**Oral Argument Not Yet Scheduled**

# Nos. 16-3076, 16-3570

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

**NOVELIS CORPORATION**
**Petitioner/Cross-Respondent**

**and**

**JOHN TESORIERO, MICHAEL MALONE, RICHARD FARRANDS, ANDREW DUSCHEN**
**Intervenors**

**v.**

**NATIONAL LABOR RELATIONS BOARD**
**Respondent/Cross-Petitioner**

**and**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC**
**Intervenor**

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

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**FINAL FORM BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS**
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**UNITED STEEL, PAPER AND FORESTRY, RUBBER,**
**MANUFACTURING, ENERGY, ALLIED INDUSTRIAL &**
**SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC**
**Intervenor**

---

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

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**BRIEF FOR**
**THE NATIONAL LABOR RELATIONS BOARD**

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## STATEMENT OF JURISDICTION

This case is before the Court on the petition of Novelis Corporation to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued against Novelis. The Board's Decision and Order is reported at 364 NLRB No. 101 (August 26, 2016). In this case, the Board found that Novelis committed serious and substantial unfair labor practices in response to the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Union's nascent organizing campaign. (A. 1698.)[1]

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the Act, which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction under Section 10(e) and (f) of the Act because the unfair labor practices occurred in Oswego, New York.

Novelis filed its petition for review on September 6, 2016, and the Board filed its cross-application for enforcement on October 24, 2016. Both filings were

[1] "A." references are to the deferred appendix. "Br." refers to Novelis's brief, "Int. Br." to the Intervenors' brief filed in support of Novelis, and "Am. Br." to the amici brief filed in support of Novelis. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Novelis committed numerous, extensive, and serious violations of the Act.

2. Whether the Board acted within its broad remedial discretion in ordering Novelis to recognize and bargain with the Union as a remedy for those violations.

## STATEMENT OF THE CASE

Acting on unfair-labor-practice charges filed by the Union, the Board's General Counsel issued a consolidated complaint alleging that Novelis committed serious and pervasive violations of the Act and that a bargaining order was necessary to remedy those violations. (A. 552-65, 579-83.) After a 17-day hearing, an administrative law judge sustained the complaint's allegations and issued a recommended order, which included a remedial bargaining order. (A. 1740-42.)

Following the issuance of the administrative law judge's decision, Novelis filed exceptions, as well as three motions to reopen the record to receive evidence of changed circumstances regarding the bargaining order. (A. 1695; A. 1552-634, 1639-53, 1663-94.) After reviewing Novelis's exceptions, the Board issued its

Decision and Order, affirming the judge's findings and denying Novelis's motions to reopen the record. (A. 1700 & n.17.) Below are summaries of the Board's findings of fact and conclusions and order.

## I. THE BOARD'S FINDINGS OF FACT

### A. Novelis's Operations and Policies

Novelis manufactures rolled aluminum and, at the time of the violations, employed about 600 workers at its facility in Oswego, New York. (A. 1695, 1706; A. 286.) In 2010, Novelis began expanding the Oswego facility and created new production lines. (A. 1706; A. 198.) Around the same time, Novelis closed its plant in Saguenay, Quebec, and transferred that work to Oswego. (A. 1706 & n.10; A. 1086-87.) Employees work one of two schedules: the S-21 with 8-hour days or the J-12 with 12-hour days. Most employees prefer the J-12 schedule because it doubles the amount of time off. (A. 1707 & n.12; A. 190, 192.)

Novelis's solicitation policy "prohibits solicitation and distribution in working areas of its premises and during working time (including company email or any other company distribution lists)." (A. 1707; A. 604-05.) Novelis also maintains a social media policy that offers "guidelines" for employees to consider when interacting on social media. It includes adhering to the company code of conduct, being responsible for words and actions that may "tarnish" Novelis's image, being a "scout for compliments and criticism," letting authorized personnel

respond to posts, and being "conscious when mixing business and personal lives." (A. 1707-08; A. 730-32.)

### B. Novelis Announces Reductions in Pay Via Elimination of Sunday Premium Pay and Unscheduled Overtime; Employees Walk Off the Job

In May 2013, Novelis announced to crew leaders that it planned to change employee wages and benefits. The crew leaders protested, and Novelis postponed the changes. (A. 1709 & n.18; A. 136-38, 208-09.) In November, Novelis announced that, effective January 1, 2014, unscheduled overtime and Sunday premium pay would be eliminated, health care premiums would increase, and retiree health benefits would decrease. (A. 1709 & n.20; A. 137-38, 203-04.) Prior to the changes, any unscheduled overtime and Sunday work was paid at the time-and-a-half rate. After the changes, employees would have to work 40 hours in a week before receiving overtime; Sundays, holidays, and vacation leave would not count toward the 40 hours. (A. 1695, 1709; A. 97.)

The day of the November announcement, 50-60 employees stopped work and convened to demand answers. (A. 1709; A. 100-01.) They met with Human Resources Manager Peter Sheftic and Cold Mill Operations Leader Jason Bro. (A. 1709; A. 100-01.) During this meeting, employee Everett Abare asked whether it was true that Novelis intended to eliminate unscheduled overtime and Sunday premium pay. (A. 1709; A. 101.) Sheftic responded by asking whether the

gathering was organized and who organized it. (A. 1709; A. 102.) Abare responded, "you can call this a work stoppage or you can call it whatever you may want to call it, a safety shutdown, a safety time out, whatever it might be that you feel comfortable calling this, but there are a lot of employees out there that their minds are not on the job." (A. 1709; A. 102.) Abare explained that employees feared losing benefits. (A. 1709; A. 102.) Sheftic and Bro confirmed that Novelis planned to eliminate Sunday premium pay and unscheduled overtime, but that they would contact company headquarters to get additional information. (A. 1709; A. 101-02, 139.) All the employees returned to work. (A. 1709; A. 102.)

On December 16, Novelis held its annual mandatory wage and benefit meetings with employees. Sheftic and Chris Smith, the plant manager, formally announced the new pay scale—including the elimination of unscheduled overtime and Sunday premium pay—to be effective January 1. In addition, they announced a bonus and a pay increase. (A. 1709; A. 139-40, 168-69, 210, 1300-01.) Employees expressed their displeasure with the planned elimination of unscheduled overtime and Sunday premium pay. (A. 1709; A. 140, 210.) Sheftic responded that Novelis would consider their concerns. One employee suggested that workers might seek union representation. Sheftic responded, "we certain[ly] hope that we don't have to have a union here at this point, that we will—we're better off doing our own negotiating." (A. 1709; A. 1761.)

### C. The Employees Respond to the Reduction in Pay by Contacting the Union

After the December 16 meeting, Abare discussed the proposed changes with other employees. He then contacted the Union. The next day, he and employee Brian Wyman met with James Ridgeway, the Union local's president. Abare and Wyman signed cards authorizing the Union to represent them and took blank cards for other employees to sign. (A. 1709; A. 76, 96, 140-41, 235.)

Ridgeway and another union representative held six offsite meetings with employees between December 17 and January 12. (A. 1709; A. 76.) The meetings were attended by both pro- and anti-union employees. (A. 1709 & n.23; A. 178.) Abare, in addition to his prominent role in organizing the union meetings, gave employees union campaign literature and stickers, and posted pro-union literature in the facility. (A. 1710; A. 122, 733-45.) Abare and other employees obtained 351 signed union-authorization cards between December 17 and January 5, representing a majority of employees. (A. 1695, 1710; A. 141.)

In December, at his annual performance review, employee Dennis Parker informed supervisor Brian Gigon that "there was talk of a union" because employees were concerned about changes to their wages and benefits. (A. 1710; A. 177, 555, 570.)

After obtaining signed authorization cards from a majority of employees, the Union sent plant manager Smith a demand for voluntary recognition as the

employees' bargaining representative. (A. 1716; A. 631-33.) Novelis received the demand via certified mail on January 9. (A. 1716; A. 77.)

Also on January 9, Smith and Sheftic announced the restoration of unscheduled overtime and Sunday premium pay. (A. 1717; A. 169, 659.) A handout they distributed stated that there would be "[n]o planned major impacts to employee compensation and benefits," vacation and holiday pay "WILL be considered 'hours worked' and WILL be included in the calculation of overtime," and Sunday premium pay "will be restored." (A. 1717; A. 659.) Following the restoration of benefits, some employees requested that their signed union-authorization cards be returned to them. (A. 1717 & n.83; A. 183.)

On January 13, Smith declined the Union's demand for recognition. His letter noted that he received the Union's demand "on the afternoon of January 9." (A. 1716 & n.75; A. 635.) The Union filed a petition for an election, which was scheduled for February 20 and 21. (A. 1716; A. 634.)

### D. Novelis Counters the Union Organizing Campaign with a Barrage of Coercive Conduct Including Removing Union Literature, Interrogations, Threats of Layoff and Job Loss, and Misrepresentation of the Union's Position Regarding Pay Changes

In the run-up to the election, Novelis began a campaign of its own to convince employees to vote against representation. It created a website, held weekly meetings with employees, and distributed anti-union literature. (A. 1716;

A. 301, 303, 935, 1086-88, 1097-123.) In addition, Novelis managers and supervisors removed pro-union literature, interrogated employees about their union activities, told employees to remove union insignia, threatened employees with job loss, solicited grievances, misrepresented to employees that the Union sought to have Novelis rescind the restoration of unscheduled overtime and Sunday premium pay, and held threatening captive-audience meetings.

### 1. Novelis managers remove pro-union literature while leaving anti-union literature in place

On January 12, Cold Mill Operations Leader Jason Bro entered a control room that also serves as an employee break room while two employees were present. Bro noticed election campaign propaganda: one was an anti-union comparison of benefits and the other a pro-union list of benefits lost by employees. Bro told the employees that the anti-union document could remain, but the pro-union list could not. He then asked whether the employees knew who put the union literature in the room and provided two names. The employees did not recognize the names. Next, Bro asked whether it was Abare. The employees replied that they did not know. Bro took the pro-union literature and left. (A. 1718; A. 268.)

In mid-January, Bro removed a union meeting notice from a bulletin board. On January 21, he removed a pro-union flier from the bulletin board. (A. 1718; A. 248-49, 272.)

Also on January 21, Remelt Operations Leader Duane Gordon removed pro-union literature from the "cabana," which is used as an office and break room. He replaced the pro-union literature with an anti-union pamphlet. He told employees there that they were not allowed to have pro-union fliers in the room. (A. 1718; A. 232-33, 237-38.)

On January 23, Bro met with six employees in the furnace office. Bro began by removing a pro-union fact sheet and told employees that neither pro- nor anti-union literature was allowed on bulletin boards or employees' clipboards. (A. 1718; A. 159-61, 164.) He then gave the employees a pamphlet entitled "My Employment At-a-Glance 2014," which stated that unscheduled overtime and Sunday premium pay would continue through December 31, 2014. (A. 1718; A. 159, 660-65.) During this meeting, supervisor Dan Taylor entered the room and removed pro-union materials from employees' clipboards and a desk. (A. 1719; A. 171, 225.)

Also on January 23, an employee posted a Union meeting notice on a cafeteria bulletin board. While another employee was reading the notice, a supervisor removed it from the board. (A. 1719 & n.98; A. 265-67.)

### 2. A Novelis manager interrogates employees about their union sympathies

On January 23 and a week later, Bro interrogated employees about their union sympathies. (A. 1696 n.11, 1719.) In both meetings, Bro approached

employees individually and asked, "do you know what to do if you don't want the Union in?" Bro then instructed them to say "Vote no." Some employees responded the way Bro wanted; others refused to answer or said they planned to vote yes. (A. 1719; A. 160, 166-67, 171, 225.)

**3. Novelis managers permit anti-union stickers to be worn while telling employees to remove or cover union insignia**

On January 23, Bro directed employees wearing pro-union insignia to remove or cover them up. (A. 1718; A. 160, 163-64, 170, 224.) Employees responded to Bro's directive by asking why they were not allowed to wear "Vote Yes" stickers while others were allowed to wear "Vote No" stickers. (A. 1718; A. 157, 225.) Bro stated that neither type of sticker could be worn, and if he saw someone wearing such a sticker, he would ask them to remove it. (A. 1718; A. 163-64, 225.) An employee later saw Bro in an area of the facility while employees openly wore anti-union stickers. (A. 1718 n.94; A. 225-26.) Another employee saw managers, including Warren Smith and operations leader Craig Formoza, in an area of the facility where employees openly wore anti-union stickers. (A. 1719 n.95; A. 157, 935.)

**4. Novelis managers threaten employees with layoff and that they do not have to work for Novelis if they are unhappy with their employment terms**

In his January 23 meeting with employees in the furnace room, Bro used a whiteboard to explain how employees were not losing money as a result of the

announced wage and benefit changes. When an employee protested Bro's calculations and referred to his paystub, Bro told him that if he did not like his job, he "could find a new one." (A. 1696 n.11, 1718; A. 160.)

On January 28, manager Formoza approached employee Allen Cowan. Cowan had been employed by Novelis for just over a year and worked the J-12 schedule. Formoza asked about the Union, but Cowan replied that he did not feel comfortable discussing it. Cowan attempted to talk about the weather, but Formoza persisted: he warned that Cowan "could always go to another schedule. And if things aren't very busy we could lay off one of the shifts." "Of course," Formoza explained, a layoff would "be in order of seniority." Formoza concluded by asking Cowan, "where are you in the order of seniority?" (A. 1719; A. 156.)

**5. A Novelis manager solicits grievances**

On February 15, Human Resources Leader Andrew Quinn visited the Remelt control room where three employees had gathered. Quinn asked about employee morale, and then stated that if employees voted "no" in the union election, "it would never be as good as it was, but it would be better than it is now." Quinn told the employees that Novelis "couldn't start making things better until a 'No' vote was in." Employees had not encountered Quinn in that area of the facility before. (A. 1720 & n.108, 1733; A. 176.)

### 6. Novelis managers misrepresent to employees that the Union sought to have Novelis rescind its restoration of unscheduled overtime and Sunday premium pay

On January 27, the Union filed unfair-labor-practice charges against Novelis, alleging overly broad solicitation and distribution policies, surveillance, interrogation, intimidation, coercion, and harassment. (A. 1719; A. 487.) On February 10, Board agent Patricia Petock sent a letter to Novelis's counsel advising him that "it is now necessary for me to take evidence from your client regarding the allegations raised in the investigation." (A. 1719-20; A. 1095-96.) The letter listed several allegations, including removal of literature, reprisals, and interrogations, as well as a promise of restored benefits: "Plant Manager Chris Smith and Human Resource Manager Peter Sheftic announced to employees that [Novelis] was restoring 1½ premium pay for Sunday and vacation and holiday time would be considered 'hours worked' in the calculation of overtime in response to learning that there was an ongoing union organizing campaign." (A. 1720; A. 1095-96.)

Novelis managers then distributed to employees a blurred version of Petock's letter that omitted most of the text, except the sentence regarding restoration of Sunday premium pay and unscheduled overtime. (A. 1720 & n.105; A. 1093-94.) At the final union meeting before the election, employees asked why the Union filed a charge over the restoration of benefits and why they were not

informed about such a charge. Ridgeway explained that no charges had been filed over the restoration of benefits. (A. 1720; A. 78, 82, 84, 212.) Several employees were concerned that they would have to pay back the premium pay if the Union won. (A. 212.)

**7. Novelis managers hold threatening captive-audience meetings just days before the election**

On February 17 and 18, Novelis managers held three mandatory employee meetings before the election on February 20 and 21. At each meeting, President and CEO Phil Martens, Plant Manager Chris Smith, and Senior Vice-President Marco Palmieri addressed employees. (A. 1720; A. 123, 222, 607-30, 669-701, 754-89.)

At the first meeting, Martens reminded employees that the plant in Quebec had closed, resulting in 140 lost jobs, while the Oswego plant was expanding. He cast Oswego's good fortune as the result of his personal commitment to the plant and employees, stating that he "made a decision to locate the [new production] lines here," that he "personally made the commitment. . .to sustain the employment levels here at Oswego and make them grow," and that the "commitment I've made to you guys is unparalleled." (A. 1720-21; A. 608-09, 615.) He then told them that if they voted for the Union, it "becomes a business decision." (A. 614.) Martens compared their better work schedules, and more generous wages and benefits, to those at Novelis's unionized plants in Terre Haute, Indiana and Fairmont, West

Virginia. He also stated that negotiations with the Union would not start "where you're at today." (A. 614.) Instead, negotiations would start where the Terre Haute and Fairmont collective-bargaining agreements are, "and they are much different, and much less supportive of the lifestyles that you want." (A. 1721; A. 614.) Finally, Martens held up a letter he referenced as coming from the Board detailing "grievances" filed against Novelis by the Union. Asserting that the Union misled employees on the issue, Martens said, "[t]hat's who you're dealing with," and urged them to "understand that customer that you want to dance with a little bit better." (A. 1722; A. 615.)

In his remarks, Smith suggested that unionization would lead to a loss of business and less job security: Novelis's "extremely demanding customer. . .will have options as we go forward. The last thing we want to do is give [it] any reason to look elsewhere outside of Novelis, or specifically Oswego." (A. 1721-22; A. 625-26.) He cautioned the employees that "if [w]e stub our toe, we fail on delivery, we don't sustain supply or the quality that we need, then we're back amongst the also rans. It's ours to lose, guys. We got to make sure we don't fall into that category." (A. 1722; A. 620.) Finally, Smith made more explicit Martens's discussion of the Union's "filed grievances," and told employees that the Union filed unfair-labor-practice charges over "the fact that we brought those

concessions to the table four weeks ago? So in other words, if we plead guilty, those concessions come off the table." (A. 1722; A. 626.)

Martens's and Smith's remarks at the second meeting were similar. Martens repeatedly stated he had a "deep" and personal commitment to Oswego, as opposed to his personal decision to close the Quebec plant and relocate that work to Oswego. (A. 1722; A. 758.) He encouraged employees to vote no, telling them that he did not want decisions at Oswego to "become a business decision." (A. 1723; A. 768.) And while he did not "want to go down that path, he know[s] how to do that." Instead, he wanted employees "to preserve what [they] have" and consider the "big decisions I've made to support all of you." (A. 1723; A. 768.) He further told employees that unionization would be cheaper because there would be "forced overtime. . .lower money, lower annual compensation." (A. 1723; A. 765-66.) Again, he compared the Oswego workers' benefits and schedules to those at the unionized plants, concluding that if he looked at the issue "purely from the aspect of how can I save money," he would favor unionization. (A. 1723; A. 766.)

Martens held up a copy of the February 10 Board letter and described it as containing unfair-labor-practice charges by the Union. He said he had heard that the Union told employees it had not filed any "grievances" against Novelis, but

employees could find the grievances filed by the Union on the NLRB website. (A. 1723; A. 767.)

Smith then took the stage and discussed the unfair-labor-practice charges, telling employees that they were filed over the "concessions we put on the table in January for the time and [a] half and Sunday and the bridge to overtime." (A. 1724; A. 786.) He said if Novelis "decided to say, yep, we're guilty as charged, the result would be those concessions would come off the table and they'd be retroactive to the 1st of January." (A. 1724; A. 786.) Later, after an employee complained that Martens and Smith were not being truthful, both the original letter and the redacted version were posted in the facility prior to the election. (A. 1724-25; A. 213, 751-52, 1095-96.)

At the third meeting, Martens repeated his remarks about the potential for job loss and loss of flexibility, pay, and benefits if the Union won the election. Again, Martens told the assembled employees that he decided to close the Quebec plant "to ensure that we retained and maintained employment levels here at this plant." (A. 1724; A. 672.) By firing 140 workers in Quebec, Novelis was able to "maintain the employment levels here versus looking at two to 300. . .here." (A. 1724; A. 672.) He told the employees that they "have flexibility" in scheduling their work and are not subject to "strict rules and regulations." (A. 1724; A. 679.) But "if you vote yes, I move from owning this as a personal decision and a

personal passion for this plant to one where it becomes a business decision for me, and I look at it as a start point. . . ." (A. 1724; A. 679.) He then compared their wages and benefits with those of the unionized Fairmont and Terre Haute plants, noting that those employees have "lower wages. Pensions are funded at a lower level. They get lower benefits in terms of compensation. They have stricter rules in terms of how you can do your job." (A. 1724; A. 679.)

Smith told employees that the workforce is "distracted and divided. . .[and they] can't afford for that to continue." (A. 1725; A. 688.) He questioned whether Novelis would continue to invest in the Oswego facility, telling the employees that "[i]t's not a God-given right that every time Novelis has the opportunity to invest," that investment would come to Oswego. (A. 1725; A. 693.)

Martens and Smith also raised the issue of the unfair-labor-practice charges, telling employees that the Union "know[s] how to say one thing in a forum and then turn around and press charges against this company." (A. 1725; A. 680.)

**E. The Union Loses the Election**

Novelis and the Union signed a stipulated election agreement detailing the job classifications eligible to vote in the election, and Novelis provided a list of 599 employees eligible to vote in the election.[2] The eligibility list included all

[2] The agreed-upon appropriate bargaining unit included various job classifications of production and maintenance employees. (A. 1701; A. 636-38.)

crew leaders. (A. 1725; A. 636-56.) At the election held on February 20 and 21, Abare served as the Union's observer. (A. 1725; A. 657.) The Union lost the election 273 to 287, with 10 challenged ballots and 1 voided ballot. (A. 1726; A. 657.)

### F. Novelis Demotes Crew Leader Everett Abare

Abare has worked for Novelis since 1998. In addition to his duties as a furnace operator, Abare served as the crew leader for his seven-person team. (A. 1726; A. 92, 96.) Crew leaders are the "go-to person per shift, per work area." (A. 1726; A. 96.) Abare's crew leader duties included receiving work orders from the coordinator, assigning tasks to crew members, and evaluating their technical skills. Crew leaders earn an additional $2 per hour. (A. 1726; A. 96, 132-34.) Abare's 2014 performance evaluation stated that he "has done a great job as a crew leader. He is respected by his crew as well as others outside the crew." (A. 1726; A. 711-12.)

Abare also wore several other hats: he trained new crane operators, and served as fire captain for Novelis's on-site fire department and as shift captain for the on-site emergency medical squad. In 2013, he was named Firefighter of the Year. (A. 1726; A. 93-95, 136, 726.)

Following the Union's election loss, on Saturday, March 29, Abare posted the following comment on Facebook from home: "As I look at my pay stub for the

36 hour check we get twice a month, One worse than the other. I would just like to thank all the F*#KTARDS out there that voted 'NO' and that they wanted to give them another chance…! The chance they gave them was to screw us more and not get back the things we lost....! Eat $hit 'NO' Voters....." (A. 1726; A. 727.)

At least 10 Novelis employees saw Abare's post; nine "liked" or commented on it. (A. 1726; A. 728.) The tenth reported the post to Sheftic and Smith. (A. 1726; A. 319-20.)

On April 4, Cold Mill Manager Greg Dufore and Human Resource Leader Quinn asked Abare to meet with them. At the meeting, Quinn showed Abare a copy of the Facebook post. Abare admitted that he wrote the post. (A. 1727; A. 128, 729.) Quinn said the post violated Novelis's social media policy. Quinn gave Abare a copy of the policy, telling him that "you may not be aware that we have a social media policy." (A. 1727; A. 125-26, 730-32.) Abare apologized for the post, offered to apologize to anyone who was offended, and explained that he wrote the post out of frustration. (A. 1726; A. 126, 729, 1762.) Quinn told Abare that Sheftic and Smith were very interested in the outcome of the meeting. (A. 1727 & n.164; A. 126.)

On April 11, Quinn and Dufore again met with Abare. Quinn told Abare he was being removed from his positions as crew leader, fire captain, emergency medical squad shift captain, and crane trainer, a decision made with the

involvement of Sheftic and Smith. (A. 1727 & n.165; A. 124-26, 463.) Abare questioned the severity of the punishment given that only his Facebook "friends" could see the post. Quinn told him that the length of his punishment would depend on how he "react[ed]" to the demotions. (A. 1727; A. 126-27, 1137.) Michelle Johnson, another union supporter, replaced Abare as crew leader. (A. 1727; A. 147, 201.)

Prior to April 11, Abare had never been disciplined. (A. 1727; A. 130.) Vulgar language, including the words "fucktard," "idiot," "retard," "brain-dead," and others were regularly used by Novelis employees in the presence of supervisors. No employee or crew leader had previously been disciplined for such language. (A. 1727 & n.167; A. 130, 190, 202-03, 227-29, 271.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Pearce and Members Hirozawa and McFerran) found that Novelis violated Section 8(a)(1) of the Act by:

- Threatening employees with job loss if they selected the Union as their bargaining representative;
- Threatening employees with a reduction in wages if they selected the Union as their bargaining representative;
- Threatening employees with more onerous working conditions if they selected the Union as their bargaining representative;
- Threatening employees by telling them that they did not have to work for Novelis if they were unhappy with their terms and conditions of employment;

- Threatening an employee with layoff if employees selected the Union as their bargaining representative;
- Threatening employees that Novelis would lose business if they selected the Union as their bargaining representative;
- Misrepresenting that the Union sought to have Novelis rescind employees' pay and/or benefits and blaming the Union by telling employees that they would have to pay back wages retroactively as a result of charges filed by the Union;
- Interrogating employees about their union membership, activities, and sympathies;
- Prohibiting employees from wearing union insignia on their uniforms while permitting employees to wear anti-union and other insignia;
- Maintaining an overly broad work rule that unlawfully interfered with employees' use of Novelis's email system for Section 7 purposes;
- Selectively and disparately enforcing Novelis's posting and distribution rules by prohibiting union postings and distributions while permitting non-union and anti-union postings and distributions;
- Removing union literature from mixed-use areas;
- Granting wage increases and benefits in order to discourage employees from selecting union representation;
- Soliciting grievances and promising to remedy them in order to discourage employees from selecting union representation; and
- Maintaining and giving effect to its overly broad unlawful social media policy.

(A. 1701.)

The Board further found that Novelis violated Section 8(a)(1) and (3) of the Act by demoting Abare because of his support for the Union or engaging in other protected concerted activities and violated Section 8(a)(5) and (1) of the Act by

failing and refusing to recognize and bargain with the Union. (A. 1696 n.12, 1701.)

The Board's Order requires Novelis to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. (A. 1702-03.) Affirmatively, the Board's Order directs Novelis to, recognize, and on request, and bargain with the Union; on request, rescind the changes to Sunday premium pay and unscheduled overtime; rescind the unlawful provisions of the social media policy; rescind the overly broad work rule that unlawfully interferes with employees' use of Novelis's email system for Section 7 purposes; furnish employees with inserts for the current handbook that advise them that the unlawful rule has been rescinded or provide the language of a lawful rule, or publish and distribute revised handbooks; offer Abare full reinstatement to his former job and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him; and post a remedial notice. (A. 1703.)

## SUMMARY OF ARGUMENT

This case involves Novelis's serious unfair labor practices, undertaken to subvert its employees' nascent union campaign. Prompted by upcoming wage cuts, the employees, led by Abare, contacted the Union and collected signed union-authorization cards. Novelis reacted swiftly to stifle the organizing. On the day the Union requested recognition as the employees' bargaining representative, Novelis reversed its decision to cut wages. In addition, supervisors and managers coerced employees in large and small meetings, by threatening job loss, layoff, loss of business, reduced wages, and more onerous working conditions. In an attempt to sow distrust of the Union, managers even misleadingly claimed that the Union sought rescission of Novelis's restoration of pay and, if the Union won, the employees would have to pay back their wages retroactively. Novelis's threats were made by its highest-level officials and disseminated widely to employees through mandatory meetings.

Managers engaged in many further unlawful actions: they interrogated employees about their union sympathies; solicited and promised to remedy grievances to discourage union support; disparately prevented pro-union insignia on employee uniforms while allowing anti-union insignia; disparately enforced solicitation and distribution rules by removing pro-union literature from the facility while allowing anti-union literature; and maintained an overly broad social media

policy and an overly broad work rule that unlawfully restricted employees' use of Novelis's email system for protected purposes.

Following the Union's loss in the election, Novelis continued its unlawful actions by demoting Abare, the leader of the union organizing effort, under its (separately unlawful) social media policy for writing a personal Facebook post about the election and related employee pay concerns. Using vulgar language regularly heard in the facility, the post was a continued protest of wage and benefit problems that employees had expressed. Novelis failed to show any other discipline for vulgar language.

The Board acted well within its broad remedial discretion in ordering Novelis to recognize and bargain with the Union. A bargaining order was necessary to remedy Novelis's serious and substantial unfair labor practices as a fair rerun election would be unlikely. Moreover, the passage of time and employee and management turnover did not preclude issuance of a remedial bargaining order. Novelis's ownership remains the same, and many of the managers and supervisors remain. Likewise, while some employees left and others were hired, hundreds who were aware of Novelis's prior misconduct remain. Further, given the severity and wide reach of the conduct, the 2½ years between the election and the Board's order cannot erase the seriousness of Novelis's violations.

# I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT NOVELIS ENGAGED IN A HOST OF SERIOUS UNFAIR LABOR PRACTICES TO ERODE EMPLOYEES' UNION SUPPORT

## A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations. . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements this guarantee by prohibiting employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7. *See NLRB v. Exch. Parts Co.*, 375 U.S. 405, 408 (1963). An employer's conduct violates Section 8(a)(1) if it has a reasonable tendency to coerce employees in the exercise of their right to engage in Section 7 or other concerted activity. The violation does not depend on whether the employees are actually coerced. *N.Y. Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998.)

The Board's findings of fact are "conclusive" under Section 10(e) of the Act (29 U.S.C. § 160(e)) if supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Katz's Delicatessen of Houston St.*, 80 F.3d 755, 763 (2d Cir. 1996). As the Supreme Court has said, a reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488; *NLRB v. G&T*

*Terminal Packing Co.*, 246 F.3d 103, 114 (2d Cir. 2001). This Court will not overturn the Board's factual findings unless "no rational trier of fact could reach the conclusions drawn by the Board." *NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1310 (2d Cir. 1990).

As repeatedly recognized by this Court, credibility determinations made by the administrative law judge and accepted by the Board may not be disturbed on review "unless they are 'hopelessly incredible' or they 'flatly contradict' either the 'law of nature' or 'undisputed documentary testimony.'" *NLRB v. S.E. Nichols*, 862 F.2d 952, 956 (2d Cir. 1988) (citations omitted). Finally, "[t]he Board's finding that an employer has committed an unfair labor practice cannot be lightly overturned." *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995) (quotation omitted).

As demonstrated below, substantial evidence supports the Board's findings that Novelis engaged in numerous forms of coercive conduct in response to employee union organizing. The Court will reject defenses where—as here—"the company simply disagrees with the Board's findings and asks [the Court] to accept its characterization of the evidence as though [the Court's] function were to determine facts rather than to decide whether the Board's findings are supported by substantial evidence on the record considered as a whole." *S.E. Nichols*, 862 F.2d at 958.

### B. Substantial Evidence Supports the Board's Findings That Novelis Repeatedly Coerced and Interfered with Employees' Protected Activity

#### 1. Substantial evidence supports the Board's finding that Novelis's restoration of unscheduled overtime and Sunday premium pay was tantamount to a wage increase and was coercive

An employer violates Section 8(a)(1) of the Act by responding to an organizing campaign with offers to reward employees for rejecting unionization because such conduct reasonably tends to impinge upon their freedom to choose a collective-bargaining representative. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 685-86 (1944). As the Supreme Court explained, "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Exch. Parts*, 375 U.S. at 409-10. *Accord Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975).

The Board, with this Court's approval, has drawn the inference that new benefits, if granted or announced during an organizing campaign, are coercive. *See Beverly Enters. v. NLRB*, 139 F.3d 135, 140 (2d Cir. 1988). Where, as here, the employer deviates from the pre-campaign status quo, it must provide a union-neutral justification for the timing of its announcement or promise of benefits. *Waste Mgmt. of Palm Beach*, 329 NLRB 198, 198-99 (1999).

As described above (p. 6), on December 16, Novelis announced the end of unscheduled overtime and Sunday premium pay, effective January 1. But after employees began organizing and telling management about their interest in a union—and on the same day the Union requested recognition—Novelis announced that it was restoring those benefits. (A. 1728-29.) As the Board found, this restoration was "tantamount to a pay raise." (A. 1698.) Because the elimination of that pay was the "flashpoint for employees seeking collective-bargaining representation," the Board found it likely that, following the restoration of benefits, "many employees no longer saw a need for such representation." (A. 1698.) Indeed, some employees requested that their signed union-authorization cards be returned. (A. 1717 & n.83.) Novelis's restoration of those benefits was coercive and "likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed." (A. 1698, quoting *Pembrook Mgmt*., 296 NLRB 1226, 1228 (1989).) *See also S.E. Nichols*, 862 F.2d at 959 (unlawful offer of wage increases during union campaign).

Novelis contends (Br. 17-23) that it had no knowledge of the Union's campaign when it restored the pay scale and thus could not have intended to

influence employees.[3] It further claims (Br. 24-25) that the Board ignored its lawful motivations. Both arguments fail.

Substantial evidence supports the Board's finding that Novelis had knowledge of the nascent Union campaign. (A. 1728-29.) First, on December 16, in an employee meeting to announce the elimination of unscheduled overtime and Sunday premium pay, an employee told HR manager Sheftic that workers might seek union representation. Sheftic responded, "we certain[ly] hope that we don't have to have a union here at this point, that we will—we're better off doing our own negotiating."[4] (A. 1709.) In mid-December, Novelis managers received a specific warning about union organization when employee Parker informed a supervisor that "there was talk of a union" because employees were concerned about changes to their wages and benefits. (A. 1710.) Moreover, during December, anti-union employees participated in the Union's organizing meetings, and the Union organizing committee solicited cards from hundreds of employees. (A. 1729.) Given this evidence, the Board properly concluded that there was "sufficient circumstantial knowledge that [Novelis] knew of the incipient union

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[3] Contrary to Novelis's claim (Br. 25 n.7) that it never actually conferred a benefit, the Board found that Novelis's own January 9 letter to employees showed that it changed pay, then explicitly "restored" it. (A. 1717, 1729; A. 183, 659.)

[4] Novelis contends (Br. 21) that the administrative law judge ruled this statement by Sheftic to be inadmissible. Novelis is incorrect; the statement was admitted. (A. 97-99, 1761.)

campaign prior to receiving" the Union's demand for recognition on January 9 and restoring wages. (A. 1729.) *See Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988) (Board may draw "reasonable inference" of knowledge based on circumstantial evidence).

Thus, this case is unlike *Hampton Inn NY—JFK Airport*, 348 NLRB 16 (2006), cited by Novelis (Br. 17). There, the employer's promise of increased wages and benefits during organizing was lawful because the General Counsel failed to establish employer knowledge and, in fact, "the only affirmative evidence [was] to the contrary." 348 NLRB at 17. Here, the affirmative circumstantial evidence established Novelis's knowledge of the organizing campaign. Further, in this case, there was clearly more than "talk of a union," as Novelis suggests (Br. 17). By January 9, when Novelis announced the restoration of pay, the organizing committee had gathered hundreds of signed authorization cards, employees—including anti-union employees—had attended union meetings, and managers had been warned that employees were talking about a union. (A. 1710, 1729.)

Next, Novelis fails to show that it had a legitimate business reason for restoring pay. In its brief (Br. 24), Novelis simply claims that it rescinded the changes because it "listened to employee concerns." But the Board found that "there was a palpable absence of testimony by a Company manager about the process and rationale that led [Novelis] to reverse its decision between December

20 and January 9." (A. 1717 n.81.) As a result of Novelis's failure to provide a legitimate business reason for its decision, the Board drew a "plausible inference" that Novelis's "decision to restore Sunday premium pay was not in response to employee concerns but, rather, in response to concerns about a Union organizing campaign." (A. 1717 n.81.) *See NLRB v. Milk Drivers & Dairy Employees*, 531 F.2d 1162, 1165 (2d Cir. 1976) ("Board is, as is any other trier of fact, accorded the power to draw reasonable inferences from the evidence before it").

### 2. Substantial evidence supports the Board's findings that Novelis managers misrepresented the Union's actions and made numerous threats in captive-audience meetings a few days before the election

On February 17 and 18—just a few days before the election—CEO Phil Martens and Plant Manager Chris Smith addressed employees in mandatory meetings. Substantial evidence supports the Board's findings of numerous instances of coercive conduct.

#### a. Novelis misrepresented the Union's position regarding employee benefits to wrongly cast blame on it

At each of the three captive-audience meetings, Martens and Smith displayed a letter from a Board agent and told employees that it contained charges, filed by the Union, relating to the restoration of unscheduled overtime and Sunday premium pay. (A. 1730.) The Board agent's letter solicited Novelis's evidence in response to several allegations, including that "Plant Manager Chris Smith and

Human Resource Manager Peter Sheftic announced to employees that it was restoring 1½ premium pay for Sunday and vacation and holiday time would be considered 'hours worked' in the calculation of overtime in response to learning that there was an ongoing union organizing campaign." (A. 1720; A. 1095-96.) As the Board explained, that was an "allegation" the Board agent sought to investigate, but it was not among the allegations contained in the unfair-labor-practice charge filed by the Union. (A. 1730.) Indeed, Novelis managers would have known this because they were served with the charge on January 27. (A. 1730; A. 487.)

Nevertheless, Martens and Smith put a different spin on the letter in the captive-audience meetings. Martens told employees that "[a]pparently" the Union informed employees "that they filed no grievances," which was "strange because right here is a letter from the NLRB of filed grievances. That's who you're dealing with." (A. 1722; A. 615.) Smith followed up, telling employees that the "charge was filed against the fact that we brought those concessions to the table four weeks ago[.]" Not only was the charge filed, Smith said, but "if we plead guilty, those concessions come off the table. […] That's fact." (A. 1722; A. 626.) In another meeting, Smith went further, telling employees that Novelis's "concessions" regarding unscheduled overtime and Sunday premium pay "would come off the table and they'd be retroactive to the 1st of January." (A. 1724; A. 786.)

To support their account, Novelis managers displayed a blurred version of the letter that omitted most of the text, except the allegation regarding restoration of Sunday premium pay and unscheduled overtime. (A. 1720 & n.105, 1730; A. 1093-94.) The Board found that Novelis's dissemination of the blurred document was "clearly calculated to mislead employees as to the Union's conduct with regard to the restoration of benefits." (A. 1696 n.9.) Misrepresentation of the Union's position about pay has "the obvious effect of coercing employees to refrain from supporting the Union as this places their [wages and benefits] in jeopardy. Such a statement interferes with their Section 7 rights to support a union uninhibited from interference." *Wellstream Corp*., 313 NLRB 698, 707 (1994). *See also NLRB v. Knogo Corp*., 727 F.2d 55, 58 (2d Cir. 1984) (employer unlawfully blamed union for decision not to grant certain economic benefits before election); *cf. Cont'l Ins. Co. v. NLRB*, 495 F.2d 44, 50 (2d Cir. 1974) (employer bad-faith bargaining by blaming union for delay in implementing wage increase). *Accord NLRB v. Miller Waste Mills*, 315 F.3d 951, 955 (8th Cir. 2003) (employer unlawfully sent employee letter blaming union for lack of wage increase).

Novelis disputes the Board's finding, claiming that Martens "merely informed employees that Petock's letter contradicted the Union's claims about the allegations it made in its charge" (Br. 38), that the letter was "minimally redacted" (Br. 39), and that Novelis eventually disclosed the original letter prior to the

election (Br. 39). But as the Board found, Martens was not "merely" informing the employees of facts. Instead, Martens displayed an altered document, "in conjunction with a false statement that it reflected a charge filed by the Union." (A. 1730.) In addition, Martens and Smith falsely warned that Novelis would have to rescind benefits to January 1. (A. 1730.)

*Virginia Concrete Corp*., 338 NLRB 1182 (2003), cited by Novelis (Br. 38), does not support its claims. There, the Board held that the employer's misstatements regarding Board law and procedure were not objectionable. Here, in contrast, the Board found that Novelis's misstatements were about the Union's position with regard to unscheduled overtime and Sunday premium pay, not mere misstatements of law and procedure. (A. 1696 n.9.) Novelis's mischaracterization that the Union sought rescission of employee benefits was unlawful because it wrongly cast blame on the Union to undermine employee support.

Novelis's posting of the altered and unaltered letters does not "undo[] the harm," because "employees were bombarded with the altered version by Martens at the captive audience meetings." (A. 1730.) A repudiation can serve as a defense to an unfair-labor-practice finding only where it is "timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct," and where there is "adequate publication of the repudiation to the employees involved, and [assurances] that, going forward, the employer will not interfere with the

exercise of their Section 7 rights." *Lytton Rancheria of Cal*., 361 NLRB No. 148, 2014 WL 7330998, at *6. *See also Passavant Mem'l Area Hosp*., 237 NLRB 138, 138-39 (1978). As the Board found, although Novelis posted an unaltered version of the letter, it "never told employees that the pay restoration allegation was not, in fact, among charges filed by the Union." (A. 1730-31.) Novelis's action, therefore, "did not constitute a legally sufficient retraction of Martens's false, misleading, and disparaging remarks." (A. 1731.) In those circumstances, the Board properly determined that "it can hardly be said that employees, without the filed charges to compare at that moment, were capable of recognizing [Novelis's] propaganda for what it was." (A. 1730.)

**b. Novelis threatened employees with job loss, reduced wages, more onerous working conditions, and lost business**

Beyond misrepresenting the Union's charge, Novelis threatened employees with job loss, reduced wages, more onerous working conditions, and lost business during the captive-audience meetings. An employer violates Section 8(a)(1) of the Act by threatening employees with termination and other reprisals in response to their union activities. *NLRB v. Marsellus Vault & Sales, Inc.*, 431 F.2d 933, 937 (2d Cir. 1970). Section 8(c) of the Act provides that an employer may state its opinion about unionization, but only if its statements do not contain "a threat of reprisal or force or promise of benefits." *NLRB v. Gissel Packing Co*., 395 U.S.

575, 618 (1969). *Accord NLRB v. Scoler's, Inc.*, 466 F.2d 1289, 1292 (2d Cir. 1972). In construing these sections of the Act, courts "must take into account the economic dependence of employees on their employers, and the tendency of the former. . .to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Gissel*, 395 U.S. at 619. Accordingly, predictions about the impact of unionization must be "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control," and will be unlawful if "there is any indication that an employer may or may not take action solely on his own initiative or for reasons known only to him." *Id*. As shown below, Novelis's statements to employees were not "carefully phrased on the basis of objective fact" as required by *Gissel*.

**1) Novelis threatened employees with job loss**

Ample evidence supports the Board's finding that during Novelis's captive-audience meetings, Martens threatened job loss by "emphasizing that his prior personal commitment to preserving and expanding job opportunities at Oswego would cease if the Union won the election." (A. 1699.) Specifically, CEO Martens reminded the employees that 140 jobs were lost when he decided to close the Quebec plant, but that he personally "maintained [employees'] jobs" in Oswego (A. 1699; A. 615.) Further, he reminded employees that the Oswego facility lost a

contract with Ball, and he personally "made the decision not to lay people off " and instead closed the Quebec plant. (A. 1721; A. 609.) But Martens warned the employees, "if you vote yes, I move from owning this as a personal decision and a personal passion for this plant to one where it become a business decision for me." (A. 1724; A. 679.)

The Board found that those statements "sent the clear message to employees that their job security would be jeopardized if they selected the Union." (A. 1699.) Indeed, the Board found that Martens made clear that future decisions about Oswego would not be "business" decisions in any ordinary sense of the term. Rather, the Board found that because "by his own words, his past 'business' decisions had *not* been based on objective criteria[,]" Martens "led [employees] to believe that he would base future decisions at Oswego on subjective criteria, such as the presence of a union." (A. 1729, emphasis in original.)

By arguing that there was "overwhelming evidence of a positive future in Oswego" and it would be "inconceivable" for Novelis to abandon its investment in the facility (Br. 29-30), Novelis ignores the Board's actual findings. The Board did not find a threat of plant closure. It found, rather, that Novelis threatened employees with job loss. (A. 1696 n.8.) On this record, reasonable employees could hear Martens's "potent theme of contrasting [Novelis's] current personal commitment to the employees with the prospect of a 'third-party' union" and

conclude that a union victory "would lead only to dire economic consequences for them." (A. 1700.)

Moreover, Novelis and Amici's claim (Br. 32-33, Am. Br. 5-7) that the Board took Martens's statements out of sequence and context is simply incorrect. (A. 607-30, 669-701, 754-89.) In each meeting, Martens told the employees that he made a personal decision to protect employment at Oswego, in contrast to his personal decision to close the Quebec facility. (A. 609, 671-73, 758-60.) For example, in one meeting, Martens told employees that he "personally made the commitment [] to sustain the employment levels here at Oswego," he personally decided not to lay off 200-300 workers at Oswego when the Ball contract was lost, and he personally closed the Quebec facility and transferred that work to Oswego. (A. 609.) In addition, Martens repeatedly contrasted personal and business decisions by telling employees that he would vote no, he did not "want this to become a business decision," and he wanted employees to know "it's extremely important for me that you know how big [sic] decisions I've made to support all of you." (A. 768.) Further, Martens told employees "[y]ou have incredible working conditions, and you and your families have a future that is more secure today than it ever has been at any time that this plant has been in existence, and I personally have made the difficult decisions to make that a reality." (A. 681.) Employees whose livelihoods depended on Martens's decisions would certainly understand the

import of his words. Martens's statements, "when viewed within the context of the rest of the speech," provide "sufficient evidence to support a finding that [Section] 8(a)(1) of the Act ha[s] been violated." *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996).[5]

**2) Novelis threatened employees with reduced wages and benefits**

The record also fully supports the Board's finding that Martens "predict[ed] that employees would be paid less" and "implied a loss of existing benefits." (A. 1729-30.) Martens warned that if the Union won, the "base line" for negotiations would be the lower wages and benefits at the unionized Terre Haute and Fairmont plants, which are "less supportive of the lifestyles that you want." (A. 1721; A. 614.) The unionized status of those plants, however, was not a requirement for reducing wage levels, and Martens never explained why union negotiations would necessarily result in a reduction of wages and benefits at Oswego. Contrary to Novelis's claims (Br. 27), Martens repeatedly stated that the lower wages and benefits at Novelis's unionized facilities would mean lower wages at Oswego if the

[5] *Stanadyne Automotive Corp*., cited by Amici (Am. Br. 6), does not provide support for their claims. There, unlike here, the Board found that the employer's speeches did not violate the Act because speakers "repeatedly made clear that they were not making threats or predictions about the future, but rather, presenting facts and recollections about actual events." 345 NLRB 85, 89 (2005) (internal quotation omitted), *enf'd in relevant part sub nom. Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008).

Union won. Those statements were not based on objective fact and were, therefore, coercive. *See Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 485 (5th Cir. 2001) (statements about possible reductions of pay and benefits unlawfully "crossed the line" from mere predictions to threats of reprisal "because there was no lawful explanation based on objective facts as to why such a loss of benefits would occur") (internal quotation omitted).

**3) Novelis threatened employees with more onerous working conditions**

Similarly, Martens's suggestions that employees would lose their flexible work schedules were unlawful threats of more onerous working conditions. Martens warned that employees at the unionized plants in Terre Haute and Fairmont "don't have the same flexibility in the work schedules that you do, but that's whe[re] we would start" if the Union won the election. (A. 1723.) The Board explicitly found that Martens "mentioned these developments as an eventuality while omitting any mention of the need to bargain over such changes based on objective facts." (A. 1730.) *See Snyder Tank Corp*., 177 NLRB 724, 727 (1969) (threats of "stricter work rules," fewer coffeebreaks, and restrictions on talking), *enforced*, 428 F.2d 1348 (2d Cir. 1970) (per curiam).

Novelis's claim (Br. 35) that Martens "merely emphasized" that Novelis wanted employees to keep their flexible work schedules fails to take into account Martens's actual words: he told employees that the less flexible schedules at the

unionized plants would be where bargaining would start. That contradicts a desire to preserve the extant schedules. (A. 1723.)

**4) Novelis threatened employees with lost business**

In addition to Martens' threats, Plant Manager Smith warned employees of lost business and job security, by suggesting that Novelis's customers would "look elsewhere" if employees voted in the Union. (A. 1722.) He questioned Novelis's ability to remain competitive and satisfy the Ford contract if the employees voted for the Union and specifically linked that contract to loss of business and job security. (A. 1722.) Smith told employees that "[i]t's not a God-given right that every time Novelis has the opportunity to invest," that its investment would come to Oswego, and that "[t]here's no way we can be successful being represented by someone who has limited to no knowledge of our business. . . ." (A. 1723, 1725; A. 693, 774.) According to Smith, Novelis has "an extremely demanding customer" and that customer "will have options as we go forward. The last thing we want to do is give [it] any reason to look elsewhere outside of Novelis, or specifically Oswego. . . ." (A. 1722; A. 626.) The Board found that Smith "did not offer objective criteria to support" his assertions, "instead declaring that the impediment of a union presence would cause [Novelis] to lose current and future contracts at the Oswego plant, further resulting in layoffs." (A. 1730.)

Novelis contends (Br. 36) that "[a]t most" Smith's comments reflected his opinion "that Novelis' ability to meet customer expectations could be impacted by any number of challenges" and had "nothing to do with a union." Again, Novelis is putting forth its own view of facts and ignoring the context of Smith's statements, which were made at a mandatory employee meeting just a few days before the election and were tied to the Union. Indeed, he referred to the Union as "a third party that knows very little, if anything, about our business," claimed that "[b]ringing in a union is a distraction that will take us away from achieving our business goals," and stated that "we've got to get past the vote." (A. 1722; A. 621, 625-26.) A reasonable employee would hardly believe that Smith's statements had "nothing to do with the Union." (Br. 36.)

**3. Substantial evidence supports the Board's finding that Novelis managers threatened employees that they did not have to work for Novelis if they were unhappy with their employment terms and threatened employees with layoff**

The Board found that Novelis manager Jason Bro violated the Act by telling an employee who protested Novelis's changes to wages that if he did not like his job, he "could find a new one."[6] Inviting employees "to quit their jobs in response to employees' §7 conduct" violates the Act. *Alton H. Piester, LLC v. NLRB*, 591

[6] Novelis's claim (Br. 45-46) that Bro "permitted employees to aggressively question his math during the presentation" ignores the fact that the employee who questioned Bro's math was told that he could "find a new [job]." (A. 1733; A. 160.)

F.3d 332, 336 (4th Cir. 2010). As the Fourth Circuit explained, statements that employees should find another job "have been determined to be coercive because they tend to imply that continuing to engage in protected activity is incompatible with continued employment and would be looked upon with disfavor by the employer." *Id*.

The Board further found that manager Craig Formoza violated the Act by impliedly threatening new employee Cowan with layoff if the Union won. After Cowan declined Formoza's invitation to discuss the Union, Formoza said Cowan could be moved to another schedule, or a shift could be laid off in seniority order, while artfully inquiring as to Cowan's seniority. (A. 1696 n.11, 1733.) Threatening employees with layoff violates Section 8(a)(1) if that threat is "motivated by or conditioned upon an employee's participation in a labor organization." *N.Y. Univ.*, 156 F.3d at 410.

In its defense, Novelis complains (Br. 45-46) about the Board's factual and credibility determinations and argues that the incidents cannot be considered unlawful because they are de minimis. But the Court will not "determine facts rather than [] decide whether the Board's findings are supported by substantial evidence on the record considered as a whole." *S.E. Nichols*, 862 F.2d at 958. Nor will the Court overturn the Board's credibility determinations unless they are "hopelessly incredible." *Id*. at 956. In cases such as this one, where the threats

occurred within the broader context of Novelis's myriad unfair-labor-practice violations, Novelis "cannot claim its threats are de minimis as a mere isolated incident." *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 179 (2d Cir. 1965).

**4. Substantial evidence supports the Board's findings that manager Quinn solicited grievances**

An employer that solicits grievances and promises to address them violates Section 8(a)(1) of the Act, even where the promises are merely implied. *NLRB v. Windsor Indus*., 730 F.2d 860, 862-64 (2d Cir. 1984). While manager Quinn did not ordinarily visit the remelt control room to talk with employees (A. 1720 & n.108), five days before the election he went there and asked three employees about employee morale. One told Quinn that he was not happy about the changes to benefits and overtime. After discussing whether that could be fixed, Quinn told them that if employees voted "no" in the union election, "it would never be as good as it was, but it would be better than it is now." But, Quinn noted, Novelis "couldn't start making things better until a 'No' vote was in." (A. 1720.)

Novelis incorrectly claims (Br. 45) that the Board failed to consider evidence that Quinn "had a consistent practice of visiting employees on the shop floor." The Board *did* consider Quinn's testimony that "it was not unusual for him to speak with employees on the shop floor[,]" (A. 1720 n.108; A. 459-60), but found that Quinn "failed to refute the credible testimony of [two employees] that it was unusual for [him] to engage *them* in their work area." (A. 1720 n.108.) In

addition, the Board discredited Quinn's denial and found that "it was evident from the credible testimony of [two employees] that [Quinn] eventually expanded on [his] remarks to forecast a better future for employees if the Union lost." (A. 1720 n.108.) Accordingly, the record evidence fully supports the Board's finding that Quinn, during his unusual visit to the control room, unlawfully solicited grievances in order to influence the employees to vote against the Union.

**5. Substantial evidence supports the Board's finding that Novelis manager Bro interrogated employees about their union sympathies**

Section 8(a)(1) prohibits an employer from questioning employees about their union views if the interrogation tends to coerce employees in the exercise of their rights under the Act. *See NLRB v. Milco, Inc.*, 388 F.2d 133, 137-38 (2d Cir. 1968). Whether an employer's interrogation tends to be coercive depends on the totality of the circumstances. *Rossmore House*, 269 NLRB 1176 (1984), *enforced sub nom., Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

Manager Bro twice interrogated employees about their union sympathies. (A. 1696 n.11, 1732.) In both meetings, Bro asked employees individually, "do you know what to do if you don't want the Union in?" Bro then instructed them to say "Vote no." Some employees responded as Bro wanted while others refused to answer. (A. 1719, 1733.) Substantial evidence supports the Board's finding that,

based on the totality of the circumstances, including "Bro's management position, the combative nature of the encounter, and Bro's role in other similar situations," his one-by-one coaching of employees on how to vote "would reasonably tend to coerce an employee" in the exercise of his Section 7 rights. (A. 1733.)

Novelis asserts (Br. 45-46) that Bro's "light-hearted" questioning was not coercive because he did not tell employees how to vote, ask how they would vote, or threaten job loss if the Union won. But the Board explicitly found (A. 1733) that the exchange was "combative," not light-hearted, a finding this Court will not overturn unless "no rational trier of fact could reach the conclusions drawn by the Board." *Springfield Hosp*., 899 F.2d at 1310. Moreover, asking whether employees know how to vote is coercive interrogation. *Milco*, 388 F.2d at 137-38. That finding is further supported by employees' evasiveness in responding to the interrogation. *Id. Accord Tellepsen Pipeline Servs. Co. v. NLRB*, 320 F.3d 554, 561 (5th Cir. 2003).

**6. Substantial evidence supports the Board's finding that Novelis managers prohibited union insignia on employee uniforms while permitting anti-union and other insignia**

Curtailing employees' right to wear union insignia at work is a clear violation of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.7 (1945). *Accord Dist. Lodge 91, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 814 F.2d 876, 881 (2d Cir. 1987). Novelis does not seriously contest the

Board's finding (A. 1701) that it violated the Act by directing employees wearing pro-union stickers to remove or cover them up while allowing other employees to wear anti-union insignia. Rather, Novelis makes only a cursory challenge by stating (Br. 84) that Bro told employees they could wear union stickers on their personal clothing. This claim fails to acknowledge the entirety of Bro's remark: employees could wear union stickers on their personal clothing, only if the stickers were covered by their uniforms. (A. 1732; A. 160.) Moreover, Novelis does not challenge the Board's finding that while some employees were told to remove anti-union insignia, "it is evident that [Novelis] did not always enforce the policy in an evenhanded manner." (A. 1718 n.87.)

**7. Novelis selectively and disparately enforced its solicitation and distribution rule, and the rule is impermissibly vague as to e-mail use**

Where an employer permits employees to transmit personal messages—via a bulletin board, telephone, or email—it cannot then discriminate against employees who send messages about their union activity. As the Board and this Court have held, such discrimination violates Section 8(a)(1). *See S.E. Nichols*, 862 F.2d at 958 (employer discriminatorily enforced no-solicitation rule); *Honeywell, Inc.*, 262 NLRB 1402, 1402-03 (1982) (employer unlawfully allowed personal employee notices on bulletin board while prohibiting union meeting notices), *enforced*, 722 F.2d 405 (8th Cir. 1983).

Substantial evidence supports the Board's finding (A. 1701) that Novelis "selectively and disparately enforc[ed its] posting and distribution rules by prohibiting union postings and distributions while permitting nonunion and antiunion postings and distributions." The record demonstrates multiple instances of managers removing pro-union literature from the plant while leaving anti-union literature. Specifically, the Board found (A. 1732-33) that:

- On January 12, 2014, manager Bro removed pro-union literature from a break area while leaving anti-union literature.
- In mid-January, Bro removed a union meeting notice from a bulletin board despite Novelis's practice of permitting employees to post a variety of personal and non-work-related items on the boards.
- On January 21, supervisor Duane Gordon told employees that they could not have pro-union literature in a break room, removed pro-union literature, and replaced it with Novelis's anti-union literature.
- On January 23, Bro and other supervisors met with employees in the furnace room, a dual work/break area. Bro removed pro-union literature, told employees that no pro-union or anti-union literature would be permitted on bulletin boards or clipboards, and distributed a company anti-union pamphlet. During the same meeting, supervisor Dan Taylor removed union materials from a desk and employees' clipboards despite Novelis's practice of leaving anti-union literature in this area.

Thus, Novelis's claim (Br. 46) that "no evidence exists" that supervisors removed pro-union literature while allowing anti-union literature is explicitly contradicted by the Board's factual and credibility findings. Novelis has provided no basis for reversing these findings. *See S.E. Nichols*, 862 F.2d at 958. Further,

Novelis's claim (Br. 46 n.17) that the "indisputably prevalent" pro-union literature "undermines" the Board's finding is unsupported by the record or the law. While pro-union (and anti-union) literature was prevalent, Novelis managers still violated the Act by discriminatorily removing only pro-union fliers from several locations. (A. 1731-32.) Discriminatory enforcement of a no-solicitation rule violates the Act. *S.E. Nichols*, 862 F.2d at 958. That Novelis did not purge all pro-union literature is no defense to its discriminatory attempt to jettison some pro-union material, and it has not cited any authority to support that notion. *See Baptist Med. Ctr./Health Midwest*, 338 NLRB 346, 366 (2002) (employer unlawfully told employees to remove table with pro-union literature although it allowed distribution by hand).

Novelis does not challenge the Board's finding that its solicitation and distribution rule is "impermissibly vague to the extent that an employee who has rightful access to the email system would reasonably feel restrained from posting Section 7 material via email during non-work time." (A. 1731.) Rather, Novelis argues (Br. 47-48) only that the Board improperly applied the standard set out in *Purple Communications, Inc.*, 361 NLRB No. 126, 2014 WL 6989135, retroactively. There, the Board held that "employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems."

2014 WL 6989135, at *1. In an earlier case, relied upon by Novelis (Br. 47) and overruled in *Purple Communications*, the Board held that employers "may lawfully bar" employees from using the company email system for nonwork-related emails, unless an employer "acts in a manner that discriminates against Section 7 activity." *The Register-Guard*, 351 NLRB 1110, 1116 (2007), *enforced in part*, 571 F.3d 53, 58 (D.C. Cir. 2009) (policy prohibiting use of email for all non-job-related solicitations was not before court).

In its brief, Novelis makes only a conclusory statement that it suffered "manifest injustice" because of the Board's application of *Purple Communications* rather than *Register Guard*. Conclusory statements are not sufficient to preserve an argument for appellate review. *See Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal"). In any event, in *Purple Communications*, the Board gave a detailed rationale for its decision to follow its "usual practice" of applying new policies and standards "to all pending cases in whatever stage." 2014 WL 6989135, at *16 (quotation omitted). Because Novelis has failed, in its opening brief, to dispute that rationale, the Board's finding should be enforced. *See Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, 391 F.3d 433, 438 n.4 (2d Cir. 2004) (Court will not consider arguments party failed to raise in opening brief).

**8. Novelis violated the Act by maintaining and giving effect to an overly broad social media policy**

In evaluating an employer's maintenance of workplace rules, the Board examines whether the challenged rule or policy "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). An employer's rule that does not explicitly restrict Section 7 activity still violates Section 8(a)(1) if "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). *Accord Triple Play Sports Bar & Grille*, 361 NLRB No. 31, 2014 WL 4182705, at * 8, *enforced*, 629 F. App'x 33 (2d Cir. 2015) (summary order). Overbroad rules are unlawful "because they infringe upon rights protected by Section 7 of the Act." *Fresh & Easy Neighborhood Mkt.*, 361 NLRB No. 8, 2014 WL 3778347, at *2. Ambiguity in a rule must be construed against the promulgator. *Lafayette Park*, 326 NLRB at 828.

Applying the above principles, the Board concluded (A. 1733-34) that Novelis's employees would reasonably interpret the social media policy to encompass protected activity. That policy explicitly governs employee participation on social media "personally, as well as when acting on behalf of [Novelis.]" (A. 730.) It places "ultimate[]" responsibility on the employees for any online posts "that potentially can tarnish the Company's image." (A. 731.) As

the Board found, the policy's overly broad language "threaten[s] employees with discipline for posting messages that may 'potentially' or 'might' conflict with [Novelis's] position." (A. 1732.) Thus, the Board properly concluded that employees could reasonably construe the policy to prohibit activity protected by Section 7 of the Act, such as protesting unfair labor practices, that may "'potentially tarnish' or 'cause conflict' with [Novelis's] image." (A. 1734.)

Novelis argues (Br. 48) that its social media standard is lawful because it was not "promulgated in response to union activity or applied to restrict the exercise of Section 7 rights" and because it implemented the policy for "legitimate business reasons." Contrary to Novelis's claims, the rule need not be promulgated for an improper purpose or applied to prohibit Section 7 activity. Rather, under *Lutheran Heritage*, a violation lies in "*one* of the following" – employees could reasonably construe the rule to prohibit Section 7 activity, the rule was promulgated in response to union activity, *or* the rule was applied to Section 7 activity. 343 NLRB at 647 (emphasis added). *See also Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. NLRB*, 520 F.3d 192, 197 (2d Cir. 2008) (unlawful to promulgate rule with "chilling effect" on organizing rights "[e]ven if [that] rule does not explicitly restrict protected activity"); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992) (unlawful prohibition on

discussing wages and other employment terms "even absent evidence of [its] enforcement").

*Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), does not further Novelis's cause (Br. 48). There, the employer prohibited "abusive or threatening language to anyone on company premises." 253 F.3d at 25. The court found that such language is generally not related to protected activity, and "[a]n employer's effort to squelch criticism from employees. . .is quite different from demanding employees comply with generally accepted notions of civility." 253 F.3d at 26-27. In contrast, Novelis's social media policy was not restricted to the use of abusive or threatening language. Finally, Novelis is incorrect (Br. 48) that it did not apply the policy "to restrict the exercise of Section 7 rights." As discussed next, substantial evidence supports the Board's finding that Novelis unlawfully demoted employee Everett Abare under the policy.

**9. Substantial evidence supports the Board's finding that Novelis violated Section 8(a)(1) and (3) of the Act by demoting Abare for engaging in protected, concerted and union activity**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits discrimination against employees "to encourage or discourage membership in any labor organization." Disciplining an employee for engaging in protected, concerted, or union activity to discourage membership in a union violates Section 8(a)(1) and (3). *See, e.g., NLRB v. Sprain Brook Manor Nursing Home, LLC*, 630 F. App'x

69, 71 (2d Cir. 2015) (summary order). *See also NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 213 (2d Cir. 1980) (unlawful demotion of union adherents).

The Board's test for determining whether activity is concerted is whether it is "engaged in[,] with[,] or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885 (1986) (quoting *Meyers Indus.*, 268 NLRB 493, 497 (1984)), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The Supreme Court stated that "mutual aid or protection" should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-70 (1978) (employee discussions of terms and conditions of employment, including pay, are protected and concerted). In addition, employee discussion of such workplace concerns, including on Facebook, is protected and concerted. *See Triple Play*, 629 F. App'x at 37-38 (protected, concerted activity when employees complained, on Facebook, about employer's incorrect tax withholding).

Analysis of unlawful discipline typically focuses on the employer's motivation under the Board's "*Wright Line*" test. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983) (approving *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981)). But where, as here, the employer admits that protected activity played a part in its decision, no further analysis of motive is necessary. *See, e.g.*, *Phoenix Transit Sys.*, 337 NLRB

510, 510 (2002), *enforced*, 63 F. App'x 524 (D.C. Cir. 2003); *accord Allied Aviation Fueling of Dallas LP*, 347 NLRB 248, 249 n.2 (2006), *enforced*, 490 F.3d 374, 379 (5th Cir. 2007) (motive not at issue when employer admits discharge was for protected activity). Such an admission serves to "eliminate any question" concerning the reason or "other causes suggested as the basis" for the action. *L'Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980) (quotation omitted).

It is undisputed that Novelis demoted Abare by stripping him of his responsibilities as crew leader, fire and medical captain, and crane trainer, because of his Facebook post about the election and pay.[7] (A. 1727 & n.165.) Indeed, Quinn told Abare that the post violated Novelis's social media policy. (A. 1727; A. 125-26, 730-32.) The Board found (A. 1696 n.12) that Abare's demotion for engaging in protected, concerted, and union activity violated the Act and that this demotion gave effect to Novelis's overly broad social media policy in further violation of the Act.

Abare's post explicitly raised two issues that fall under the Act's protection. First, it concerned the recent union election. Board law is clear that union activity

[7] Abare's post stated, "As I look at my pay stub for the 36 hour check we get twice a month, One worse than the other. I would just like to thank all the F*#KTARDS out there that voted 'NO' and that they wanted to give them another chance…! The chance they gave them was to screw us more and not get back the things we lost….! Eat $hit 'NO' Voters….." (A. 1726.)

is protected and also inherently concerted. *See Oncor Elec. Delivery Co., LLC*, 364 NLRB No. 58, 2016 WL 4087599, at *2. Further, his post raised another crucial concern of employees: pay. Employee discussions about pay are clearly protected. *See Eastex*, 437 U.S. at 569-70. There is also no dispute that Abare was concerned about the changes to overtime calculations and Sunday premium pay. He expressed his concerns in May 2013 when the changes were first announced and again in November 2013 during an employee work stoppage. (A. 1709 & n.18, 1735.) The December 16 pay and benefits meeting—during which managers discussed the upcoming changes in overtime and Sunday premium pay—was the impetus for Abare to contact the Union and meet with a representative the next day. (A. 1709 & n.22.)

Employee discussions about pay are also "fairly … characterized as concerted activity for the 'mutual aid or protection'" of employees. *Id.* An employee is engaging in concerted activity if that activity "represents either a 'continuation' of earlier concerted activities or a 'logical outgrowth' of concerted activity." *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (citation omitted). "[E]ven action which involves only a speaker and a listener can qualify as concerted action if it had some relation to group action in the interest of the employees." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 785-86 (8th Cir. 2013) (quotation omitted). Here, employees in addition to Abare

expressed their concerns about the pay changes to Novelis managers. (A. 1709.) Thus, Abare's Facebook post was a continuation of this conversation, not simply his "individual frustration." (Br. 42.)

Novelis argues that Abare's Facebook post was not concerted because 1) no Novelis employee "liked" the post and only one Novelis employee commented on the post, and 2) Novelis did not know other employees participated.[8] At a minimum, Novelis knew that three people commented and 10 people saw and "liked" Abare's Facebook post. (A. 149, 729.)[9] Moreover, its stated reason for demoting him was because his comments were "discriminatory and threatening to co-workers. . . ." (Br. 44 n.13.) It is difficult to reconcile Novelis's concern that the post was discriminatory and threatening with its asserted belief that no employees saw the post. In any event, as a comparison of A. 639-56 and A. 728 clearly shows, nine Novelis employees saw and "liked" or commented on the post (employees Dopp, Gregway, Kline, Losurdo, Maxfield, McManus, Robinson, Spencer, Stock). The post was, therefore, a concerted act.

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[8] Novelis further argues (Br. 40-41) that Abare is a supervisor under Section 2(11) (29 U.S.C. §152(11)), and, because he was not a protected employee, his demotion could not violate the Act. We explain why this claim lacks merit below, pp. 67-73.

[9] As Novelis concedes (Br. 43), A. 729 is the copy of the post that Quinn showed Abare. It shows that, at the time it was printed, Abare's post had received 10 "likes" and three comments.

Further, substantial evidence supports the Board's finding that Abare's Facebook post was a continuation of his prior protected, concerted, and union activity and that Novelis knew about that activity. He spoke up at the work stoppage in November 2013 where employees protested the announced change to their pay, and he was the Union's observer at the election in February. (A. 1735.) The Board also found that it was "evident" that management's "focus on Abare had filtered down to midlevel managers" when Bro asked employees whether Abare had placed pro-union literature in a break room. (A. 1735.) Thus, as a continuation of his discussion of employee concerns over pay and the Union election, Abare's Facebook post constituted concerted, protected activity. *See Triple Play*, 2014 WL 4182705, at *3.

Novelis briefly argues (Br. 44) that Abare's comments lost the protection of the Act because of the language used. But as the Board found, this type of language was common in Novelis's facility and was used by employees and management alike, as described above, p. 21. (A. 1727.) And Novelis failed to provide any evidence that it had ever disciplined any employee for similar behavior. (A. 1736; A. 130, 190, 202-03, 227-28, 270-71.) *See Triple Play*, 629 F. App'x at 35-37 (employees' Facebook statements, including statement that employer was an "asshole," did not lose the protection of the Act).

Finally, Novelis argues (Br. 44 n.13) that the Board improperly relied on *Triple Play*, which analyzed whether an employee discussion on Facebook was disloyal and, therefore, lost the Act's protection, and that it did not demote Abare because his post was disloyal. This Court does not consider arguments "mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). In any event, the Board has not limited the application of *Triple Play* to cases in which disloyalty is involved. *See NC-DSH, LLP*, 363 NLRB No. 185, 2016 WL 2753320, at *1 & n.3 (applying *Triple Play* and finding that employee did not lose protection of Act by using profanity while discussing union with another employee). As described above, substantial evidence supports the Board's finding that Abare's Facebook post did not lose the protection of the Act under *Triple Play*, and Novelis violated Section 8(a)(1) and (3) by demoting Abare for engaging in protected, concerted, and union activities.

## II. THE BOARD REASONABLY EXERCISED ITS BROAD DISCRETION IN ORDERING NOVELIS TO BARGAIN WITH THE UNION TO REMEDY ITS SERIOUS UNFAIR LABOR PRACTICES

### A. Applicable Principles and Standard of Review

In *NLRB v. Gissel Packing Co*., the Supreme Court affirmed the Board's authority to issue a remedial bargaining order in cases in which employers commit "serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election." 395 U.S. 575, 594 (1969). The Board may issue a remedial bargaining order under *Gissel* where a union "lost a representation election because of the employer's [unfair labor practices] if. . .the union at one time enjoyed majority support in the bargaining unit," as expressed by signed authorization cards. *Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 826 (D.C. Cir. 2001). *Accord Coating Prods., Inc. v. NLRB*, 648 F.2d 108, 109 (2d Cir. 1981).

Under *Gissel*, there are two categories of cases warranting remedial bargaining orders. "Category I" cases are marked by "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." 395 U.S. at 613-14. In "Category II" cases, the unfair labor practices are less pervasive, but they "nonetheless still have the tendency to undermine majority strength and impede the election processes." *Id.* at 614. Bargaining orders are appropriate in Category II cases where the Board has

reasonably found that "the possibility of erasing the effect of past practices and of ensuring a fair election. . .by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order. . . ." *Id.* at 614-15.

Remedial bargaining orders advance employees' free choice by effectuating their designation of a union through authorization cards where, due to the employer's misconduct, an election is "not likely to demonstrate the employees' true, undisturbed desires." *Id.* at 610-11. They also deter the commission of serious unfair labor practices by refusing to permit wrongdoers "to delay or disrupt the election process or put off indefinitely [their] obligation[s] to bargain." *Id.* at 610.

Finally, the Supreme Court in *Gissel* emphasized that "the Board and not the Courts" should make the determination whether a bargaining order is necessary "based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *Id*. at 612 n.32. In doing so, the Board "draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *Id.* *See also* 29 U.S.C. §160(c) (authorizing the Board "to take such affirmative action. . .as will effectuate the policies of th[e] Act"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (Board has "primary responsibility and broad discretion to devise remedies that

effectuate Act's policies, subject only to limited judicial review"). Moreover, this Court will enforce the Board's remedy unless it "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Consol. Bus Transit, Inc.*, 577 F.3d 467, 476 (2d Cir. 2009) (internal quotation omitted). This Court reviews the Board's decision to issue a remedial bargaining order for abuse of discretion. *Coating Prods*, 648 F.2d at 109.

### B. The Union Demonstrated, Through Signed Authorization Cards, that It Had the Support of a Majority of Employees

The Board found (A. 1695-96) that as of January 9, 2014, when it requested recognition, the Union had attained the support of a majority of employees with authorization cards signed by 351 of approximately 600 employees. The evidence supports the Board's determinations that the authorization cards were properly authenticated and validly solicited.

#### 1. The administrative law judge did not abuse his discretion by authenticating cards through signature comparison

The Union's authorization cards "contained an emphatic statement" in all caps authorizing the Union to represent the signers as their collective-bargaining agent. (A. 1710.) As demonstrated below, Novelis's argument that some of the union-authorization cards should not have been counted is without merit.

The administrative law judge granted the General Counsel's motion to authenticate 38 cards via signature comparison. (A. 1302-08.) The judge

authenticated all but five based on signature specimens from subpoenaed personnel records. (A. 1697, 1710 n.25, 1737; A. 274, 874-912.) The Board found that the judge properly authenticated the cards. (A. 1697, 1710.)

As an initial matter, the Board noted that it has long accepted as authentic, "any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing." (A. 1697.) *See McEwen Mfg.*, 172 NLRB 990, 992 (1968), *enforced*, 419 F.2d 1207 (D.C. Cir. 1969). *Accord Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 330 (4th Cir. 2008). Similarly, it has long been the Board's practice to allow an administrative law judge, as the trier of fact, to authenticate an authorization card by comparing it to an authenticated document. *See Action Auto Stores*, 298 NLRB 875, 879 (1990), *enforced mem*. 951 F.2d 349 (6th Cir. 1991); *NLRB v. Philamon Labs., Inc.*, 298 F.2d 176, 180 (2d Cir. 1962). *See also* Fed. R. Evid. 901(b)(3). Moreover, as the D.C. Circuit has explained, "[f]or decades, the Board has treated employee documents from an employer's personnel files as genuine specimens for purposes of authenticating signatures on authorization cards." *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 105 (D.C. Cir. 2000). "Both the source of the handwriting specimens and the nature of the documents involved are strong evidence of the genuineness of the handwriting therein." *Aero Corp*., 149 NLRB 1283, 1287 (1964).

Novelis makes only a bare assertion, echoed by the Intervenor (Br. 52-53 n.19; Int. Br. 17), that the administrative law judge used "highly suspect" authentication techniques. They have failed to show any abuse of discretion in the application of established and judicially approved Board authentication procedures.

Although the Intervenor complains (Int. Br. 21) that the administrative law judge improperly authenticated cards because Federal Rule of Evidence 901(b)(3) allows authentication by signature only where the comparison documents have themselves been authenticated, neither the Intervenor nor Novelis excepted to the judge's decision on this basis. During the hearing, Novelis did not even object to providing documents with signatures to authenticate cards that could not be authenticated through testimony. (A. 118.) Further, Novelis failed to except to the judge's authentication *process* under Fed. R. Evid. 901(b)(3). Instead, Novelis excepted only to the authentication of seven cards because "those employees did not testify at trial and the signature comparisons were not reliably similar." (A. 1557.) Because no exceptions were filed regarding the judge's decision to authenticate cards by the process of signature comparison, Section 10(e) of the Act (29 U.S.C. §160(e)) deprives this Court of jurisdiction to hear the Intervenor's argument. *See Elec. Contractors, Inc. v. NLRB*, 245 F.3d 109, 115 (2d Cir. 2001). In any event, neither Novelis nor the Intervenor claims that the comparison signatures from Novelis's own records were inauthentic. There simply was no

abuse of discretion. *See NLRB v. The Staten Island Hotel Ltd. P'ship*, 101 F.3d 858, 861 (2d Cir. 1996) ("It is within the ALJ's powers to dispose of procedural requests, motions, or similar matters") (internal quotation omitted).

Further, the Intervenors' claim (Int. Br. 18-19) that the General Counsel improperly refreshed the recollections of three card solicitors is a veiled attempt to challenge the Board's credibility determinations. The administrative law judge determined, based on their testimony, that the cards they solicited were authentic. (A. 1711 & nn.31-34, 1713 & n.46, 1715 & n.64, 1736-37.) *See NLRB v. Scoler's, Inc.*, 466 F.2d 1289, 1293 n.3 (2d Cir. 1972) (all credibility issues resolved in favor of counting card). Moreover, the Board has long held that a party may—as the General Counsel did here—"use an affidavit to refresh a witness's recollection." *W&M Props. of Connecticut, Inc.*, 348 NLRB 162 (2006). *Accord Dreyer's Grand Ice Cream, Inc. v. NLRB*, 140 F.3d 684, 690 (7th Cir. 1998). In the context of soliciting many cards (over 50 in Abare's case), months earlier at various times and locations, it is not unusual that these witnesses could not remember every employee from whom they solicited a card and may have needed some refreshing of their recollections. Other than casting aspersions on the General Counsel, the Intervenors offer nothing to contradict the witnesses' testimony. In addition, the Board presumes that a signed, dated card is valid. *See, e.g., McAllister Towing & Transp. Co.*, 341 NLRB 394, 420 (2004), *enforced*, 156 F. App'x 386 (2d Cir.

2005) (summary order). The Intervenors have provided no grounds for invalidating these cards.

Novelis erroneously claims (Br. 52-53 n.19), joined by the Intervenor (Int. Br. 13-16), that the Board erred by "ignor[ing] Novelis's security gate records" purportedly showing that card signers or witnesses were not in the facility on the dates the cards were signed. But the Board fully addressed the issue, finding Novelis's security records to be "reliable and mostly accurate" and indicating that 15 cards were signed by employees outside the facility, not inside. Nevertheless, the administrative law judge independently and properly authenticated the cards through signature comparison. (A. 1711-12 n.36, 1713 n.46, 1715 n.63.)

**2. The administrative law judge did not abuse his discretion by limiting evidence regarding Abare's supervisory status and therefore receiving into evidence the cards he solicited**

In addition to its meritless attacks on the Board's authentication procedures, Novelis challenges the Union's majority status by claiming (Br. 53-61) that Abare was a supervisor under Section 2(11) of the Act (29 U.S.C. §152(11)) and, therefore, the 57 cards he solicited were invalid. Novelis, however, fails in its claim that the judge abused his discretion by limiting evidence on that issue.

Fifteen days into the hearing, Novelis attempted to enter evidence of Abare's supervisory status. (A. 442-49.) At no point during the General Counsel's case did Novelis object to the admission of cards solicited by Abare on the basis of

supervisory status. Instead, Novelis waited until the General Counsel's case was concluded to even claim that he was a statutory supervisor. The judge granted the General Counsel's motion to preclude the evidence and denied Novelis's motion to amend its answer to the complaint to add an affirmative defense alleging Abare's supervisory status. (A. 1309-12; A. 471-72, 1446-47.) In his order, the judge noted that Novelis failed to specifically plead Abare's status as an affirmative defense, that Novelis stipulated to Abare's eligibility to vote in the election, and that the "belated" introduction of evidence related to Abare's status would prejudice the General Counsel and Union. (A. 1310-12.)

The judge had "significant discretion in controlling the hearing and directing the creation of the record." (A. 1695 n.3.) The Board will not overturn a judge's evidentiary ruling "unless [it] constitutes an abuse of discretion." (A. 1695 n.3.) And this Court reviews procedural rulings by administrative law judges "only for abuse of discretion." *Staten Island*, 101 F.3d at 861. Novelis failed to overcome that standard.

Novelis argues (Br. 41, 57-59) that it challenged Abare's supervisory status in its answer to the complaint and, even if it did not, the judge should have allowed it to amend its answer. Novelis further argues that a challenge to the Union's majority status cannot be waived, and that the pre-election stipulation does not bar subsequent litigation. None of these arguments has merit.

Affirmative defenses must be specifically pled. *See The George Washington Univ.*, 346 NLRB 155, 158 n.2 (2005) ("bare assertions" offered as affirmative defenses without explanation or evidence to be insufficient), *enforced*, No. 06-1012, 2006 WL 4539237 (D.C. Cir. 2006) (unpublished) (per curiam). Here, Novelis asserts Abare's supervisory status not only to challenge the Union's majority status, but also to argue that his demotion was lawful because he was not an employee protected by the Act. To do so, Novelis should have specifically asserted—in its answer to the complaint—that affirmative defense. It did not. Rather, the first affirmative defense in Novelis's answer stated only that it "did not take any adverse action against any employee under the Act and no agent or supervisor of Novelis within the meaning of the Act took any unlawful act which affected employee free choice." (A. 600.) Only in its eighth affirmative defense does Novelis mention Abare by name, arguing that the complaint should be dismissed "because even assuming that Mr. Abare engaged in legally cognizable concerted activity under the Act on March 29, 2014 [the date of Abare's Facebook post], which Novelis denies such activity was not protected under the Act." (A. 601.) Accordingly, the General Counsel (and Union) had no notice—until 15 days into the hearing—that Abare's supervisory status was challenged. The judge acted within his discretion in refusing to allow the new defense.

Novelis claims (Br. 41) that its first affirmative defense "is an obvious reference to the Act's definition of 'employee'" and therefore constituted a challenge to Abare's supervisory status. Nothing in that defense, which reads "[Novelis] did not take any adverse action against an employee under the Act[,]" suggests that Novelis was asserting that Abare is a statutory supervisor. Moreover, as the judge pointed out, Novelis failed to argue that Abare was a supervisor "at the critical junctures of this litigation." (A. 1311.) It failed to mention Abare's supervisory status during the investigation of the unfair-labor-practice charges, in its position statement to the Board, during the district court injunction proceedings, in its opening statement during the unfair-labor-practice hearing, or during argument at the hearing relating to the subpoenaed production of disciplinary records, which would be irrelevant if Abare were a supervisor. (A. 1311.)

Because Novelis failed to raise the supervisory issue until after 15 days of hearing and the completion of the General Counsel's case, the judge found that allowing the new defense would have required recalling "many, if not most" of those witnesses and caused "undue delay and unfairly prejudice[d] the General Counsel and [Union]." (A. 1312; A. 445-46.) Under those circumstances, denying Novelis's motion to amend its answer was not an abuse of the judge's discretion. (A. 471-72; A. 1446-47.) Novelis failed to argue—much less prove—as much (Br. 41). *See NLRB v. Gimrock Const., Inc.*, 695 F.3d 1188, 1192 (11th Cir. 2012)

(Board did not abuse discretion by refusing to allow employer to amend answer); *Parts Depot, Inc. v. NLRB*, 260 F. App'x 607, 610 (4th Cir. 2008) (same); *Yesterday's Children, Inc. v. NLRB*, 115 F.3d 36, 47 (1st Cir. 1997) (same).

Novelis further argues (Br. 58) that it cannot waive a challenge to majority status and that it has the right to challenge the validity of union cards in cross-examination of a card solicitor. But Novelis misunderstands the administrative law judge's ruling. The judge ruled that Novelis waived its challenge to Abare's supervisory status, not any *other* challenge to the Union's majority status. In fact, in its opening statement, Novelis argued that its defense to the bargaining order would be based on the "widespread misrepresentations in the process of soliciting union cards," not any defense related to Abare's supervisory status. (A. 1312; A. 66.) The judge allowed Novelis to question whether card solicitors misrepresented the purpose of the cards to employees. (A. 1737.) In addition, Novelis failed to challenge Abare's cards on the basis of supervisory status. It explicitly declined to object to any cards Abare solicited that he initialed ("And I will say 'no objection' once he confirms the – you know, that's his initials on the cards"), and challenged only the cards Abare failed to initial and could not identify without refreshing his recollection. (A. 1711 n.31; A. 106-11, 114-16.)

Novelis complains (Br. 54, 56 n.20) that it solicited testimony about Abare's duties and card solicitation "without objection," and that the judge sent "mixed signals about whether Novelis actually 'waived' its 'defense.'" Because Novelis did not raise Abare's supervisory status until after the General Counsel's case ended, there was no need for such objections during that questioning. (A. 1312; A. 443-45.) Further, in claiming (Br. 56 n.20, citing A. 476) mixed signals, Novelis is incorrect. The judge was consistent: he precluded evidence of Abare's supervisory status on October 16 and, on October 21, barred Novelis's attempt to elicit such testimony. (A. 476.)

Finally, Novelis argues (Br. 58-59) that its pre-election stipulation to Abare's eligibility to vote does not bar litigation of his supervisory status. It stipulated to Abare's eligibility to vote as a unit employee by including him in its list of voters. (A. 1312; A. 639.) This Court views such lists as a "contract," and they "constitute evidence" as to eligible voters. *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1433-34 (2d Cir. 1996). Novelis's citation to *The Oakland Press Co*., 266 NLRB 107 (1983), *enforced*, 735 F.2d 969 (6th Cir. 1984), is unavailing. There, the Board's regional director refused to accept the parties' stipulation because he believed certain employees might be supervisors and submitted the issue to the Board. Before the Board could determine the issue, the Union withdrew its election petition. Accordingly, the supervisory issue was not litigated. 266 NLRB at 107.

In later cases, the Board has made clear that employee eligibility to vote can be waived by failing to raise it at the appropriate time under Board procedures. *See I.O.O.F. Home of Ohio, Inc.*, 322 NLRB 921, 922 (1997) (distinguishing *Oakland Press* and finding that because employer failed to raise supervisory issue in representation proceeding, it was barred from raising issue in unfair-labor-practice proceeding).

### C. Novelis's Serious and Substantial Unfair Labor Practices Made a Fair Rerun Election Unlikely

In determining that a bargaining order was necessary, the Board (A. 1698-99) specifically relied on three "hallmark" violations[10] by Novelis, in addition to Novelis's numerous additional violations, all of which occurred within a few months: Novelis granted a substantial benefit to employees by restoring unscheduled overtime and Sunday premium pay; in captive-audience meetings, managers threatened employees with job loss; and Novelis continued its unlawful actions post-election by demoting Abare, the leader of the organizing effort. The Board did not abuse its discretion by finding that "the possibility of erasing the

[10] Hallmark violations are "highly coercive and…"support the issuance of a bargaining order unless some significant mitigating circumstance exists." *Coating Prods.*, 648 F.2d at 109 (internal quotation omitted).

effects of [Novelis's] unfair labor practices and of ensuring a fair election by the use of traditional remedies is slight." (A. 1699.)

As the Board emphasized (A. 1698), Novelis's violations were serious. Most significantly, Martens and Smith threatened job loss at three mandatory employee meetings mere days before the election. Those threats repeatedly made clear that Martens's "personal" commitment to maintain jobs at Oswego would become a "business" decision if the Union won. For example, he reminded employees that he personally decided to close the Quebec facility and keep jobs at Oswego. Then Smith "suggestively questioned [Novelis's] ability 'to be successful' with the Union representing employees." (A. 1699.) Such job loss threats are powerfully coercive, and militate in favor of a bargaining order. *See Tufo Wholesale Dairy, Inc.*, 320 NLRB 896 (1996), *enforced*, 113 F.3d 1230 (2d Cir. 1997) (unpublished); *Donovan v. NLRB*, 520 F.2d 1316, 1319 (2d Cir. 1975).

The source of those threats exacerbated their coercive impact. As the Board highlighted (A. 1699), Martens and Smith were Novelis's "highest-ranking company executive and the highest-ranking plant official, respectively." Therefore, their repeated threats would likely be viewed as highly credible expressions of Novelis's intentions. *See The Salvation Army Williams Mem'l Residence*, 293 NLRB 944, 988 (1989) (threats by most senior resident officials), *enforced mem.*, 923 F.2d 846 (2d Cir. 1990); *Scoler's*, 466 F.2d at 1291-94 (closure

threat by owner). Moreover, wide dissemination of the threats in mass mandatory employee meetings supports the issuance of a bargaining order. *See NLRB v. Byrne Dairy, Inc*., 431 F.2d 1363, 1364 (2d Cir. 1970) (threat in speech to all employees).

Novelis's attempt to downplay (Br. 77 n.29) the reach of its threats fails. As the Board found (A. 1699 n.16), even under Novelis's view, "the meetings were attended by at least 250-300 employees" and "unlawful threats made to this number of employees are pervasive, even in an overall unit of nearly 600 employees." Moreover, as this Court stated, proof of dissemination is not required because "any expressions of company attitudes even to small groups of individuals, were likely to be rapidly disseminated around a plant during the struggle of organization." *Irving Air Chute Co. v. NLRB*, 350 F.2d 176, 179 (2d Cir. 1965). *Accord NLRB v. Air Prod. & Chems., Inc*., 717 F.2d 141, 146 (4th Cir. 1983) (employer threats are "rapidly disseminated among" employees).

Novelis further reinforced its coercive message by taking a carrot-and-stick approach to the issue of employee benefits. As a carrot, Novelis rescinded cuts to unscheduled overtime and Sunday premium pay, essentially giving employees a wage increase in an attempt to influence employees. The cuts had been highly unpopular—precipitating an employee walkout and Abare's decision to contact the Union—but Novelis rescinded the cuts after the Union began organizing and on the day the Union requested recognition. Not surprisingly, once Novelis rescinded the

cuts, several employees requested that their union-authorization cards be returned, an indication that the changes had the desired effect. (A. 1717.)

Additionally, as the Board explained (A. 1698), the granting of wage increases—an especially significant workplace "carrot"—is a "substantial indication that a bargaining order is warranted." Wage increases "have a particularly long lasting effect on employees." (A. 1698, internal quotation omitted.) In addition, they are "difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees." (A. 1698, internal quotation omitted.) A wage increase will "regularly appear in the employees' paychecks, [and serve as] a continuing reminder that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." (A. 1698, internal quotation omitted.) Because of those important concerns, the Board and courts have long recognized that well-timed grants of benefits are powerful tools for interfering with employee choice. *See Coating Prods*, 648 F.2d at 109 (granting benefits to employees is "hallmark" violation supporting bargaining order). *Accord Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944) (employee choice may be affected by "favors bestowed by the employer as well as by his threats or domination").

Novelis compounded this violation when Smith told employees that Novelis would have to rescind the changes if the Board found it "guilty" of charges it misleadingly claimed the Union had filed. (A. 1698; A. 786.) By "blaming it for the potential loss of the very benefits that they had looked to the Union to restore and protect," Novelis "sought to undermine the employees' support for the Union." (A. 1698.) Novelis's attempt to shift blame onto the Union "accentuated" the coercive effects of its other unfair labor practices. *Hogan Transports, Inc.*, 363 NLRB No. 196, 2016 WL 2941104, at *9.

As a stick, Martens and Smith used the mandatory meetings to threaten employees with reduced wages, more onerous working conditions, and lost business if the Union won. Martens clearly predicted—by comparing the employees' wages and benefits to those at the unionized plants in Terre Haute and Fairmont—that employees would be paid less, have lower pensions, and have less flexibility in their work schedules if the Union won. (A. 1723-24.) Yet he provided no reason why wages at Novelis plants in Indiana and West Virginia would provide the starting point for wages at the Oswego plant. Smith warned of lost business, suggesting that Novelis would lose contracts and that the Oswego facility would not receive the same level of corporate investment if the Union won. (A. 1723.) Novelis's message was clear: employees would gain nothing, and would even lose benefits, by voting for the Union, but would reap a substantial

reward by voting against the Union. Those coercive tactics also support the issuance of a bargaining order. *See Salvation Army*, 293 NLRB at 988 (threats of lost break times and changed work rules); *Marsellus*, 431 F.2d at 937 (promises of benefits if employees "stuck with him"); *NLRB v. Consol. Rendering Co.*, 386 F.2d 699, 703-04 (2d Cir. 1967) (threat of "loss of time and other changes in working conditions").

The Board (A. 1699) also reasonably relied on Novelis's misconduct persisting after the election. By demoting Abare, "the leader of the organizing effort and a well-known union adherent," Novelis "committed another violation that is particularly likely to destroy the chances of a fair re-run election." (A. 1699.) The Board has found, with this Court's approval, that an employer is likely to engage in recidivist behavior where misconduct persists following the election. *Tufo*, 320 NLRB at 897, *enforced*, 113 F.3d 1230 (2d Cir. 1997) (unpublished); *Salvation Army*, 293 NLRB at 945, *enforced mem.*, 923 F.2d 846 (2d Cir. 1990). Further, the demotion of the leading Union supporter showed "a continuing hostility" toward the employees' pro-union activity and "is strong evidence that [Novelis's] unlawful conduct will persist in the event of another organizing campaign." (A. 1699.) Therefore, the Board reasonably found that Abare's demotion was "likely to have a lasting effect on a large percentage of [Novelis's] work force and to remain in employees' memories for a long period." (A. 1699.)

Thus, this case is unlike *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928, 933 (2d Cir. 1980), cited by Novelis (Br. 49, 50, 72, 81, 85). There, the Court characterized the violations as "few and isolated," and explained that the employer "did not conduct an extensive anti-union campaign." *Id.* The Court found no need for a bargaining order because "the employer's actions were spontaneous and unplanned, without a showing of a wrongful intention on the part of the employer to engage in such activities in the future." *Id*. at 934. In contrast here, Novelis's violations were not few, isolated, spontaneous, or unplanned; they showed a "continuing hostility" to the employees' Section 7 rights. (A. 1699.)

Further supporting the bargaining order is the Board's reliance on Novelis's commission of numerous unfair labor practices in the short period between the Union's request for recognition on January 9 and the February 20-21 election. (A. 1698.) They include soliciting and promising to remedy employee grievances, interrogating employees, prohibiting union insignia on uniforms, and repeatedly removing pro-union literature. Novelis (Br. 82-85) complains that those unfair labor practices do not support a bargaining order. But the Board did not find that those unlawful actions alone warranted a bargaining order. Rather, the Board found that they were serious and had a "cumulative coercive impact" on employees. (A. 1699.)

### D. Novelis's Challenges to the Bargaining Order Fail

#### 1. Changed circumstances do not warrant vacating the bargaining order

Novelis argues that the bargaining order should be set aside because the Board failed to consider evidence of employee and management turnover and the effect of the passage of time. Under Board law, the Board evaluates the appropriateness of a *Gissel* bargaining order as of the time the unfair labor practices occurred and does not generally consider any changes in circumstances thereafter. (A. 1700 n.17). *See Garvey Marine*, 328 NLRB 991, 995-96 (1999), *enforced*, 245 F.3d 819 (D.C. Cir. 2001). As demonstrated below, however, the Board explained that even if it were to consider the proffered evidence, Novelis's serious and substantial unfair labor practices still warranted a bargaining order.

Novelis failed to show that its proffered evidence of management and employee turnover would require a different result. With respect to *management* turnover, the Board noted (A. 1700 n.17) that Novelis's ownership remains the same, and some of the managers who engaged in unfair labor practices remain. For example, manager Formoza, who threatened employee Cowan with layoff, was promoted to CASH line manager. (A. 1719 n.99.) Andrew Quinn, the human resources leader who unlawfully demoted Abare, also remains. Thus, Novelis has failed to show that a bargaining order is unnecessary where its ownership is unchanged and some key managers responsible for unfair labor practices remain

employed. *See NLRB v. Gerig's Dump Trucking, Inc.*, 137 F.3d 936, 944 (7th Cir. 1998).

Moreover, Novelis failed to show that *employee* turnover would dissipate the effects of its unfair labor practices. As the Board explained, while some employees may no longer work for Novelis, "a substantial number of unit employees who would recall [Novelis's] serious and widespread unlawful labor practices remain in [Novelis's] employ." (A. 1700 n.17.) Those employees are likely to have informed any new employees of what transpired during the Union's organizing campaign. Likewise, the impact of the threats would not be limited to those who heard them. As the Board found (A. 1700 n.17), in a case like this one, threats are likely to "live on in the lore of the shop," passed on from old employees to new arrivals, and exert a continuing coercive influence. *See Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 828 (D.C. Cir. 2001); *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (1978).

Novelis contends (A. 1684) that 84 of the 599 employees at the time of the election are no longer employed.[11] (*See also* Int. Br. 25-26, Am. Br. 10-11.)

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[11] In its brief (Br. 69 n.27), Novelis contends that 93 of the 599 employees at the time of the election are no longer employed, and that Novelis has hired an additional 310 employees. But at the time the Board issued its order in August 2016, Novelis had proffered evidence that 84 workers were no longer employed and 255 had been hired. This Court requires the Board "to find that a bargaining order was necessary *when it was issued*." *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (1984) (emphasis added).

Assuming the accuracy of Novelis's claim, 86 percent of those present at the time of Novelis's unfair labor practices remain employed. The Board has found, with this Court's approval, that where a substantial number of unit employees employed at the time of the unfair labor practices remain employed, employee turnover has not dissipated the violations. *See Salvation Army*, 293 NLRB at 944-45 (63% of employees still employed), *enforced mem*., 923 F.2d 846 (2d Cir. 1990). *Cf. NLRB v. W.A.D. Rentals Ltd*., 919 F.2d 839, 841 (2d Cir. 1990) (enforcing Board's affirmative bargaining order despite 500 percent turnover in industry with rapid turnover rate). *Accord Dunkin' Donuts Mid-Atlantic Distribution Ctr. v. NLRB*, 363 F.3d 437, 442 (D.C. Cir. 2004) (enforcing bargaining order despite turnover of 74 and 81 percent in successive years); *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 964 (6th Cir. 1970) (enforcing bargaining order despite turnover of 7 of 8 employees).

The Board has been "long and consistently instructed by the Supreme Court that mere turnover. . .does not oust a union as bargaining representative." *Balsam Vill. Mgmt. Co.*, 273 NLRB 420, 424 (1984), *enforced sub nom*., *NLRB v. Gordon*, 792 F.2d 29 (2d Cir. 1986) (citing *NLRB v. P. Lorillard Co.*, 314 U.S. 512, 513 (1942); *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944); *NLRB v. Katz*, 369 U.S. 736, 748 n.16 (1962); *Gissel*, 395 U.S. at 610). If turnover alone could oust a union, an employer could, "[b]y playing a waiting game, . . .indefinitely postpone serious bargaining with the union." *W.A.D. Rentals*, 919 F.2d at 842. Thus,

where, as here, the Board finds that the seriousness of the employer's behavior has not been dissipated, courts have found "no abuse of discretion in the Board's finding that the change in workforce did not make a bargaining order unnecessary." *NLRB v. Intersweet, Inc.*, 125 F.3d 1064, 1070 (7th Cir. 1997).

Further, the Board rejected the argument raised by Novelis, the Intervenors, and the Amicus (Br. 70, Int. Br. 23-24, Am. Br. 12) that the bargaining order is no longer viable because of the passage of time. (A. 1700 n.17.) The Board found that the approximately 2½ years between the violations and the Board's decision, "[g]iven the number of employees exposed to [Novelis's] unlawful conduct and the nature and severity of that conduct," was not "unacceptable for *Gissel* purposes." (A. 1700 n.17.) Remanding the case for an election due to the passage of time resulting from litigation would reward employer recalcitrance. *St. Francis Fed'n of Nurses & Health Prof'ls v. NLRB*, 729 F.2d 844, 856 (D.C. Cir. 1984). *See also Am.'s Best Quality Coatings Corp. v. NLRB*, 44 F.3d 516, 522 (7th Cir. 1995) (enforcing bargaining order and noting that "only in extreme circumstances, where the delay has been of considerable length, has this Court concluded that a bargaining order is too stale for enforcement"). Indeed, where, as here, there are numerous serious and substantial violations, this Court has enforced bargaining orders despite the passage of similar or longer periods. *See A.P.R.A. Fuel Oil Buyers Group, Inc.*, 309 NLRB 480, 488 (1992) (almost two years between

violations and Board order), *enforced*, 28 F.3d 103 (2d Cir. 1994) (table); *Salvation Army*, 293 NLRB at 945 (6 years between election and Board order), *enforced mem.*, 923 F.2d 846 (2d Cir. 1990). In addition, other circuits have enforced bargaining orders with similar or longer periods. *See, e.g.*, *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 332 (4th Cir. 2008) (4 years between violations and Board order); *NLRB v. Henry Colder Co.*, 447 F.2d 629, 630 (7th Cir. 1971) (5½ years between violations and Board order).

**2. There is no merit to Novelis's claim that the Board failed to consider traditional remedies, employee rights, or the effects of the competing campaigns on the election's outcome**

Contrary to Novelis's assertion (Br. 71-72), the Board did explain the inadequacies of traditional remedies in the specific circumstances of this case. Here, the sum of Novelis's misconduct is "far greater than its individual parts." (A. 1699-700.) For example, the Board described the effects of Martens's threats of job loss and concluded that the "persistent painting of the Union as a threat to employees' job security and economic well-being—accomplished via tactics such as vivid characterizations of its large cutbacks at other plants and outright misrepresentation of the Union's actions," justified imposing a bargaining order. (A. 1700.) Traditional remedies—such as requiring that Novelis refrain from unlawful conduct, reinstate Abare, rescind unlawful rules, and post a notice—

"would not be sufficient to dispel the coercive atmosphere that [Novelis] has created." (A. 1700.)

Equally meritless is the contention of Novelis and the Intervenors (Br. 61, Int. Br. 27-29) that a bargaining order would "eviscerate" current employees' rights. The Board was not required to show that the Union still enjoyed majority status as of the date of the bargaining order. As the Supreme Court has stated, the Board has the authority to issue a bargaining order "even where it is clear that the Union, which once had possession of cards from a majority of the employees, represents only a minority when the bargaining order is entered." *Gissel*, 395 U.S. at 610. As the Board noted (A. 1700), a bargaining order does not risk a serious injustice to the new employees because it is not intended to fix a permanent relationship. Employees remain free to reject the union as their representative after Novelis fully remedies its unfair labor practices and bargains in good faith for a reasonable period of time. *See Gissel*, 395 U.S. at 612-13 & n.33. Intervenors' assertion (Int. Br. 27-28) that employees' "self-determination rights. . .may be extinguished for up to three years under the Board's contract bar rule if the parties negotiate an agreement," ignores *Gissel*, in which the Supreme Court specifically found that not only could a union demonstrate majority status on the basis of cards,

but a bargaining order could issue on that basis. *Gissel*, 395 U.S. at 602, 608.[12] Restricting the Board to the limited remedies of a cease-and-desist order or rerun election "would in effect be rewarding the employer and allowing him to profit from (his) own wrongful refusal to bargain." *Id.* at 610 (internal quotation omitted).

Moreover, Novelis's complaint (Br. 64) that the administrative law judge erred by limiting evidence intended to show that the Union ran an offensive campaign, including "cartoonish"[13] paraphernalia, is unsupported by any showing that the judge abused his discretion. (A. 1706 n.3.) *See Staten Island*, 101 F.3d at 861. In any event, as the judge explained (A. 1706 n.3; A. 72), the Board considers objective, rather than subjective, evidence of the effects of unfair labor practices on employees. *See Lee Lumber & Bldg. Material Corp.*, 322 NLRB 175, 177 & n.23 (1996). As the Supreme Court explained in *Gissel*, "employees are more likely than not, many months after a card drive and in response to questions

[12] The Court further noted that a union recognized under a bargaining order does not have certain "special privileges" enjoyed by certified unions, including, among other things, protection for 12 months from decertification petitions, election petitions by rival unions, or challenges to its majority status, and protection from recognitional picketing by rival unions. 395 U.S. at 599 n.14.

[13] Novelis also asserts (Br. 64) that the Union's campaign paraphernalia was "racist." Novelis never made any charges of racism to the administrative law judge (A. 67), nor does the specific evidence outlined in its brief (Br. 64-65) contain any such allegations.

by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of [Section] 8(a)(1)." 395 U.S. at 608. Thus, the Supreme Court "reject[ed] any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry." *Id*. Even in cases where a union has engaged in misconduct of its own, this Court has deferred to the Board's finding that an employer's unlawful conduct warranted a remedial bargaining order. *See Donovan*, 520 F.2d at 1321-22.

Likewise, because the Board applies an objective, not subjective, test, there is no basis to Novelis's claim (Br. 74-75) that the Board failed to consider evidence that Novelis's unfair labor practices did not affect the election results. *Irving Air*, 350 F.2d at 179 ("proof of the actual effect of the Company's threats is not required in view of their inherently coercive nature"); *NLRB v. Kaiser Agric. Chems.*, 473 F.2d 374, 383 (5th Cir. 1973) ("no requirement" that Board show "a direct relationship between the unfair labor practices and the loss of the union's majority status").

**3. Novelis's letters to employees and its compliance with the injunction do not obviate the need for a bargaining order**

Novelis argues (Br. 87-89) that it remediated its unfair labor practices by sending letters to employees disavowing its conduct and by complying with a district court's injunction, issued under Section 10(j) of the Act (29 U.S.C. §

160(j)). The Board (A. 1739-40) properly determined that neither effort sufficiently mitigated the serious and substantial unfair labor practices Novelis committed during the Union's organizing campaign.

An employer's repudiation of unlawful conduct must be "timely, unambiguous, specific in nature to the coercive conduct and free from other proscribed illegal conduct." *Kinney Drugs*, 74 F.3d at 1430 (quoting *Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138 (1978)). The repudiation should also be publicized and "should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights." *Passavant*, 237 NLRB at 138-39.

Martens and Smith sent letters to employees in June 2014 (A. 1739; A. 1089-92), but did not "clear up any conceivable confusion an employee could have had about their speeches," as Novelis claims (Br. 87). Rather, as the Board found (A. 1739), the letters "merely denied any wrongdoing and attributed [Novelis's] unlawful conduct to 'possible misunderstanding or misconception.'" (A. 1739; A. 1089-92.) Moreover, the letters did not assure employees of their rights and "were neither unambiguous nor unequivocal in admitting wrongdoing." (A. 1739.) Thus, the Board reasonably determined that the letters' "equivocating language [was] insufficient to repudiate past actions." (A. 1739.) *See Kinney Drugs*, 74 F.3d at

1430 (affirming Board's finding that employer's repudiation letter was insufficient).

Further, contrary to Novelis's claim (Br. 88, *see also* Int. Br. 22-23, Am. Br. 4), its compliance with the district court's injunction, issued under Section 10(j) of the Act, did not "remediate[] the effects of *all* potential" unfair labor practices. As this Court has explained, there is "nothing permanent" about an interim order, "which will last only until the final Board decision." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975) (citing *Gissel*, 395 U.S. at 613).

While Novelis complied with the district court's order and did not risk contempt proceedings, reasonable employees could hardly be blamed for finding little comfort where it took a federal-court injunction to secure Novelis's compliance with the law. Moreover, although threats of job loss are likely to endure in the "lore of the shop," Novelis's reading of the Board's notice, as required by the district court, was not heard by new employees. Thus, Novelis has failed to remediate the effects of its unfair labor practices, and the Court should enforce the Board's Order in full.

## CONCLUSION

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

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April 2017

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

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| NOVELIS CORPORATION<br>Petitioner/Cross-Respondent<br><br>and<br><br>JOHN TESORIERO, MICHAEL MALONE,<br>RICHARD FARRANDS, ANDREW DUSCHEN<br>Intervenors<br><br>v.<br><br>NATIONAL LABOR RELATIONS BOARD<br>Respondent/Cross-Petitioner<br><br>and<br><br>UNITED STEEL, PAPER AND FORESTRY,<br>RUBBER, MANUFACTURING, ENERGY,<br>ALLIED INDUSTRIAL & SERVICE WORKERS<br>INTERNATIONAL UNION, AFL-CIO, CLC<br>Intervenor | ) | Nos. 16-3076, 16-3570<br><br>Board Case Nos.<br>03-CA-121293 et al. |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 20,864 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 18th day of May, 2017

**UNITED STATES COURT OF APPEALS**
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**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by

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