our employees.” (JA.620. *Accord* JA.783,823.) Finally, purportedly responding to a rumor that the Company would cut wages and benefits after the Union was voted out, Ledbetter asked, “if you ran the business, would you punish employees for getting rid of the union?” (JA.785,833.) “If you think about the issue logically,” he continued, “you will know the answer to the question of what will happen to your wage, benefits and working conditions if [the Union] is voted out on Election Day.” (JA.785,834.)

F. Charges Are Filed, the Election Is Postponed, and the Company Again Prevents the Union from Meeting with Employees

The Union filed unfair-labor-practice charges against the Company, and the Director postponed the February election pending an investigation. (JA.1424;54.)³ On February 8, the Company again prevented the Union from accessing the

³ The Board ordered the election petition held in abeyance pending its disposition of this case. Decision and Order, Case 26-RD-081637, <http://apps.nlr.gov/link/document.aspx/09031d4581677d90> (Mar. 31, 2014). The Director subsequently dismissed the petition after determining that employee disaffection had been caused by the Company’s unlawful conduct. Letter, Case 26-RD-081637, <http://apps.nlr.gov/link/document.aspx/09031d458220d4b3> (Exhibit 3) (Sept. 6, 2016). The Board upheld the dismissal. Order, Case 26-RD-081637, <http://apps.nlr.gov/link/document.aspx/09031d45822d602f> (Dec. 9, 2016).

facility. (JA.1425;1130,1132,1135,1139-40.) Thereafter, the Company denied the Union any further access. (JA.1425;55,1176-84.)

G. The Company Interrogates and Disciplines Employees for Their Union Activities and Promises Better Wages Without the Union

In January, after the captive-audience meetings had begun, employee David Capetillo discussed the Union with other employees, including union supporters Lorraine Marks, Sandra Phillips, and Vicki Loudermilk. (JA.1427-28;59-60,154-56,175-81,1189.) Echoing Ledbetter's statements, Capetillo said the Union was to blame for Hostess' closure. Several days later, Phillips clipped an article that supported her contrary view—that Hostess management was responsible—and showed to Capetillo. (JA.1427;156-58,162-63.) Capetillo subsequently complained to the Company of “union harassment” by Phillips, Marks, and Loudermilk. (JA.1427-28;998.)

On February 4, human resources manager Burke questioned Marks, Phillips, and Loudermilk individually in her office. She used forms which stated, “[w]e have received a complaint of potential harassment regarding the upcoming election. As [Ledbetter] promised, we will investigate all complaints.” (JA.999-1001.) The forms warned that “dishonesty [is] a termination offense” and that “the bakery is under video monitoring.” (JA.999-1001.)

Burke asked Phillips whether she had told Capetillo that her article would demonstrate that Hostess' shutdown "was not the union's fault." (JA.1410;999.) Phillips acknowledged that she had asked Capetillo to read the article. (JA.1410; 999.) Burke asked Marks whether she had told Capetillo that he would lose his job if the Union were decertified, or that he only had a job because his parents worked for the Company. Marks denied making those statements. (JA.1410;1000.) Finally, Burke asked Loudermilk whether she had asked Capetillo how he planned to vote, which Loudermilk denied. (JA.1410;1001.)

On March 27, the Company issued Phillips a written warning for bringing a newspaper into a production area. (JA.1428;1002-03.) No other employee had ever been disciplined for that offense. (JA.322-23,327.) The Company also instructed Phillips "to refrain from behavior that creates a hostile work environment or harassment of fellow employees." (JA.1002-03.) On the same day, the Company also issued written personnel file documentations to Marks and Loudermilk. (JA.1428;1011-26.)

In April, the Company hired employee Jeremy Woods. (JA.98-103.) When Burke and Banks interviewed Woods, they told him a decertification vote was approaching and that "they could offer him better wages than the Union could." (JA.1430;100.)

H. The Company Suspends and Issues a Final Warning to Marks

On May 24, Marks was unable to find a supervisor when she urgently needed to use the restroom, so Phillips covered her spot on the line for five minutes. (JA.1428;190-91.) Banks discovered that Marks had used the restroom without permission, and Burke questioned and then suspended her that day. (JA.1428;191-92,195,1185.) The suspension lasted until May 31. (JA.193-94.) On May 30, the Company issued Marks a final warning for leaving an assigned work area without permission. (JA.1428-29;193,1186-88.)

Other employees regularly left the line, sometimes within view of a supervisor, to use the restroom without permission. (JA.1429;196,205-07.) The Company, however, had never disciplined anyone else for doing so. (JA.1429;58.) Marks was a particularly active union supporter who had regularly met with union representatives in the break area, picketed the Company during contract negotiations, and filed a class-action grievance that won backpay for 15 employees. (JA.1428;56-57,177-81,198-200,400.)

I. While the Union Is Excluded, an Antiunion Petition Circulates; the Company Withdraws Recognition and Fulfills Its Promise To Raise Wages

In May and June, while the Company continued to bar the Union from the facility, an employee circulated a petition asking the Company to withdraw recognition from the Union. (JA.1430;1161-72.) Relying solely on that petition,

the Company did so on July 3. (JA.1430;1190.) On September 29, the Company granted employees an across-the-board wage increase that was larger than the last offer the Company had made to the Union in contract negotiations.

(JA.1404,1431;299.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Miscimarra and Hirozawa) found, in agreement with the judge, that the Company violated Section 8(a)(1), (3), and (5) of the Act. (JA.1404.) The Board found that the Company coerced employees in violation of Section 8(a)(1) by:

- Threatening employees with discipline, job loss, and plant closure if they supported the Union (JA.1404n.1,1430-31);
- Promising to reward employees with higher wages and other benefits if they rejected the Union (JA.1401,1432);
- Threatening that continued union representation would be futile (JA.1407-08,1432);
- Coercively disparaging the Union (JA.1405-06,1433);
- Installing cameras that created an impression that employees' union activities were under surveillance (JA.1404,1432);

- Promulgating a rule requiring employees to report other employees' union activities to the Company, and threatening unspecified reprisals for engaging in union activities (JA.1404n.1,1408-09,1432-33); and
- Interrogating Contreras, Phillips, Marks, and Loudermilk about their union activities (JA.1409-10,1431).

The Board further found that the Company violated Section 8(a)(3) and (1)

by:

- Investigating and disciplining Marks and Loudermilk for talking about the Union (JA.1404n.1,1409n.16,1433);
- Investigating and disciplining Phillips for showing Capetillo a newspaper clipping about the Union (JA.1404,1409n.16,1434); and
- Investigating, suspending, and issuing a final written warning to Marks for her union activities (JA.1404,1433-34).

Finally, the Board found that the Company violated Section 8(a)(5) and (1)

by:

- Failing to bargain before installing surveillance cameras in the Union's meeting area (JA.1404n.1,1434);
- Unilaterally restricting the Union's right to meet with employees (JA.1404,1434-35);
- Withdrawing recognition from the Union (JA.1404,1435); and

- Unilaterally granting employees a wage increase (JA.1404,1435).

Concurring in part and dissenting in part, Member Miscimarra disagreed with or did not pass on several of the Board majority's findings. (JA.1412-21.) Nonetheless, he agreed that the Company violated the Act in numerous respects. (JA.1412&n.1.) In particular, he agreed that because the Company's unfair labor practices caused employees to abandon the Union, its withdrawal of recognition was unlawful. (JA.1412&n.1.)

The Board's Order requires the Company to cease and desist from its unlawful conduct, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (JA.1411-12.) Affirmatively, it requires the Company to bargain with the Union and rescind the unilaterally granted wage increase if the Union so requests; restore the Union's access rights; remove cameras installed without bargaining; rescind the unlawfully promulgated rule; rescind the unlawful discipline issued against Marks, Phillips, and Loudermilk, and make Marks whole for her unlawful suspension; post a notice; and have a company official or Board agent read the notice to unit employees. (JA.1411-12.)

SUMMARY OF ARGUMENT

1. The Court should summarily enforce the Board's Order to the extent the Company fails to contest it or raises only meritless credibility- or notice-based challenges. The Company has not contested, before the Board or the Court, the Board's findings that it unlawfully failed to bargain before installing cameras in the break area and investigated and disciplined Marks and Loudermilk for their union activities. In addition, the Company inadequately argued its exception to the judge's findings that it made threats of job loss, discharge, and unspecified reprisals. As to the Board's findings that the Company threatened, interrogated, and promised benefits to Woods and Contreras, the Company raises only meritless credibility challenges. Similarly, with regard to its interrogation of Marks, Phillips, and Loudermilk, the Company only claims, unconvincingly, that it did not understand the allegations against it. After rejecting the Company's limited contentions, the Court should grant enforcement as to all of these matters.

2. Substantial evidence supports the Board's findings that the Company made numerous unlawfully coercive statements to employees. The Board reasonably found that the Company threatened plant closure and job loss, and unlawfully disparaged the Union, when it linked the recent closure of a unionized former competitor to its own impending shutdown if employees kept their representation. The Board also reasonably found that the Company unlawfully coerced employees

by characterizing bargaining as a pointless exercise that would inevitably leave them with less than nonunion coworkers. And the Board reasonably found that the Company violated the Act when it promised employees that they would get more if they, too, got rid of the Union. Contrary to the Company's arguments, its statements were outside the Act's free-speech safe harbor because reasonable employees would have understood them as threats and promises of benefits.

The Board also reasonably found that the Company unlawfully ordered employees to inform it about protected, union-related activities. Under established law, that rule was unlawful both because it was promulgated in response to union activities and because, in the midst of a campaign free of actual evidence of harassment, employees reasonably would have understood it to restrict lawful solicitation.

Undisputed evidence also supports the Board's finding that the Company created an unlawful impression of surveillance when, without explanation, it installed surveillance cameras in the area where the Union met with employees. The Company did not erase that violation by subsequently disabling the cameras at certain times.

3. Substantial evidence supports the Board's findings that the Company unlawfully disciplined Phillips and Marks for their union activities. Applying its well-established *Wright Line* framework, the Board properly found that the

Company's animus toward Phillips' and Marks' union activities was a motivating factor in its decision to discipline them. Before the Court, the Company presses its affirmative defense that it disciplined them for violating work rules. But the Company did not meet its burden of establishing that it would have taken the same action absent their union activity. In particular, it failed to show that it had ever before suspended an employee for using the restroom or disciplined anyone for having a newspaper clipping on the work floor.

4. Substantial evidence supports the Board's finding that the Company breached its duty to bargain by repeatedly curtailing the Union's contractual right to freely meet with employees in their break area. The Company relies on its own overly narrow construction of the contract, failing to recognize that the parties' established past practice had given it a broader meaning that the Company could not unilaterally abridge.

5. Finally, substantial evidence supports the Board's finding that the Company violated the Act by withdrawing recognition from the Union and unilaterally granting the wage increase it had promised to employees if they rejected the Union. The Board reasonably found that the Company's course of unlawful conduct—including its hallmark violations of threatening plant closure and suspending a union advocate, and its evisceration of employees' ability to meet with their representative—predictably eroded the Union's majority support.

Indeed, the correlation between that unlawful conduct and employees' increasing levels of disaffection corroborates the Board's reasonable judgment that the Company's efforts to undermine the Union had their desired effect.

STANDARD OF REVIEW

This Court's review of the Board's fact-finding is limited in scope. *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779-80 (8th Cir. 2013). 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); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). In evaluating whether the Board's credibility determinations are supported by substantial evidence, the Court "afford[s] great deference to the findings of the [judge] and the Board and will not overturn them unless they shock the conscience." *RELCO*, 734 F.3d at 787. The Court also "defer[s] to the Board's conclusions of law if they are based upon a reasonably defensible construction of the Act." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003).

ARGUMENT

I. THE COURT SHOULD GRANT SUMMARY ENFORCEMENT OF MANY PORTIONS OF THE BOARD'S ORDER

A. Numerous Uncontested Board Findings Are Not Properly Before the Court

The Company has failed to preserve numerous challenges to the Board's Order. Under Section 10(e) of the Act (29 U.S.C. § 160(e)), the Court lacks jurisdiction to consider any argument the Company failed to raise to the Board. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). In addition, under the Court's practice, "points not meaningfully argued in an opening brief are waived." *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007).

Before the Board, the Company did not except to the judge's findings that it violated the Act by failing to notify and offer to bargain with the Union before installing cameras in the break area (JA.1404n.1,1411,1434), and by investigating and disciplining Marks and Loudermilk for talking about the Union (JA.1404n.1,1409n.16,1411,1433-34). Nor did the Company meaningfully contest those findings in its opening brief. For both of those reasons, the Court should summarily enforce the Board's Order to the extent it remedies those violations. *See NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005).

The Board also found that supervisor White threatened Contreras with discharge and job loss (JA.1431), and that Ledbetter threatened employees with strike-related job loss (JA.1431) and threatened unspecified reprisals when he said the Company would “address the problem” when employees reported “harassment” during the decertification campaign (JA.1432-33). The Board found that the Company inadequately argued, and thus failed to preserve, challenges to those findings. (JA.1404n.1.) Although, as the Company notes (Br.38), its first exception referenced unspecified reprisals, its argument under that heading (JA.1262-66) did not contend with the judge’s finding (JA.1432-33) that Ledbetter’s harassment-related order constituted such a threat. And as explained below (pp.26-29), the Company never disputed that White’s statements, as recounted by Contreras, were threats; it merely attacked Contreras’ credibility. (JA.1263-64.) Finally, the legal argument it did offer to support its first exception focused primarily on threats of plant closure. (JA.1262.)⁴

Finally, the Company did not specifically challenge any of the Order’s remedies before the Board or the Court, including its requirements to bargain with the Union and read a notice. (JA.1411-12.) The Court therefore lacks jurisdiction

⁴ In any event, if the Company did adequately argue its job-loss-threat exception or if its arguments regarding threats of plant closure and job loss are interchangeable, as it argues (Br.38), the Board reasonably rejected those contentions when it found that the Company unlawfully characterized the Union as “prone to engaging in strikes that resulted in job loss” (JA.1407), as explained at greater length below (pp.33-43).

to consider any such arguments. *See NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 826-27 (8th Cir. 2000); *NLRB v. Midwest Hanger Co.*, 474 F.2d 1155, 1163 (8th Cir. 1973) (enforcing bargaining order after rejecting employer’s “sole [challenge] that it committed no unfair labor practices”).

As to all the foregoing matters, the Board “is entitled to summary enforcement.” *NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008).⁵

B. The Company Contests Other Findings Only with Meritless Credibility Challenges

As to the Board’s findings that the Company promised benefits to Woods and threatened and interrogated Contreras, the Company has disputed only the Board’s credibility determinations—not whether the credited facts establish a violation. As the Company concedes, however, “this court does not disturb the credibility determinations of the Board.” (Br.42.) The Company provides no basis for doing so here.

The Board found that the Company unlawfully promised Woods improvements if employees decertified the Union, stating it could offer “better wages than the Union.” (JA.1430,1432;100.) *See De Queen Gen. Hosp.*, 264 NLRB 480, 487 (1982), *enforced*, 744 F.2d 612 (8th Cir. 1984). The Board credited Woods’ testimony, noting his “strong recollection,” in contrast with

⁵ The Court should disregard amicus’ attempts to inject new issues, remedial and otherwise, “that exceed those properly raised by the parties.” *Cellnet Comm., Inc. v. FCC*, 149 F.3d 429, 443 (6th Cir. 1998).

managers’ “poor recall of the meeting.” (JA.1430.) *See NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1259 (8th Cir. 1982). The Board also noted (JA.1430) that the promise Woods recalled was “deeply consistent” with promises the Company made at captive-audience meetings. (*See* pp.33-40, below.) The Company asks the Court to overturn those determinations because Woods recounted managers referencing an upcoming decertification vote during his April 2013 interview, the month after the election was postponed. (Br.46-47.) But his testimony—that the Company said “they were going through a process of whether or not they wanted to keep the Union” and “they were going to put it up for a vote” (JA.100)—was consistent with the postponed election date being up in the air.

The Company’s arguments regarding Contreras similarly fail. The Board found (JA.1404 n.1,1429-30,1431-32) that White threatened Contreras with discharge and job loss when he said he could get rid of Contreras whenever he wanted, and threatened plant closure when he said ““if they did not get the Union out, then this facility would go down like Hostess.”” (JA.1430 (citing JA.228)). The Board also found (JA.1409,1411,1430,1431) that two weeks later, White interrogated Contreras, asking why he was a dues-paying union member. The Board found Contreras to be “a generally credible witness, who was candid about sensitive issues, including his poor attendance and criminal record.” (JA.1430.) White, by contrast, was “less than credible,” and “seemed more committed to

pleasing [the Company] than offering a candid account.” (JA.1430.) And as the Board noted, the threats Contreras described were consistent with the ones the Company made in captive-audience meetings. (JA.1430.)

The Company provides no reason for overturning those findings. As with Woods, it seizes on a supposed inconsistency in timing, noting (Br.44-45) that, although there was no other evidence that a decertification petition was circulating in November 2012, Contreras thought that was when White and Hankins asked him to sign one. But at the hearing, the Company never confronted Contreras with that potential inconsistency. As a result, the record does not disclose whether Contreras was simply mistaken as to when the conversation occurred, or whether someone did, in fact, circulate another petition around that time. In any event, neither circumstance would have required the judge to discredit Contreras. *See Harper & Row Publishers, Inc. v. NLRB*, 476 F.2d 430, 434 (8th Cir. 1973) (testimony was reliable despite possible error in employee’s recollection as to timing); *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1530, 1532 (11th Cir. 1987). *Cf. SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10-11 (D.C. Cir. 2012) (Board permissibly credited employee who described being asked to sign a decertification petition before one was established to have existed).

More generally, the Company complains (Br.42-43) that the Board credited the General Counsel’s witnesses over its own. But credibility determinations are

not invalid simply because the Board “uniformly credited the Board’s witnesses and as uniformly discredited those of the [employer].” *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) (quotation omitted). *Accord Eldeco, Inc. v. NLRB*, 132 F.3d 1007, 1010 (4th Cir. 1997). Nor, contrary to the Company’s insinuations (Br.42-43), is there anything improper about the Board’s use of well-established, standardized language to describe its review of judges’ credibility determinations under *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enforced*, 188 F.2d 362 (3d Cir. 1951).

C. The Company Challenges Other Findings Only on Notice Grounds, Which the Board Reasonably Rejected

The Company does not raise, and therefore waives, any challenge to the merits of the Board’s findings (JA.1409-10) that it unlawfully interrogated Marks, Loudermilk, and Phillips when Burke questioned them about their union-related interactions with Capetillo. *See Cintas Corp. v. NLRB*, 589 F.3d 905, 916 (8th Cir. 2009). It contends only that it lacked notice of the allegations because the complaint referenced interrogations “during captive audience meetings” (Br.52), whereas they actually took place during investigatory meetings the three employees were required to attend.

The Board properly rejected that contention. (JA.1409n.18.) In Board proceedings, “[t]he complaint is not to be judged by rigid pleading rules.” *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977). The Court has long

held that “a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded.” *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 77 (8th Cir. 1969) (quotation omitted). Here, despite an errant reference to captive-audience meetings, the Company does not dispute that it “was on notice of the dates, the individuals, and the basic substance of the claim, and the parties fully litigated the matter.” (JA.1409n.18.) *See McGraw-Edison*, 419 F.2d at 77. Because “it is plain that [the Company] knew what was going on, that is where the matter ends.” *Sunnyland Packing*, 557 F.2d at 1162.

* * *

In sum, after rejecting the Company’s credibility- and notice-related arguments, the Court should summarily enforce the Board’s findings that the Company violated the Act by:

- Unilaterally installing surveillance cameras;
- Investigating and disciplining Marks and Loudermilk;
- Interrogating Contreras and threatening him with discharge, job loss, and plant closure;
- Threatening other employees with job loss during captive-audience meetings;
- Promising benefits to Woods if employees decertified the Union; and

- Interrogating Marks, Loudermilk, and Phillips.

Those findings remain in the case, “lending their aroma to the context in which the remaining issues are considered.” *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (quotation omitted). As shown below (pp.47-48,53-64), they “furnish important background to the other violations,” *NLRB v. Broyhill Co.*, 514 F.2d 655, 656 n.2 (8th Cir. 1975), confirming the Company’s antiunion animus and reinforcing the coercive impact of its other violations.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY COERCING EMPLOYEES IN NUMEROUS RESPECTS

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to “form, join, or assist labor organizations” and “bargain collectively through representatives of their own choosing.” An employer violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interfering with, restraining, or coercing employees in their exercise of those rights. The question is not whether actual coercion occurred, but rather whether the employer’s statement or conduct “reasonably tends” to coerce employees. *DeQueen Gen. Hosp. v. NLRB*, 744 F.2d 612, 614 (8th Cir. 1984). As shown below, substantial evidence supports the Board’s findings that the Company committed many serious violations of Section 8(a)(1).

A. The Company Unlawfully Created the Impression that Employees' Interactions with the Union Were Under Surveillance

Conduct that suggests an employer is monitoring employees' union activities is coercive, and therefore violates Section 8(a)(1), because it tends to "inhibit the employees' right to pursue [those] activities untrammelled by fear of possible employer retaliation." *Chem Fab*, 691 F.2d at 1258. Ample evidence supports the Board's findings that the Company created an unlawful impression of surveillance when it installed cameras in the employee break area. (JA.1432.)

It is undisputed that "the break area was the hub" of union activity within the plant. (JA.1432.) The Company provided no immediate explanation for installing cameras there just before letting the Union back in after months of exclusion. (JA.1424&n.12.) Employees attempting to meet with the Union on January 8 and 11 beneath the newly installed cameras (JA.38-43,138-39) reasonably would have believed the Company was watching. It is unsurprising, then, that fewer employees than usual met with the Union on January 8. (JA.38-43,211-12.)

The Company fails (Br.43-44) to negate the unlawful impact of its conduct. Regardless of what the cameras actually captured, they appeared to be pointed at break-room doors, showing the comings and goings of employees meeting with the Union. (JA.152.) *See Labor Ready, Inc.*, 327 NLRB 1055, 1059 (1999) (whether or not video camera was on, employer created impression of surveillance by setting

it up near union organizer), *enforced*, 253 F.3d 195 (4th Cir. 2001). And the Company did not explain the cameras to employees until January 14, 2013—after it had created an impression of surveillance on January 8 and 11. (JA.401.) *See Seton Co.*, 332 NLRB 979, 981 (2000) (brief videotaping of union activities was unlawful). Nor did the Company effectively repudiate the violation by subsequently covering up the cameras. *See Cintas*, 589 F.3d at 915.

B. The Company Unlawfully Threatened Employees with Plant Closure and Futility, and Promised Benefits

An employer violates Section 8(a)(1) if it threatens that union activities will be futile or lead to plant closure, *NLRB v. Noll Motors, Inc.*, 433 F.2d 853, 855-56 (8th Cir. 1970), or promises to reward employees if they reject union representation, *NLRB v. Spotlight Co.*, 462 F.2d 18, 18 (8th Cir. 1972) (*per curiam*). Threats or promises need not be explicit. *Concepts & Designs, Inc.*, 318 NLRB 948, 954-55 (1995), *enforced*, 101 F.3d 1243 (8th Cir. 1996). In evaluating whether an employer has made implied threats or promises, the Board recognizes that economically dependent employees will “pick up intended implications of the [employer] that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

“The coercive effect of an employer’s speech in a particular labor relations setting[] is a question essentially for the specialized experience of the NLRB.”

J.P. Stevens & Co. v. NLRB, 638 F.2d 676, 687 (4th Cir. 1980) (quotation omitted).

Accordingly, contrary to the Company's request for de novo review (Br.24), the courts "must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship." *Gissel*, 395 U.S. at 620. Substantial evidence supports the Board's findings (JA.1407-08,1431-32) that the Company, in addition to overtly threatening and making promises to individual employees as discussed above (pp.26-29), made numerous more subtle threats and promises during captive-audience meetings.

As the Board explained (JA.1407), Ledbetter told employees that unions had "strangled" numerous companies "to death." (JA.572,585.) In context, that extreme language was not harmless rhetoric, as the Company would have it. (Br.30-31.) As shown (pp.9-11), time and again, Ledbetter emphasized that another bakery, Hostess, had closed because of the same union that represented unit employees, throwing 18,000 out of work. In doing so, as the Board explained, Ledbetter vividly "depicted a causal relationship between unionization and plant closure." (JA.1407.) And when he said that the closure at Hostess was "why we do not want a union here," he communicated that the Company, like Hostess, would close if the Union remained. (JA.1407.) *See Noll Motors*, 433 F.2d at 854-56 (employer's speeches citing "other plants in the community where employees had been laid off following their vote to unionize" was an unlawful prediction "that unionization would inevitably cause the plant to close"); *NLRB v. Garry Mfg. Co.*,

630 F.2d 934, 939 & n.3 (3d Cir. 1980) (employer threatened employees by referencing local unionized employer which had closed and communicating that “the Union could insist upon demands which, if forced upon the Company, would make the Company unable to compete”); *Homer D. Bronson Co.*, 349 NLRB 512, 512-14 (2007); *Eldorado Tool*, 325 NLRB 222, 224 (1997).

There is no merit to the Company’s claim that it was merely “sharing information.” (Br.30-31.) Its constant references to Hostess’ ruin conveyed its firm belief that if employees retained the Union, what happened to Hostess would also happen in Hope. As the Supreme Court has recognized, “conveyance of the employer’s belief, even though sincere, that unionization will or may result in the closing of the plant is not a [lawful] statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.” *Gissel*, 395 U.S. at 618-19 (quotation and brackets omitted). Absent such proof, an employer’s warning of possible plant closure is a threat. *NLRB v. C.J. Pearson Co.*, 420 F.2d 695, 695 (1st Cir. 1969) (per curiam).

Here, as the Board found (JA.1407,1432n.33), the Company provided no “objective facts about the [Company]” to substantiate its claim that the Union would drive it to Hostess’ end. In particular, it never established that the demands the Union had made at Hostess would be repeated in bargaining with the

Company.⁶ See *NLRB v. Mark I Tune-Up Ctrs., Inc.*, 691 F.2d 415, 417 (8th Cir. 1982) (where “Board found no objective basis” for predictions, employer did not escape liability by “couch[ing] [its] remarks in terms of the possible economic consequences of unionization”); *De Queen*, 264 NLRB at 485 (employer threatened employees by conveying “that there would be a decline in business at the hospital in the future if the Union were voted in”). *Patsy Bee, Inc. v. NLRB*, 654 F.2d 515 (8th Cir. 1981), which the Company cites (Br.31), is not to the contrary. There, the employer had an objective basis for comparing its plant to others that had failed: the “established policies” of its two largest customers were to “pull their contracts if the plant went union.” *Id.* at 516-17. And unlike the Company, the employer in *Patsy Bee* displayed no hostility toward the union. *Id.* at 517-18.

As the Board found (JA.1407), the Company reinforced its plant-closure threat by warning that it did not have to “stay open or keep all of its employees” for the full term of a collective-bargaining agreement (JA.778,795), insisting that

⁶ On the contrary, regarding pensions, the Company’s own statements indicate that the Union never made the demands that, according to Hostess management, caused that company’s downfall. Compare JA.994 (noting that the Company did not participate in the Union’s multiemployer pension plan, and that the Union had never asked it to) with *Maker of Twinkies May Go Out of Business*, Washington Post, 2012 WLNR 24390261 (Nov. 16, 2012) (Hostess “cited increasing pension and medical costs for employees as one of the drivers behind [bankruptcy] filing”); *Future of Hostess Hangs on Ultimatum to Strikers*, Kansas City Star, 2012 WLNR 24261404 (Nov. 14, 2012) (stating that union was not willing to “give up [employee] pension”).

the Union had “put your jobs on the line” (JA.782,816), and emphasizing that the cost of dealing with the Union, including hiring “expensive lawyers,” left it less able “to provide safe, steady and secure good-paying jobs for its employees” (JA.783,823). Such statements coercively “impl[y] that further union activities would deprive the employees of pay they might otherwise receive.” *Pilot Freight Carriers, Inc.*, 223 NLRB 286, 286 n.1 (1976), *enforced*, 604 F.2d 375 (5th Cir. 1979). Settled law refutes the Company’s claim (Br.36-37) that it was permitted to make them under the guise of describing business realities. *See NLRB v. Gerbes Super Markets, Inc.*, 436 F.2d 19, 21 (8th Cir. 1971) (statement that “the company might have to close the store because it couldn’t afford to pay union wages” coerced employees); *Mesker Door, Inc.*, 357 NLRB 591, 595-96 (2011) (employer threatened employees by stating that money spent on legal fees dealing with union “could have gone into improving life here in the plant”).

In addition to threatening job losses resulting from the money the Company spent dealing with the Union, Ledbetter communicated that those costs would leave union-represented employees’ compensation perpetually lagging behind that of unrepresented employees. And he underscored that the Union was powerless to produce improvements because it could only ask for more. If it went beyond asking—that is, if it struck—the Company would close, like Hostess. (*See* pp.9-13.) Taken together, those statements conveyed that continued union

representation would be futile (JA.1407), while ousting the Union would win unit employees higher wages and benefits (JA.1432). *See Aqua Cool*, 332 NLRB 95, 96 (2000) (Board found, “independently” of any bargaining-from-scratch threats, that employer threatened futility by saying “employees were unlikely to win anything more (and possibly less) at the bargaining table than the bulk of the [employer]’s employees”); *De Queen*, 264 NLRB at 487 (employer promised improvements by referencing “new policies being instituted” that would not apply to represented employees).

The Company erroneously argues that it never implied it would “tak[e] adverse action against workers on its own initiative.” (Br.32-34.) On the contrary, it threatened that employees would have to strike to get more than it wanted to give, and what it wanted to give was up to the Company alone. *See Garry Mfg.*, 630 F.2d at 939 (employer threatened that union would only make gains “by resort to economic coercion,” which “evidenced a willingness to force the union to strike”). And the Company’s claim (Br.37) that it lawfully compared represented and unrepresented employee compensation is at odds with the facts. The Company embellished those comparisons with winking assurances that the Board reasonably considered to be implied promises. (JA.785,834 (“If you think about the issue logically, you will know the answer to the question of what will happen to your

wage, benefits and working conditions if [the Union] is voted out on Election Day.”).)

Finally, contrary to the Company’s claims (Br.31-32,35-36), it did not neutralize its coercive statements by stating a willingness to work with the Union. *See Harper & Row Publishers*, 196 NLRB 343, 348, 353 (1972) (employer said “he’d work with a union or without a union,” but if a union came in, employees would lose holidays and pay), *enforced*, 476 F.2d 430 (8th Cir. 1973); *Garry Mfg.*, 630 F.2d at 939 (finding unlawful threat despite statement that employer “would bargain in good faith”); *Taylor Chair Co.*, 292 NLRB 658, 658 n.2 (1989) (employer did not effectively disavow plant-closure threat by subsequently stating that it “intend[ed] to operate the plant regardless of the results of the election or negotiations”), *aff’d mem.*, 899 F.2d 12 (5th Cir. 1990). The Board reasonably found that the Company’s “intermittent recognition of employees’ statutory rights” (JA.1408) failed to counterbalance its overarching message that bargaining could not lead to improvements, only subpar wages or catastrophic strikes. *See Noll Motors*, 433 F.2d at 855 (speech contained threats notwithstanding employer’s disclaimer that “you have every right to vote union or not as you choose”).

C. The Company Unlawfully Disparaged the Union

In the context of other unlawful coercion, an employer's disparagement of a union to the employees it represents may rise to the level of an implicit threat.

Fred Meyer Stores, 362 NLRB No. 82, 2015 WL 1956201, at *4 (Apr. 30, 2015), *review pending*, Nos. 15-1135, 15-1167 (D.C. Cir.). Here, the Board reasonably found (JA.1405) that the Company's January 17, 2013 memorandum unlawfully disparaged the Union.

Like the Company's captive-audience speeches, the January 17 memorandum used Hostess' example to coercive effect. (JA.1405-06.) It stated that if the Union did not agree to the Company's final offer in then-ongoing negotiations, "[a]ll the union could do is reject the contract terms and call a strike (as they recently did at Hostess Bakeries)." (JA.994-95.) Indeed, it declared without substantiation, "[t]he union appears to have plans to take our employees out on strike here in Hope, same as they did recently at Hostess, where over 18,000 jobs were lost and 33 bakeries and 500 retail outlets were closed." (JA.995.) "Perhaps," the Company continued, "that is why the International (Maryland) [Union] representatives have come to Hope." (JA.995.) The memorandum also labeled union statements false and accused the Union of discriminating against Hispanic employees. (JA.1405-07.)

As the Board found (JA.1406), the memorandum conveyed the message— unsupported by evidence of any kind—that the Union was planning a strike that would, as with Hostess, close the plant. (JA.1406-07.) The Board reasonably found that the Company exceeded the bounds of lawful expression by disparaging the Union as dishonest and discriminatory while threatening that supporting it would cost employees their jobs. (JA.1405-07.) *See NLRB v. Miller Waste Mills*, 315 F.3d 951, 955 (8th Cir. 2003) (employer unlawfully “blamed the union for preventing a wage increase”); *Turtle Bay Resorts*, 353 NLRB 1242, 1263, 1278-79 (2009) (finding unlawful disparagement coupled with a threat where employer called union representative a liar and threatened to discipline employees who talked to her), *incorporated by reference*, 355 NLRB 706 (2010), *enforced*, 452 F. App’x 433 (5th Cir. 2011); *Tony Silva Painting, Co.*, 322 NLRB 989, 989 n.1, 993 n.5 (1997).

The Company does not dispute that disparagement can be unlawful. Rather, it argues (Br.26-27) that it lawfully described the Union’s history of strikes and bankruptcy. But as the Board explained (JA.1406&nn.8-9), employees would have understood the Company’s recitation of Hostess’ and Meyer’s misfortunes, coupled with claims of union strike plans, to be a prediction of plant closure. *See Eldorado Tool*, 325 NLRB 222, 223 (1997). And because the Company never established that the Union actually had such plans, it did not meet its “burden of

showing its predictions [we]re based on objective fact.” (JA.1406 n.9 (citing *Gissel*, 395 U.S. at 618).) Indeed, as noted above, the Company provided no reason to think that the Union would pursue the same bargaining strategy with the Company that had failed at Hostess. *See Iplli, Inc.*, 321 NLRB 463, 468 (1996) (employer’s predictions of job loss were unlawful because it did not know what impact union’s ultimate demands would have on labor costs).

Finally, the Company argues (Br.28-29) that it was entitled to respond to a purported union claim that the Company would discriminate against Latino employees. But the Board found that even assuming that response was lawful, the Company’s further accusation of racial discrimination on the Union’s part was “additional evidence of unlawful disparagement.” (JA.1407.) *See Holiday Inn of Chicago-S.*, 209 NLRB 11, 11 (1974) (employer’s “racially oriented statement” violated Section 8(a)(1).) The Company argues (Br.29-30) that the Board’s reliance on that language violates due process, but it did not use the Board’s motion-for-reconsideration procedure to make that argument to the Board. *See W&M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345-46 (D.C. Cir. 2008). Accordingly, under Section 10(e) of the Act, the Court lacks jurisdiction to consider it. *See id.*

The Company also asserts (Br.28-29) that the memorandum was permissible campaign propaganda under *Midland National Life Insurance*, 263 NLRB 127

(1982). As the Board explained (JA.1406n.8), however, under *Midland* it continues to guard against “threats, promises, or the like,” which it reasonably found here. *Cf. Eldorado Tool*, 325 NLRB at 224 (threats are unlawful even if union has opportunity to respond).

D. The Company Promulgated an Unlawful Rule

An employer violates Section 8(a)(1) when it promulgates a work rule that “would reasonably tend to chill employees in the exercise of their [protected] rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Under settled Board law, which the Company does not challenge, a rule is unlawful if employees would reasonably construe it to prohibit, or if it was issued in response to, activity protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Here, the Board found that the Company violated Section 8(a)(1) by promulgating a rule requiring employees to report harassment relating to the decertification campaign. The Board concluded (JA.1409) that employees would reasonably construe that rule to prohibit activity protected by Section 7, and that the Company issued it in response to protected activities. (JA.1409.) Ample evidence supports both findings.

First, the Board reasonably found that employees would understand the Company’s rule to require employees to report Section 7 activity. (JA.1409.) Section 7 protects “persistent union solicitation even when it annoys or disturbs the

employees who are being solicited.” *Ryder Truck Rental*, 341 NLRB 761, 761 (2004), *enforced*, 401 F.3d 815 (7th Cir. 2005). And as the Court has recognized, in an ordinary union campaign, employees will understand an employer’s orders to report threats or harassment “in the context of conduct which had actually occurred—namely, persistent union solicitation which was protected under the [A]ct,” leading them to assume that such solicitation is proscribed. *Bank of St. Louis v. NLRB*, 456 F.2d 1234, 1235 (8th Cir. 1982) (per curiam). *Accord Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 363-64 (D.C. Cir. 2016); *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979).

Here, at the end of a speech in which the Company threatened employees with dire consequences if they retained union representation, it suggested that employees might have faced harassment for opposing the Union. (JA.576.) It then instructed employees to report any such harassment “immediately” so that the Company could “address the problem.” (JA.576.) Thus, as the Board explained (JA.1409), the Company linked pro-union activity with “harassment,” which it did not define but made clear it would punish. In context, the Board reasonably determined (JA.1409) that employees would have feared being reported and disciplined for lawful campaign activities others might subjectively consider harassing. *See Hawkins-Hawkins Co.*, 289 NLRB 1423, 1424 (1988) (by instructing employees to notify employer of harassment so it could “take care of

it,” employer unlawfully “announce[d] [its] intent to take unspecified action to stop the subjectively offensive activity without regard to whether or not the reported activity was protected by the Act”); *W.F. Hall Printing Co.*, 250 NLRB 803, 804 (1980).

The cases the Company cites (Br.39-40) lend it no support in this case’s context. In *NLRB v. Arkema, Inc.*, for example, the Fifth Circuit determined that a policy against harassment was promulgated after unprotected harassment had occurred. 710 F.3d 308, 318 (5th Cir. 2013). The Board found no such activity in this case. Moreover, the court in *Arkema* determined that the employer there, unlike the Company, had not engaged in coercion that would color its rule. *Id.* Cf. *Lutheran Heritage Village-Livonia*, 343 NLRB at 653-54 (Board found no other unfair labor practices aside from the employer’s maintenance of other overbroad rules); *Champion Enters., Inc.*, 350 NLRB 788, 790 (2007) (in context, it was clear that employer “asked only that employees report unprotected conduct”).

In addition, as the Board found (JA.1409), the Company’s rule was unlawful because it was issued in response to Section 7 activity. The Company promulgated the rule during an antiunion speech, and it solely addressed harassment “during this election campaign.” (JA.1408.) Although the Company suggests (Br.40-41) it was simply restating a preexisting rule, the Board has rejected that argument before. *See Boulder City Hosp., Inc.*, 355 NLRB 1247, 1249 (2010) (reposting of existing

anti-harassment policy in response to union solicitation was unlawful); *Care One*, 832 F.3d at 363-64. In any event, the Company’s handbook advised employees to tell a harasser to stop, and noted, “you may take your complaint directly to your supervisor.” (JA.496.) The rule at issue here, by contrast, was mandatory: it instructed employees to “immediately” report harassment relating to the campaign.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) BY INVESTIGATING AND DISCIPLINING PHILLIPS AND MARKS FOR THEIR UNION ACTIVITY

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by disciplining employees because of their union activity. *Cintas*, 589 F.3d at 916-17.⁷ To determine an employer’s motivation for issuing discipline, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, where an employee’s protected activity is shown to be “a motivating factor” in an employer’s decision to take adverse action against the employee, the adverse action is unlawful unless the employer demonstrates, as an affirmative defense, that it would have taken the same action even in the absence of protected activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03

⁷ Because violations of Section 8(a)(3) interfere with employee rights under the Act, they derivatively violate Section 8(a)(1), *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983), as do violations of Section 8(a)(5), *St. John’s Mercy Health Sys. v. NLRB*, 436 F.3d 843, 846 n.5 (8th Cir. 2006).

(1983); *RELCO*, 734 F.3d at 780. If the lawful reasons the employer advances for its actions are a pretext—that is, if the reasons either did not exist or were not in fact relied upon—the employer has not met its burden, and the inquiry is logically at an end. *York Prods., Inc. v. NLRB*, 881 F.2d 542, 545-46 (8th Cir. 1989); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enforced mem.*, 705 F.2d 799 (6th Cir. 1982).

Here, the Board found, and the Company does not contest, that Marks and Phillips engaged in union activity of which the Company was aware, and that its animus toward that activity was a motivating factor in its disciplinary decisions. (JA.1433-34.) Ample evidence supports those findings. The Company knew that Marks, in particular, had frequently met with union representatives and successfully pursued a class-action grievance. (*See* pp.16-17.) As for Phillips, her union activity and the conduct for which she was disciplined were one and the same: sharing a union-related article with a coworker. (JA.998.) And the Company disciplined both employees against a backdrop of numerous other violations, including its uncontested unlawful investigation and discipline of Marks and Loudermilk for talking about the Union. (*See* pp.24-25.) *See Rockline*, 412 F.3d at 968 (uncontested “recent discriminatory conduct” supported finding unlawful motive); *Hall v. NLRB*, 941 F.2d 684, 688-89 (8th Cir. 1991). The timing of those disciplinary actions strongly supports the Board’s finding that the

antiunion animus that motivated them likewise motivated the Company's warning of Phillips on the same day and its suspension and warning of Marks less than two months later. *See RELCO*, 734 F.3d at 787.

It fell to the Company, then, to prove that notwithstanding its unlawful motivation, it would have taken the same action regardless of Marks' and Phillips' union activities. *RELCO*, 734 F.3d at 780. As the Board found (JA.1434), the Company failed to meet that burden. Before the Court, the Company contends (Br.48) that it legitimately disciplined Marks for violating a rule against leaving her work area without permission. But the Board credited testimony that supervisors knew employees routinely left the production line for short breaks, yet the Company failed to show that anyone had ever been disciplined before Marks. (JA.1434.) *See Cintas*, 589 F.3d at 917; *Chem Fab*, 691 F.2d at 1261. Indeed, as the Board found, the Company had given milder discipline to other employees who had engaged in far more egregious acts of job abandonment. (JA.1429,1434.) *See Garry Mfg.*, 630 F.2d at 945 (union activists received written warnings for conduct for which other employees received oral warnings). The Company likewise contends (Br.47) that it enforced a legitimate work rule against Phillips, but again fails to show it disciplined anyone else for the same offense. (JA.1434.)

Further, it is undisputed that, as the Board found, neither employee disrupted production or jeopardized food safety. (JA.1434.) Yet the Company harshly

punished one long-term employee with a week-long suspension and final warning, and conducted a lengthy investigation before warning the other. (JA.1434.) The Board, accordingly, reasonably determined that Marks' and Phillips' purported misconduct was a pretext and that the Company failed to prove it would have taken the same actions against them absent their union activities. *See Hall*, 941 F.2d at 688 (employer's "implausible explanations" are evidence of unlawful motivation); *York Prods.*, 881 F.2d at 545-46.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY UNILATERALLY RESTRICTING EMPLOYEE ACCESS TO THE UNION

An employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by failing to notify and offer to bargain with a union before changing employees' terms and conditions of employment, which include a union's right to access represented employees on the employer's premises. *Frankl v. HTH Corp.*, 693 F.3d 1051, 1064 (9th Cir. 2012). Further, "[w]here a collective bargaining agreement embodies a particular working condition and past practice demonstrates that an employer had administered that working condition in a particular manner, the employer is forbidden from changing that condition unilaterally." *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 853 (5th Cir. 1986). Substantial evidence supports the Board's finding that the Company violated

Section 8(a)(5) by making numerous unilateral changes to the Union's right of access, as defined by the parties' contract and past practice.

The parties' collective-bargaining agreement granted the Union the right to enter the facility "for the purpose of seeing that the Agreement is being observed" and to conduct "visitation" in the break area. (JA.449-50.) All it required from the Union was notice. (JA.449.) And as the Board found (JA.1423), for decades the Union had freely met with employees in the Company's break area, without company interference or monitoring. *See Campo Slacks, Inc.*, 250 NLRB 420, 429 (1980) (where contract gave union right of access to administer contract and past practice established that union visited "freely," withdrawal of that right was unlawful), *enforced mem.*, 659 F.2d 1069 (3rd Cir. 1981); *Granite City Steel Co.*, 167 NLRB 310, 315 (1967) (parties' past practice engrafted right to unlimited union access onto contractual grievance procedure, which employer could not restrict without bargaining). That long-established practice informed the meaning of the parties' contract. *See NLRB v. Ne. Okla. City Mfg. Co.*, 631 F.2d 669, 676 (10th Cir. 1980).

Ample evidence supports the Board's finding that the Company departed from the parties' past practice by imposing novel restrictions on the Union's access

rights in 2012 and 2013.⁸ Indeed, the Company largely concedes that it made those changes by raising only a few meritless factual challenges. (Br.50-51.) First, the record refutes the Company’s claim that Calderon was the only representative it banned in 2012. As shown above (p.7), the Company refused to allow representative Woods to take Calderon’s place in July 2012. On those facts, the Board reasonably found that the Company barred union access entirely. (JA.1434-35.) In any event, the ban would have been unlawful even if it had been limited to Calderon. The Board discredited the Company’s claim that it excluded Calderon because employees accused him of misconduct, and the Company does not challenge that finding on appeal. (JA.1424&n.10.) *See Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992) (employer unlawfully denied union representative access based on unjustified claim of harassment), *enfd. sub nom. NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995).

⁸ Those changes included: “requiring the Union to divulge its reasons for visiting the plant” (JA.1434;1043,1074,1092,1094.); “mandating it to identify employees that it sought to meet with” (JA.1434;1043,1074,1092,1094); “banning all visits not involving grievances” (JA.1434;1037); “prohibiting solicitation and election discussions” (JA.1434;1037); “capping the duration and frequency of visits” (JA.1434;1037); “prohibiting meetings in the large break area and then relegating the Union to a cubicle” (JA.1434;19-22,30-31,73,84-86,132-34,397,1043,1048-49,1064-65); “threatening to respond to violations with expulsion, arrest and total exclusion” (JA.1434;22-27,125,1065,1094); “prohibiting access between March and November 2012, and at other times thereafter” (JA.1434-35;33-34,55,126,128,130-31,1130,1132,1135,1139-40,1159,1176-84); and “removing the window between the small and large break rooms that the Union used to communicate with unit employees” (JA.1435;38-46,135-38,145-46,442-43).

Second, there is no substance to the Company's disagreement with the Board's finding (JA.1425) that it prohibited visits when the Union's steward was not working. The Company repeatedly indicated that the Union had no business visiting at such times. (JA.1075,1139.) But in any event, that specific restriction was not among the changes the Board catalogued (JA.1434-35) in finding a violation. Thus, the Board's unfair-labor-practice finding stands independently of it. Finally, the Company argues that, notwithstanding the suspicious timing of its decision to block a window between the break rooms with plywood just before it temporarily allowed the Union back in, it had legitimate reasons for doing so. (Br.50-51.) The Company's reasons are beside the point, however, because the Act still required the Company to notify and offer to bargain with the Union before making the change. (JA.1434-35.)

Aside from its factual challenges, the Company suggests that it was entitled to impose changes unilaterally to enforce what it calls "the limited-access terms in the CBA." (Br.49.) But the contract was not limited as the Company imagines. As the Board recognized (JA.1423), the parties had always interpreted it broadly to allow visitation to obtain information about potential grievances, answer employees' questions, and discuss any issues of concern to them. Thus, the Board's findings do not rest on waiver, as the Company erroneously contends (Br.49), but rather on a proper application of the principle that "[w]here past

practice has established a meaning for [contract] language . . . , [it] will be presumed to have the meaning given it by such past practice.” *Ne. Okla. City Mfg.*, 631 F.2d at 676 (quotation omitted). *Accord Pub. Serv. Co. of N.M. v. NLRB*, ___ F.3d ___, 2016 WL 7368625, at *5 (D.C. Cir. Dec. 20, 2016) (defining ambiguous contract language in accordance with parties’ past practice). It is no defense that the Company became frustrated with the “liberal stance on Union access” embodied in the parties’ contract and past practice. (JA.1423.) The contract did not “vest [it] with unfettered discretion” to enforce its new, more restrictive interpretation of the contract without first offering to bargain. *Fred Meyer*, 362 NLRB No. 82, 2015 WL 1956201, at *3.

V. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) BY WITHDRAWING RECOGNITION BASED ON A PETITION TAINTED BY ITS OWN UNLAWFUL CONDUCT AND THEN MAKING UNILATERAL CHANGES

Once a majority of employees select a union to represent them, the Board presumes that the union continues to enjoy majority support. *Levitz Furniture Co.*, 333 NLRB 717, 723-24 (2001). That presumption furthers fundamental objectives of federal labor policy by “protect[ing] the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and [by] prevent[ing] an employer from impairing that right,” while also “promot[ing] continuity in bargaining relationships.” *Id.* at 723 (quotation omitted). An

employer may rebut the presumption and withdraw recognition from its employees' chosen representative only if it establishes that the union in fact lacks majority support. *Id.* at 725. Otherwise, the withdrawal constitutes a refusal to bargain in violation of Section 8(a)(5). *Id.*

A petition opposing representation signed by a majority of employees in the bargaining unit may suffice to rebut the presumption of majority support if it is untainted by employer coercion. *V&S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 281-82 (6th Cir. 1999). "An employer is not permitted, however, to rely on a union's loss of majority support caused by the employer's own unfair labor practices." *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993). Thus, "an employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that reasonably tended to contribute to employee disaffection from the union." *Columbia Portland Cement Co. v. NLRB*, 979 F.2d 460, 464 (6th Cir. 1992).

"Direct evidence of causation is not required." *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 279 (5th Cir. 1997) (per curiam). Rather, the Board assesses whether unfair labor practices tended to contribute to employee disaffection by applying the factors set forth in *Master Slack Corp.*, 271 NLRB 78, 84 (1984): (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including their detrimental or lasting

effect on employees; (3) any possible tendency of the violations to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Miller Waste Mills, Inc.*, 334 NLRB 466, 468 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003). Based on those factors, the Board reasonably found (JA.1404,1412n.1, 1435) that the June 2013 petition did not establish the uncoerced sentiment of the majority of employees because it was tainted by the Company's misconduct.

First, the temporal proximity between the Company's violations and the evidence of employee disaffection strongly supports a causal connection. The Company engaged in a series of unfair labor practices over a period of months, leading up to and continuing contemporaneously with the circulation of the June 2013 petition. After unlawfully excluding the Union for much of 2012 and threatening a union supporter with discharge and plant closure, in early 2013 the Company led employees to believe their union activities were under surveillance. It then subjected the entire bargaining unit to a barrage of unlawful threats of job loss and plant closure, coercive disparagement of the Union, and promises of benefits if employees got rid of it. Those violations were close enough in time to have influenced employees. *See NLRB v. Williams Enters., Inc.*, 50 F.3d 1280, 1288 (4th Cir. 1995) (petition tainted by employer's coercive conduct four months earlier); *Columbia Portland Cement*, 979 F.2d at 465 (violations "within one year"

of petition); *AT Sys. West*, 341 NLRB 57, 60 (2004) (last violation nine months before petition). The cases the Company cites do not demonstrate otherwise, particularly because they did not involve “hallmark” violations with lasting coercive effects, like the plant closure threats here. (Br.56-57 (citing *Tenneco Auto. Inc. v. NLRB*, 716 F.3d 640, 648 (D.C. Cir. 2013); *Lexus of Concord, Inc.*, 343 NLRB 851, 852 (2004)).)

After the election was postponed because of the Company’s misconduct, the Company compounded the coercive impact of its unlawful memorandum and speeches through a continued pattern of violations. Starting in February, it reinstated its earlier ban on union access. In March, it disciplined three union supporters for talking about the union with another employee. And in April, it perpetuated its unlawful campaign promises by repeating them to a new employee. (JA.1430;100.) *See Mesker Door*, 357 NLRB at 597 (where employer’s “unlawful statements essentially reprised [prior] violations,” Board found “that the 7-month passage of time did not dissipate the earlier unlawful conduct’s causal effects on the withdrawal of recognition”). Finally, in late May, days before the withdrawal petition circulated, the Company unlawfully suspended and issued a final warning to a high-profile union activist.

The Company seeks to artificially distance its unlawful conduct from the withdrawal petition, citing, for example, the month-plus between the petition and

the parties' last email exchange about access. (Br.57.) It overlooks, however, that the Union's unlawful exclusion was ongoing when the petition circulated. *See Goya Foods*, 347 NLRB 1118, 1121 (2006) (finding "strong temporal nexus" where employer's "pattern of unlawful conduct" was ongoing concurrently with petition), *enforced*, 525 F.3d 1117 (11th Cir. 2008). The Company also questions (Br.59) why employees coerced by its captive-audience speeches did not circulate an antiunion petition sooner. But an election was initially scheduled to come right after those speeches, and the petition's creator circulated it as soon as he could after the vote was postponed. (JA.352-53.)

The remaining *Master Slack* factors—the nature of the Company's violations and their tendency to cause disaffection from the Union and discourage employee organizational activity and union membership—also support a causal connection. The Company's "suspension of [a] union adherent[] for protected activity is a hallmark violation that is highly coercive and likely to remain in the memories of employees for a long time." *Ardsley Bus Corp., Inc.*, 357 NLRB 1009, 1013 (2011) (quotation omitted). And the Court has counted creating an impression of surveillance among the serious violations that undermine a union's majority status. *NLRB v. Arrow Specialties, Inc.*, 437 F.2d 522, 526 (8th Cir. 1971).

The Court has also recognized that threats of plant closure are “one of the most potent instruments of employer interference with the right of employees to organize.” *Chemvet Labs, Inc. v. NLRB*, 497 F.2d 445, 448 (8th Cir. 1974). *Accord Williams Enters.*, 50 F.3d at 1288. The Company’s threats of futility and promises of benefits were equally powerful. *See Hi-Tech Cable*, 128 F.3d at 279 (employer’s violations “in the months immediately preceding its receipt of the decertification cards” established taint, “particularly since several violations consisted of Company managers promising greater rewards to employees if they broke ranks with the Union”); *Radisson Plaza Minneapolis*, 307 NLRB 94, 96 (1992) (disaffection was tainted by violations which conveyed that “employees would see no change in their working lives from having a collective-bargaining representative”), *enforced*, 987 F.2d 1376 (8th Cir. 1993). As the Board has recognized, “[w]here unlawful employer conduct shows employees that their union is irrelevant in preserving or increasing their wages, the possibility of a detrimental or long-lasting effect on employee support for the union is clear.” *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001). *See Garry Mfg.*, 630 F.2d at 946 (union’s majority was eroded by “leaflets and speeches [that] threatened adverse consequences not based wholly on objective facts and promised or granted benefits in exchange for the Union’s defeat” and “the application of stricter discipline” to three union supporters) (internal citation omitted)).

Several factors magnified the coercive impact of the Company's unlawful statements. First, most of them came from Ledbetter, the Company's executive vice president and general manager. "When the highest level of management conveys the employer's antiunion stance by its direct involvement in unfair labor practices, it is especially coercive of Section 7 rights and the employees witnessing these events are unlikely to forget them." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 639 (2011), *enforced sub nom. Matthew Enter. Inc. v. NLRB*, 498 F. App'x 45 (D.C. Cir. 2012) (alteration and quotation omitted). *Accord V&S ProGalv*, 168 F.3d at 279.

Second, the Company hammered its unlawful themes home not only through incessant repetition in captive-audience meetings, but also in individual interactions with multiple employees. *See Chem Fab*, 691 F.2d at 1257-58 (Court evaluates statements in context, which includes "the frequency and content of other statements made by" other employer officials). As the Board noted (JA.1430-32), the Company's threats and promises to Contreras and Woods were "highly consistent" with what it said in captive-audience meetings. *See Spotlight Co.*, 462 F.2d at 20 (evaluating employer's statements at captive-audience meetings in context of other unfair labor practices).

Third, subsequent events reinforced and reminded employees of the Company's unlawful statements. *See Williams Enters.*, 50 F.3d at 1289. When the

Company disciplined Marks, Phillips, and Loudermilk in March for allegedly harassing a coworker, it carried out the threats of unspecified reprisals it had issued in January. (JA.576,612.) And after the Company promised employees higher wages if they ousted the Union, over the next several months “each paycheck remind[ed] them of the likely irrelevance of the [U]nion.” *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007). Meanwhile, the Company forcefully illustrated its threats of futility with a ban on union access. *See Fabric Warehouse*, 294 NLRB 189, 192 (1989) (denial of access, among other violations, tainted decertification petition), *enforced mem. sub nom. Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990). The Union’s exclusion during the months preceding the June 2013 petition served as an enduring reminder “that there is no necessity for a collective-bargaining agent.” *V&S ProGalv*, 168 F.3d at 282 (quotation omitted). *Cf. NLRB v. Hardesty Co., Inc.*, 308 F.3d 859, 865 (8th Cir. 2002) (noting that “unilateral action will often send the message to the employees that their union is ineffectual, impotent, and unable to effectively represent them”).

The Company errs in characterizing matters of union access as a “minor dispute” (Br.59-61) employees might have ignored. In February 2013, the Company abruptly cut off union visits only days after it had delivered a series of coercive speeches portraying the Union as ineffective at best and a job killer at worst. Employees surely would have noticed the Union’s sudden absence, coming

as it did after what the Company characterized as excessive visits. (JA.1077.) Drawing out-of-context language from the D.C. Circuit’s decision in *Tenneco Automotive*, the Company notes (Br.60) that the Union was not totally prevented from contacting employees. In *Tenneco*, however, the employer withheld employee addresses from the union, but union officials had precisely what the Company took away here: “routine and easy access to all unit employees” in the employer’s facility. 716 F.3d at 650. Moreover, the Union’s ability to reach employees outside the workplace did not negate the impression the Company’s conduct created that union representation would have no positive impact in the workplace.

Because the Company’s violations had a “tendency to erode the Union’s support,” *Columbia Portland Cement*, 979 F.2d at 465, it is irrelevant that one employee insisted they had no effect. (Br.63-64,67-68.) It is well established that the Board need not “engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation” of support for a union. *NLRB v. A.W. Thompson, Inc.*, 449 F.2d 1333, 1337 (5th Cir. 1971). The Board’s *Master Slack* framework, and not the testimony of individual opponents or proponents of the union, is the appropriate vehicle for determining whether the Company’s conduct tended to cause disaffection. *See Manna Pro Partners, L.P. v. NLRB*, 986 F.2d 1346, 1354 (10th Cir. 1993) (noting that “unfair labor practices that

tainted the petitions would also have tainted any employee testimony”). Further, the Company’s (Br.66) “showing that less than a majority of the employees in the bargaining unit were members of the union or paid union dues was not the equivalent of showing lack of union support.” *Terrell Mach. Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir. 1970). In a right-to-work state like Arkansas, employees may support union representation and enjoy its benefits without joining its membership. *Id.*

The Company also fails to justify its withdrawal of recognition by citing (Br.64) decertification petitions filed in December 2011 and May 2012. As an initial matter, it is well settled that the Company can justify its withdrawal of recognition, if at all, only on the grounds it relied on at the time; namely, the petition employees presented in June 2013. (*See* p.17.) Other facts “of which the employer may have been aware, but on which the employer did not base its decision to withdraw recognition from the Union, [are] of no legal significance.” *Miller Waste*, 334 NLRB at 469 (quotation omitted). Thus, the Company cannot use either prior petition to justify its withdrawal of recognition after the fact.

In any event, neither of the prior petitions has any probative value in establishing employees’ uncoerced preference for or against union representation. The Board dismissed the 2011 petition based on the Director’s determination that the Company had unlawfully promoted it. (JA.409.) *See Ron Tirapelli Ford, Inc.*

v. *NLRB*, 987 F.2d 433, 442 (7th Cir. 1993) (upholding Board’s longstanding view that “an employer-assisted decertification petition . . . is a nullity”). And after holding the 2012 petition in abeyance pending its disposition of this case, the Board upheld the Director’s dismissal of that petition as well, based on its determination that the Company’s prior misconduct had tainted it. (*See* p.14n.4.) Although the Company emphasizes (Br.64,66) that the petitions reflected increasing disaffection, that increase merely confirms that that the Company’s violations caused employees who voted to retain the Union in 2009 to oppose it in rising numbers as the Company’s long antiunion campaign wore on.

The Court did not hold otherwise in *McKinney v. Southern Bakeries, LLC*, 786 F.3d 1119 (8th Cir. 2015). There, the Court vacated a temporary injunction requiring the Company, among other things, to recognize and bargain with the Union pending the Board’s final disposition of this case. *Id.* at 1126. In concluding that injunctive relief was “[un]necessary to preserve the effectiveness of the ordinary adjudicatory process,” the Court did not question that the Board could ultimately order recognition and bargaining. *Id.* at 1124. *Cf. Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287-88 (D.C. Cir. 1993) (courts apply the same deferential standard of review to Board decisions regardless of outcome of related Section 10(j) proceeding). Although the Court recognized that a majority of employees did not support the Union in May 2012, it expressly did not “resolve

whether the Company's allegedly unlawful activities caused the employees' disaffection." *McKinney*, 786 F.3d at 1124. The Board has now determined that in the context of the Company's long pattern of unlawful conduct, the 2012 petition was "not a genuine reflection of employee sentiment." *Id.* at 1124 n.5.

In sum, all of the *Master Slack* factors support the Board's finding that the Company's recurrent and severe violation of the Act "caused the widespread employee disaffection" and tainted the 2013 petition. (JA.1435.) Accordingly, the Company cannot rely on that petition to justify its refusal to recognize the Union. *See Miller Waste*, 315 F.3d at 954-55.

Finally, the Board found, and the Company does not contest, that after withdrawing recognition from the Union, it abrogated the Union's access rights once and for all, and made good on its campaign promise to raise wages. "Because the above argument makes clear that the withdrawal of recognition was unlawful, the Company's unilateral changes in the terms and conditions of employment violated the Act." *Columbia Portland Cement*, 979 F.2d at 466.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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JANUARY 2017

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

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| SOUTHERN BAKERIES, LLC |) | |
| |) | |
| Petitioner/Cross-Respondent |) | |
| |) | Nos. 16-3328 & 16-3509 |
| v. |) | |
| |) | Board Case Nos. |
| NATIONAL LABOR RELATIONS BOARD |) | 15-CA-101311 et al. |
| |) | |
| Respondent/Cross-Petitioner |) | |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 13,969 words of proportionally-spaced, 14-point type, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); 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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Dated at Washington, DC
this 10th day of January 2017

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth 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.

Dated at Washington, DC
this 10th day of January 2017

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