

Nos. 17-1221, 17-1232

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**NOVATO HEALTHCARE CENTER**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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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 BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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NOVATO HEALTHCARE	)	
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Petitioner/Cross-Respondent	)	Nos. 17-1221, 17-1232
	)	
v.	)	
	)	Board Case No.
	)	20-CA-168351
NATIONAL LABOR RELATIONS	)	
BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

**A. Parties and Amici**

Novato Healthcare Center (“Novato”) was the Respondent before the Board and is the Petitioner/Cross-Respondent before the Court. The Board’s General Counsel was a party before the Board, and the Board is the Respondent/Cross-Petitioner before the Court. The National Union of Healthcare Workers (“the Union”) was the charging party before the Board, but has not intervened here. There were no amici before the Board, and there are none in this Court.

**B. Rulings Under Review**

The ruling under review is a Decision and Order of the Board (Chairman Miscimarra and Members Pearce and McFerran) in *Novato Healthcare Center*, 365 NLRB No. 137 (Sept. 29, 2017). (JA 84-103.)

**C. Related Cases**

This case has not previously been before this, or any other, court. Board counsel is not aware of any related cases.

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Dated at Washington, DC  
this 18th day of April, 2018

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	1
Statement of the issues .....	2
Applicable statutory provisions .....	3
Statement of the case.....	3
I. The Board’s findings of fact .....	4
A. Background; Novato’s operations .....	4
B. Employees Bernales, Brown, Metellus, and Sabelino actively participate in the Union’s organizing campaign; Novato vigorously opposes the campaign.....	6
C. Novato interrogates Metellus about his vote in the upcoming union election.....	8
D. The October 6-7 night shift .....	8
E. Novato suspends the five employees, conducts a brief investigation, then discharges them purportedly for sleeping while on duty .....	10
II. The Board’s Conclusions and Order.....	14
Summary of Argument .....	14
Standard of review .....	16
Argument.....	17
I. Substantial evidence supports the Board’s finding that Novato violated Section 8(a)(3) and (1) of the Act when it suspended and discharged employees Bernales, Brown, Metellus, Sabelino, and Rodriguez.....	17
A. An employer violates Section 8(a)(3) and (1) of the Act when it suspends and discharges employees to discourage union activity .....	18

**TABLE OF CONTENTS**

<b>Headings-Cont'd</b>	<b>Page(s)</b>
B. Novato’s hostility toward union activity was “a motivating factor” in its decision to suspend and discharge the four Station 4 employees .....	20
C. Novato violated Section 8(a)(3) and (1) of the Act when it suspended and discharged Rodriguez .....	29
II. Novato violated Section 8(a)(1) of the Act by coercively interrogating employee Metellus about his vote in the upcoming union election .....	32
Conclusion .....	39

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Allegheny Ludlum Corp. v. NLRB</i> , 104 F.3d 1354 (D.C. Cir. 1997).....	35
<i>Alpo Petfoods, Inc. v. NLRB</i> , 126 F.3d 246 (4th Cir. 1997) .....	29-30
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011).....	16-17
* <i>Bay Corrugated Container</i> , 310 NLRB 450 (1993), <i>enforced</i> , 12 F.3d 213 (6th Cir. 1993) .....	29, 30, 31
<i>Beverly California Corp. v. NLRB</i> , 227 F.3d 817 (7th Cir. 2000) .....	37
<i>Bourne v. NLRB</i> , 332 F.2d 47 (2d Cir. 1964) .....	33
<i>Cadbury Beverages, Inc. v. NLRB</i> , 160 F.3d 24 (D.C. Cir. 1998).....	23
<i>Cardinal Home Prod., Inc.</i> , 338 NLRB 1004 (2003).....	37
<i>Clark Printing Co., Inc.</i> , 146 NLRB 121 (1964).....	35
<i>Consol. Bus Transit, Inc.</i> , 350 NLRB 1064 (2007), <i>enforced</i> , 577 F.3d 467 (2d Cir. 2009) .....	19

---

\* Authorities upon which we chiefly rely are marked with asterisks.

**TABLE OF AUTHORITIES**

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Cumberland Farms, Inc.</i> , 307 NLRB 1479 (1992) <i>enforced</i> , 984 F.2d 556 (1st Cir. 1993).....	37
<i>Dawson Carbide Industries</i> , 273 NLRB 382 (1984), <i>enforced</i> , 782 F.2d 64 (6th Cir. 1986) .....	30
<i>Fortuna Enterprises, LP v. NLRB</i> , 665 F.3d 1295 (D.C. Cir. 2011).....	22
<i>Garvey Marine, Inc. v. NLRB</i> , 245 F.3d 819 (D.C. Cir. 2001).....	24
<i>Gladioux Food Serv., Inc.</i> , 252 NLRB 744 (1980) .....	35
<i>Gold Coast Rest. Corp. v. NLRB</i> , 995 F.2d 257 (D.C. Cir. 1993).....	19, 22
<i>Inova Health Sys. v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	19, 21
<i>King Soopers, Inc. v. NLRB</i> , 859 F.3d 23 (D.C. Cir. 2017).....	25
<i>Manor Care of Easton, PA., LLC v. NLRB</i> , 661 F.3d 1139 (D.C. Cir. 2011).....	23
<i>Metro. Edison Co. v. NLRB</i> , 460 U.S. 693 (1983).....	18

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Metro-W. Ambulance Serv., Inc.</i> , 360 NLRB 1029 (2014).....	31
* <i>Mountaineer Petroleum</i> , 301 NLRB 801 (1991).....	35, 36, 37
<i>NLRB v. Rich’s Precision Foundry, Inc.</i> , 667 F.2d 613 (7th Cir. 1981).....	31
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983).....	18
<i>Norton Audubon Hosp.</i> , 338 NLRB 320 (2002).....	37
<i>Nova S.E. Univ. v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015).....	35
<i>Ozburn-Hessey Logistics, LLC</i> , 357 NLRB 1456 (2011), <i>enforced</i> , 605 F. App’x 1 (D.C. Cir. 2015).....	21
* <i>Ozburn–Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	15, 17, 24
<i>Parsippany Hotel Mgmt. Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	19, 21
* <i>Perdue Farms, Inc., Cookin’ Good Div. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998).....	32, 33, 36

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Prop. Res. Corp. v. NLRB</i> , 863 F.2d 964 (D.C. Cir. 1988).....	24
* <i>Rossmore House</i> , 269 NLRB 1176 (1984), <i>enforced sub nom.</i> , <i>Hotel Employees &amp; Restaurant Employees Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985).....	32-33, 37
<i>Royal Sonesta, Inc.</i> , 277 NLRB 820 (1985).....	34-35
<i>Samsung Elecs. Am., Inc.</i> , 363 NLRB No. 105, 2016 WL 453584 (Feb. 3, 2016).....	34
<i>Shamrock Foods Co. v. NLRB</i> , 346 F.3d 1130 (D.C. Cir. 2003).....	33, 34
<i>Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB</i> , 414 F.3d 158 (1st Cir. 2005).....	19, 21
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001).....	18
<i>United Servs. Auto. Ass'n v. NLRB</i> , 387 F.3d 908 (D.C. Cir. 2004).....	33, 36
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	16
<i>Waterbury Hotel Mgmt. v. NLRB</i> , 314 F.3d 645 (D.C. Cir. 2003).....	19

---

\* Authorities upon which we chiefly rely are marked with asterisks.

## TABLE OF AUTHORITIES

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Westwood Health Care Ctr.</i> , 330 NLRB 935 (2000) .....	33
<i>Willamette Indus.</i> , 341 NLRB 560 (2004) .....	19
* <i>Woelke &amp; Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982).....	35
* <i>Wright Line, a Division of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981).....	18, 19, 31
 <b>Statutes:</b>	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157) .....	3, 14, 18, 35
*Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	2, 3, 14, 16, 17, 18, 21, 29, 32, 33
*Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	2, 3, 14, 17, 18, 29
Section 8(c) (29 U.S.C. § 158(c)) .....	35
Section 10(a) (29 U.S.C. § 160(a)) .....	2
*Section 10(e) (29 U.S.C. § 160(e)) .....	2, 16, 35
Section 10(f) (29 U.S.C. § 160(f)) .....	2

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\* Authorities upon which we chiefly rely are marked with asterisks.

**GLOSSARY**

The Act	The National Labor Relations Act (29 U.S.C. §§ 151 et seq.)
The Board	The National Labor Relations Board
Br.	Opening Brief of Petitioner/Cross- Respondent Novato Healthcare Center
CNA	Certified Nursing Assistant
JA	Joint Appendix
LVN	Licensed Vocational Nurse
Novato	Novato Healthcare Center
The Order	<i>Novato Healthcare Center</i> , 365 NLRB No. 137 (Sept. 29, 2017)
The Union	National Union of Healthcare Workers

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Novato Healthcare Center (“Novato”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued

against Novato on September 29, 2017, and reported at 365 NLRB No. 137.

(JA 84-103.)<sup>1</sup>

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”). 29 U.S.C. § 160(a). The Board’s Decision and Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act, 29 U.S.C. § 160(f), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act, 29 U.S.C. § 160(e), which allows the Board to cross-apply for enforcement. The petition and application are timely, as the Act provides no time limit for such filings.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board’s finding that Novato violated Section 8(a)(3) and (1) of the Act by suspending and discharging employees Rolando Bernales, Arlene Waters Brown, Narvius Metellus, and Angel Sabelino for engaging in union activity; and by suspending and discharging employee Gonzala Rodriguez to disguise its unlawful motive for the other four suspensions and discharges.

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<sup>1</sup> Record references in this final brief are to the Joint Appendix (“JA”) filed by Novato on April 12, 2018. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to Novato’s opening brief.

2. Whether substantial evidence supports the Board's finding that Novato violated Section 8(a)(1) of the Act when it interrogated Metellus about his vote in the upcoming union representation election.

### **APPLICABLE STATUTORY PROVISIONS**

#### **Section 7 of the Act, 29 U.S.C. § 157:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection . . . .

#### **Section 8(a)(1), (3) of the Act, 29 U.S.C. § 158(a)(1), (3):**

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title

\*\*\*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

### **STATEMENT OF THE CASE**

In this case, the Board found that Novato unlawfully suspended and discharged four employees for engaging in protected union activity and a fifth employee to conceal its unlawful motive. The Board reasonably rejected Novato's claim that it suspended and discharged these employees—four of them union activists—because they were sleeping while on duty. Instead, as the Board found,

the credited evidence shows that the union activists who were resting or sleeping that night shift were on their breaks at the time, a practice Novato admittedly allows (Br. 4). Before this Court, Novato does not challenge the Board's finding of unlawful motivation. Instead, it relies on a discredited version of events to assert that it would have discharged all five employees even in the absence of unlawful motivation. The credited evidence, however, shows that, in addition to its discredited version of events, Novato had never before taken such extreme measures when faced with allegations of employees sleeping at work. Here, it chose to discharge the four union supporters just two days before the election, sweeping in a fifth employee to cover its unlawful motivation. The evidence further shows that Novato's Director of Staff Development coercively interrogated one of these employees about his vote in the upcoming union election, a few days before suspending him. Novato falls far short of establishing, as it must on review in this Court, that the record compels reversal of the Board's relevant findings—particularly those based on witness credibility.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background; Novato's Operations**

Novato operates a skilled-nursing facility to care for patients in need of a broad range of assistance. (JA 89; JA 123, 393-94.) Novato's Administrator,

Darron Treude, maintains “total operational responsibility” for the facility, including overseeing disciplinary matters from start to finish. (JA 89; JA 112-13.) Other supervisors at Novato include Director of Staff Development Gay Rocha, who is responsible for conducting new-employee orientations and presenting employee trainings or “in-services,” and Director of Nutritional Services Teresa Gilman, who runs the facility’s Dietary Department. (JA 85, 89 & n.10, 92 n.22; JA 278, 280, 368, 373, 422.) Administrator Treude’s office is near the front entrance of the facility and overlooks the front parking lot. (JA 89; JA 126-27, 227-28.)

Novato employs both certified nursing assistants (“CNAs”)—who check patients’ vital signs, change diapers, and respond to call lights—and licensed vocational nurses (“LVNs”)—who also distribute medications. (JA 89; JA 152-53, 189-90.) Those employees work on three different shifts: day shift (7 a.m. to 3 or 3:30 p.m.), evening shift (3 p.m. to 11 or 11:30 p.m.), and night shift (11 p.m. to 7 or 7:30 a.m.). (JA 89; JA 503.)

Novato’s facility is divided into four stations (Stations 1, 2, 3, and 4). (JA 89; JA 503.) Each station contains a nurses’ station with a desk area, chairs, and a panel of call lights. (JA 89; JA 127-28, 503, 506, 507.) If a patient needs assistance, she presses a button in her room, which activates a call light over the

patient's door, as well as activates a corresponding light and sounds a loud alarm at the nurses' station. (JA 89; JA 153-54, 325.)

Novato employees are entitled to one 30-minute meal break and two 10-minute rest breaks during each 8-hour shift. (JA 89; JA 132, 568, 596.)

Employees clock in and out only for their meal break. (JA 89; JA 133, 154-55, 190, 224-25, 234.) Although Novato forbids sleeping while on duty, it permits employees to nap during their meal and rest breaks. (JA 89-90; JA 135-36, 383, 568-69, 597-99, 621-23.) Night shift employees regularly sleep or rest during their breaks, and, in practice, often take their breaks at the nurses' station. (JA 90 & n.12 & n.14; JA 172-73, 200, 204, 235, 246-47, 249-52, 322-23.)

**B. Employees Bernales, Brown, Metellus, and Sabelino Actively Participate in the Union's Organizing Campaign; Novato Vigorously Opposes the Campaign**

Novato employees contacted the National Union of Healthcare Workers ("the Union") in the summer of 2015. (JA 90; JA 106-07.) A group of about 10-12 employees led the organizing efforts, among them CNAs Bernales, Metellus, and Sabelino and LVN Brown. (JA 90; JA 107-08, 257, 266-67, 272-75.) Those four employees attended union meetings, obtained showing-of-interest signatures, spoke with coworkers about the Union, wore pro-union lanyards and buttons, and passed out flyers. (JA 90; JA 156-60, 191-95, 225-30, 271-75, 420, 601, 613-20.) They often conducted this union activity openly on Novato premises, including in

the front and back parking lots, in front of the lobby, and in the break rooms.

(JA 90; JA 156-57, 160, 192-94, 227-30, 254, 271-72, 275.) On September 16, the Union filed a petition with the Board, seeking to represent approximately 160 of Novato's service and technical employees, including CNAs and LVNs. (JA 90; JA 107, 394-95, 503-05.)

Novato vigorously opposed the union campaign. (JA 88, 90, 91 & n.15 & n.16 & n.18; JA 124, 388, 419, 471-72, 600.) Treude hired six labor consultants to "educate" employees in mandatory meetings on, among other things, why they should not support the Union. (JA 91 & n.15 & n.16; JA 119-22, 148-51, 196, 198-99, 231-33, 257, 262-64, 372, 379, 386, 388, 401, 510-13.) Novato management, including Treude and Rocha, would personally order employees to attend the meetings. (JA 166-67, 196, 231-33, 263-65, 369, 371-73, 400-01).

Novato also increased its management presence at the facility during the campaign, particularly during the night shift when management was not usually onsite. (JA 91; JA 119, 160-61, 195-96, 233, 280, 372, 399-400, 423-24, 470-71.) Treude asked supervisors to volunteer for additional shifts to answer employee questions and pass out the labor consultants' opposition materials "almost daily." (JA 91; JA 115-16, 118-19, 130, 150, 160-61, 195-98, 399-400, 423-24, 471-72, 603-12.) Novato supervisors, including Gilman, wore lanyards with the large logo "KEEP YOUR VOICE VOTE NO." (JA 88, 91; JA 508-09.)

### **C. Novato Interrogates Metellus About His Vote in the Upcoming Union Election**

On October 4, ten days before the election, Rocha came to the facility during the night shift as part of Novato's union opposition campaign. (JA 92; see JA 371-72.) Around 6:30 a.m., Rocha confronted Metellus, a relatively new employee, while he was alone by the vending machine and questioned him about "who [he] was going to go vote for and about voting" in the upcoming union election. (JA 92; JA 269, 279, 297-98.) Metellus, who was wearing his union lanyard, responded that he planned to vote "yes." (JA 92; JA 279, 297-98.) Rocha warned Metellus that "if [he] voted yes that that would have implications about [their] paychecks and [their] pay." (JA 92; JA 279-80.) Metellus responded that it was not a problem for him. (JA 92; JA 280.)

### **D. The October 6-7 Night Shift**

Just two days later, union supporters Bernales, Brown, Metellus, and Sabelino worked the night shift at Station 4. (JA 93; JA 155, 161, 190, 281-82.) CNA Rodriguez worked the night shift at Station 1 with another crew. (JA 93.)

That night, Bernales took his 30-minute meal break at 3:30 a.m., his usual break time. (JA 93; JA 155, 162, 181, 182.) He did not use the break room because it was dirty. (JA 93; JA 162.) Although Bernales closed his eyes during his break, he did not sleep because the nearby patient call lights were too loud.

(JA 93; JA 162-63.) After his break, Bernales clocked back in around 4 a.m. and went to the nurses' station. (JA 93; JA 163, 182.)

Around 4:10 a.m., Brown, who was inside the nurses' station, told Bernales and Metellus that she was going to take her 10-minute rest break and asked Bernales to take care of the call lights and Metellus to let her know if anyone needed her. (JA 93, 94 n.25; see JA 164-66, 183, 200, 282-84, 299-300.) Like Bernales, Brown did not take her break in the break room because of the mess. (JA 93; JA 209-10.) Sabelino, who was seated at the nurses' station next to Brown, told her and Metellus that she would also take her 10-minute rest break. (JA 93; JA 206-07, 220, 235-37, 245, 282, 284, 300.) She asked Metellus to answer her call lights. (JA 93; JA 282-84, 300.) Both Sabelino and Brown took their rest breaks at the nurses' station and closed their eyes during the break. (JA 93; JA 199-200, 235-36.) While Brown and Sabelino took their short breaks, Metellus and Bernales attended patients. (JA 93; JA 183-84, 285-86, 301.) Brown and Sabelino woke up on their own after 10 minutes. (JA 93; JA 219-20, 245, 307-09.)

On October 7, Gilman, along with several other supervisors, came to the facility during the night shift as part of Novato's union opposition campaign. (JA 93 & n.24; JA 399-400, 423-25.) During her rounds, she saw Brown and Sabelino at the nurses' station with their eyes closed and took their photograph.

(JA 94; JA 533.) Later that morning, Gilman told Administrator Treude that she saw five employees—all four in Station 4 along with Rodriguez in Station 1—sleeping during the night shift and shared the photo of Brown and Sabelino.

(JA 94-95; JA 395-96, 533.)

Between 5:15 and 5:30 a.m., Treude instructed Bernales to attend a mandatory union education meeting scheduled for 5:45 a.m. (JA 94-95 & n.26 & n.29; JA 166-67, 513.) Treude also asked him what time he took his breaks during his shift. (JA 95; JA 167-68.) Bernales responded that he took a 10-minute rest break sometime between 1:00 and 1:30 a.m. and his 30-minute meal break from 3:30 to 4 a.m. (JA 95; JA 167-68.) Treude separately asked Brown, Metellus, and Sabelino about their breaks. (JA 95 & n.32, 97 & n.42; JA 199, 217, 238-39, 291-92.) Sabelino told Treude that she took her 30-minute meal break. (JA 89, 95; JA 238-39.) Metellus responded with his meal break time (he did not take either of his 10-minute rest breaks that shift). (JA 95; JA 280, 291-92.) And Brown told Treude that she took her 10-minute break “around 4-ish.” (JA 95 & n.32; JA 199, 217.)

**E. Novato Suspends the Five Employees, Conducts a Brief Investigation, Then Discharges Them Purportedly for Sleeping While on Duty**

At 6:22 a.m., Treude began a series of email exchanges with Novato’s outside Human Resources consultant, initially asking what discipline he should

give the five employees, and whether he should educate them, suspend them, give them final warnings, or terminate them. (JA 95; JA 316, 621-26.) The consultant asked Treude what he had done in the past and tried to clarify whether the employees had been on their breaks at the time. (JA 95; JA 621-26.) Treude stated that only two CNAs had their breaks before 4 a.m. and initially responded that for allegations of staff sleeping, he would usually give an in-service training because the employees would say they were on break, which “was fine.” (JA 140-41, 621-23.) He noted that another supervisor saw “some staff” sleeping the prior week during the night shift, but “that could be during their break time as well.” (JA 95; JA 621-23.) Later, Treude recalled one incident where he initially suspended an employee accused of sleeping, but he could not remember the outcome or whether that person was on break at the time. (JA 95; JA 624-26.) He then concluded that his past practice “has always been to suspend, investigate and if found that the staff was sleeping not on their break, then review by HR and term[inate].” (JA 95; JA 624-26.)

Treude enlisted Director of Nursing Florinda Nobleza to investigate Gilman’s allegations and instructed her to call the five employees and tell them they were suspended pending investigation for sleeping “at work.” (JA 95; JA 169, 187, 201, 239-40, 292-93, 326, 328, 331, 522-26.) The Union responded by sending Treude a letter protesting the suspensions as unlawful and identifying

Brown, Sabelino, and Metellus as “well-known union supporters.” (JA 96, 97, 99; JA 514-16.)

Two days later, Nobleza interviewed each employee. (JA 96; JA 171, 201, 240-41, 294-95, 517-21.) They all denied sleeping while on duty, though Bernales admitted to resting on his meal break, and Brown and Sabelino admitted to resting on their 10-minute breaks. (JA 96; JA 171-72, 201-02, 241, 295-96, 517-21.) Rodriguez admitted that she had been resting that night with her head on a table, but maintained that she was alert and could hear everything around her. (JA 96; JA 521.)

As part of its brief investigation, Novato management also spoke with Gilman again and with other night shift employees, though not necessarily employees who worked the October 6-7 night shift. (JA 96; JA 331-32, 337, 342-43, 344, 405, 464, JA 627.) Although Nobleza asked a handful of night shift employees generally whether they had ever seen anyone sleeping while on duty and not on break—and no one had—she did not ask them whether night shift employees typically took naps during their breaks. (JA 96, 100; JA 332, 338, 341, 342-43, 344-53, 522-26.)

Over the weekend, Treude continued to discuss the issue with Novato’s Human Resources consultant, its outside counsel, and one of its labor consultants. (JA 89, 96; JA 408-09, 528-32.) By email, Novato’s attorney recommended

Treude discharge all five employees, including Rodriguez, “even though the Charge Nurse appears to have tolerated her sleeping.” The attorney stated:

I think that giving [Rodriguez] lesser discipline, in this situation, sends the wrong message to the NLRB or a judge looking at this. It is possible that [the] NLRB or judge could view her situation as being less serious than the others, but I would rather have you take that risk, than the risk that letting her remain employed somehow dilutes our arguments with the other 4.

(JA 96; JA 528-32.)

On October 12, just two days before the election, Treude called the five employees and told them they were discharged for sleeping while on duty. (JA 97; JA 141-42, 172, 201, 203, 243-44, 296.) Consistent with its attorney’s advice, Novato also gave the Station 1 charge nurse a written warning, claiming that she allowed Rodriguez to put her head down and sleep. (JA 96-97, 101; JA 406-07, 528-32.) Novato had never before disciplined, let alone discharged, employees for sleeping at work—despite a similar incident in June 2009 and despite allegations of staff sleeping during the night shift the week prior. (JA 95 & n.34, 97, 100; JA 114, 316-18, 597-99, 621-23, see JA 136-40.)

On October 14 and 15, the Board conducted an election, and a majority of employees voted for the Union. (JA 91-92; JA 110, 503.) The five discharged employees all voted pursuant to the challenged ballot procedure, but their votes were not determinative. (JA 92 n.21; JA 415.) On December 30, the Board certified the election results. (JA 92; JA 503.)

## **II. THE BOARD'S CONCLUSIONS AND ORDER**

On September 29, 2017, the Board (Members Pearce and McFerran, Chairman Miscimarra, concurring) affirmed the administrative law judge's finding that Novato violated Section 8(a)(1) and (3) of the Act when it unlawfully suspended and discharged four employees for engaging in protected union activity and a fifth employee to conceal its unlawful motive. (JA 84-86.) A majority of the Board (Members Pearce and McFerran) also found that Novato violated Section 8(a)(1) by coercively interrogating an employee about how he intended to vote in the union election.

The Board's Order directs Novato to cease and desist from the unfair labor practices found and from "[i]n any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act," 29 U.S.C. § 157. (JA 85.) Affirmatively, the Order requires Novato to offer the five employees full reinstatement, make them whole for any loss of earnings and benefits, remove any reference to the unlawful discipline from its files, and post a remedial notice. (JA 85-87, 101.)

### **SUMMARY OF ARGUMENT**

Substantial credited evidence supports the Board's finding that Novato violated Section 8(a)(3) and (1) of the Act when it suspended and discharged five employees, just two days before the union election. Novato does not contest the

Board's finding that this decision was unlawfully motivated. Nor could it. Four of the five employees were open union supporters, Novato knew of their union activism, and Novato exhibited union animus. Instead, Novato relies solely on its defense, claiming that it would have suspended and discharged the four union supporters notwithstanding their union activity because they "slept as a unit" (Br. 20) and endangered patients. Novato concedes, as it must, that this defense relies on a version of events that the administrative law judge entirely discredited. Contrary to Novato's assertions, the credited evidence shows that the union activists who rested or slept that night shift were on their breaks at the time. Although Novato admits that it allows employees to sleep on their breaks, it nevertheless chose to issue unprecedented discipline to the four union supporters, mere days before the union election. Novato failed to demonstrate that the judge's well-reasoned credibility determinations are "hopelessly incredible, self-contradictory, or patently unsupportable." *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (citation omitted).

Likewise, substantial record evidence shows that Novato suspended and discharged a fifth employee (Rodriguez), to disguise its unlawful motivation in suspending and discharging the four union supporters. Again, Novato's defensive claim that it suspended and discharged Rodriguez for sleeping on duty is based on discredited evidence. And even if Rodriguez had been sleeping on duty,

documentary record evidence precludes Novato from proving that it would have suspended and discharged her absent the other four employees' union activity.

Substantial evidence also supports the Board's finding that Novato violated Section 8(a)(1) of the Act when its Director of Staff Development coercively interrogated an employee about how he was going to vote in the upcoming election. The Board properly assessed the totality of the circumstances and found numerous indicia of coerciveness. In the midst of a heated union campaign, a high-level supervisor, not usually present during the night shift, interrogated a lone employee about his upcoming vote, just ten days before the election. She then followed up with a statement clearly expressing Novato's preference that he vote against the Union and offered no reasons for her questioning nor assurances against reprisal. Even though the employee was an open union supporter and answered truthfully, the balance of the relevant factors clearly militates in favor of finding the interrogation unlawful.

### **STANDARD OF REVIEW**

The Board's factual findings "shall be conclusive" if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646

F.3d 929, 935 (D.C. Cir. 2011). And this Court will accept credibility determinations made by the administrative law judge and adopted by the Board unless those determinations are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Ozburn–Hessey*, 833 F.3d at 217.

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT NOVATO VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT SUSPENDED AND DISCHARGED EMPLOYEES BERNALES, BROWN, METELLUS, SABELINO, AND RODRIGUEZ**

This case involves a very narrow issue: whether the administrative law judge’s extensive credibility findings, adopted by the Board, foreclose Novato’s claim that it would have suspended and discharged five employees notwithstanding the four Station 4 employees’ protected activity. Novato does not challenge the Board’s finding that union activity was a motivating factor in its decision to suspend and discharge the employees. And its defensive claim—that all five employees were sleeping while on duty—relies on what it admits (Br. 6 n.3, 18-21) is a discredited version of events. The credited evidence shows that the only Station 4 employees who rested or slept that night shift were on their breaks at the time, a practice Novato concedes (Br. 4) is permissible. Documentary evidence further shows that Novato only suspended and discharged the fifth employee, Rodriguez, to cover up its true motivation for suspending and discharging the four union activists.

**A. An Employer Violates Section 8(a)(3) and (1) of the Act When It Suspends and Discharges Employees to Discourage Union Activity**

Section 7 of the Act guarantees employees' the right to engage in union activity. 29 U.S.C. § 157. In turn, Section 8(a)(3) protects that right by prohibiting employer "discrimination in regard to . . . tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer thus violates Section 8(a)(3) and (1) of the Act by suspending or discharging employees for engaging in activity protected by Section 7 of the Act.<sup>2</sup> *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98 (1983); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In evaluating the lawfulness of an employer's adverse action, the Board applies the well-established test from *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under *Wright Line*, if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in an employer's decision to take adverse action against the

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<sup>2</sup> Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. § 8(a)(1). A violation of Section 8(a)(3) thus creates a derivative violation of Section 8(a)(1). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

employee, the adverse action is unlawful unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the same action even in the absence of the protected activity. 251 NLRB at 1089.

A showing of unlawful motivation typically requires three elements: "union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer." *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007) (citing *Willamette Indus.*, 341 NLRB 560, 562 (2004)), *enforced*, 577 F.3d 467 (2d Cir. 2009); *see Inova Health Sys. v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). Proof of an employer's discriminatory motive can come from direct evidence or from circumstantial evidence taken on the record as a whole. *Waterbury Hotel Mgmt. v. NLRB*, 314 F.3d 645, 651 (D.C. Cir. 2003). Such evidence includes the timing of the adverse action, *Inova Health Sys.*, 795 F.3d at 80, 82, contemporaneous violations of the Act, *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996), inadequate investigation of the employees' purported misconduct, *Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 163-64 (1st Cir. 2005), and disparate treatment of union adherents, *Gold Coast Rest. Corp. v. NLRB*, 995 F.2d 257, 264-65 (D.C. Cir. 1993).

**B. Novato's Hostility Toward Union Activity Was "a Motivating Factor" in Its Decision To Suspend and Discharge the Four Station 4 Employees**

Novato does not challenge the Board's finding that its decision to suspend and discharge Bernales, Brown, Metellus, and Sabelino was unlawfully motivated by their protected union activity. Nor could it. Substantial credited evidence demonstrates that the employees actively supported the Union, and Novato was aware of their sympathies. The four employees wore pro-union lanyards and buttons almost every day, passed out union flyers, spoke to coworkers about the Union, and encouraged coworkers to sign the showing of interest. Novato knew of their union support because they openly wore union paraphernalia and engaged in union activity in Novato's break room and parking lots. Moreover, following their suspensions, but before their discharges, the Union sent Treude a letter identifying three of them—Brown, Metellus, and Sabelino—as “well-known union supporters.” (JA 96, 97, 99; JA 514-16.) In light of this evidence, the Board discredited Treude and Gilman's “disingenuous” denials that they knew the four were union supporters. (JA 99; JA 412, 439, 493-94.)

Likewise, the Board's finding (JA 99-100) that Novato exhibited union animus is amply supported, as evidenced by the suspicious timing of the suspensions and discharges, Novato's contemporaneous unlawful conduct, its failure to conduct a thorough investigation, and its disparate treatment of union

supporters. Amidst a hard-fought organizing campaign, Novato chose to suspend four union activists one week before the election, ultimately discharging them just two days before the election. *See Inova Health Sys.*, 795 F.3d at 82 (“[T]he close proximity of protected conduct, expressions of animus, and disciplinary action can support an inference of improper motivation.”) (citing cases). Just a few days before suspending and discharging Metellus, Novato separately violated Section 8(a)(1) when its supervisor interrogated him about his vote in the upcoming union election. *See Parsippany Hotel Mgmt.*, 99 F.3d at 423 (“A company’s open hostility toward [u]nion activity, and its 8(a)(1) violations, are clearly sufficient to establish anti-union animus on the part of that company.” (quotation marks and citation omitted)).

Further, Novato only conducted a cursory investigation into Gilman’s allegations of employees sleeping during the October 6-7 night shift. *See Sociedad Espanola*, 414 F.3d at 163 (“The conducting of an inadequate investigation of . . . the incident upon which the employer relied as grounds for discharge can support a finding of discriminatory motive.”). *Cf. Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456, 1493-96 (2011) (detailing flawed investigation in finding employer’s justification for discharge pretextual), *enforced*, 605 F. App’x 1 (D.C. Cir. 2015). Nobleza did not bother to look for any witnesses who could corroborate Gilman’s version of events or determine whether, in practice, night shift employees were

typically allowed to sleep at the nurses' station during their breaks. Instead, Novato issued the ultimate discipline of discharge to the four employees, who each denied sleeping on duty. *See Fortuna Enterprises, LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011) (company's failure to investigate similar alleged violations of employer's facilities use policy while enforcing the policy against union supporters "justifies the Board's inference of anti-union animus").

Treude issued the four union activists unprecedented discipline even though other night shift employees denied seeing anyone sleeping on duty, and all four Station 4 employees insisted that any sleeping or resting that night was during their breaks, as allowed. "No other employees had been suspended and discharged for the same or similar allegations," as the Board found. (JA 100.) Instead, in 2009, Novato chose not to discipline an LVN whom someone had photographed sleeping at work. (JA 597-99.) Novato conducted an investigation but, like here, could not "substantiate" that she was sleeping on duty rather than on break, and instead of disciplining her, confirmed that "what she decides to do on her time is up to her." (JA 597-99.) Further, around the same time he received Gilman's allegations, Treude received another complaint of "some staff" sleeping during the night shift the week prior, but failed to even look into that allegation, let alone issue any discipline. (JA 621-23, see JA 95 & n.34.) *See Gold Coast*, 995 F.2d at 264-65 (union supporter's discipline for conduct that employer routinely tolerated

evidenced employer's animus). Treude's decision to suspend, then discharge, four union activists for purportedly the same thing just two days before the election led the Board to reasonably conclude that Novato "failed to prove that it would have taken the same adverse actions in the absence of union activity." (JA 100.) *Manor Care of Easton, PA., LLC v. NLRB*, 661 F.3d 1139, 1140 (D.C. Cir. 2011) (rejecting employer's affirmative defense because "[a]lthough other employees engaged in conduct similar to [employee]'s, [employer] neither investigated nor punished any one of them").

Novato's sole claim that it demonstrated that it would have suspended and discharged the four Station 4 employees notwithstanding its unlawful motive is belied by the credited record evidence. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31 (D.C. Cir. 1998) (employer must "prove, as an affirmative defense, that despite any anti-union animus, [it] *would* have fired [employee] *because of* his insubordination, not that it *could* have done so" (emphasis in original)). Significantly, as the administrative law judge found, "all allegations in this [case] may only be resolved by assessing witness credibility." (JA 87.) The judge, affirmed by the Board, fully explained her credibility findings and why she believed the employees' testimony that two employees slept during their 10-minute breaks on the night shift while the other two employees attended patients, but none of the four employees slept while *on duty*. (JA 100.) Before this Court, Novato

recognizes that its version of events, presented through Gilman’s testimony, was rejected by the Board (Br. 6-9 & n.3, 12-13, 20), but does not come close to showing that the judge’s credibility findings were “hopelessly incredible, self-contradictory, or patently unsupportable.” *Ozburn–Hessey*, 833 F.3d at 217.

Contrary to Novato’s claims, the administrative law judge did not “summarily dismiss[],” “simply ignore[],” or categorically reject Gilman’s testimony. (Br. 15, 18-21.) Rather, she provided detailed reasons for finding Gilman’s version of events “implausible” and for crediting the General Counsel’s witnesses. (JA 88.) *See Prop. Res. Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988) (“The Board, when faced with two witnesses that contradict each other, must always choose which to believe and which to discredit.”). Thus, while incredulous that the judge would “somehow” discredit Gilman’s testimony (Br. 19), Novato conveniently ignores the credited testimony of four General Counsel witnesses, which directly contradicts Gilman’s version of events.<sup>3</sup> Novato fails to even mention this testimony, let alone to meet this Court’s “high bar” for overturning

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<sup>3</sup> The judge only partially credited Sabelino’s testimony (JA 88-89); however, her analysis in doing so reflects a careful consideration of even subtle inconsistencies and implausibilities in witness testimony. *See Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 825 (D.C. Cir. 2001) (“trier of fact is surely entitled . . . to credit some but not all of a witness’s testimony . . .”).

credibility determinations. *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33 (D.C. Cir. 2017).

As the administrative law judge found (JA 88), Brown, Metellus, and Bernales were consistent on both direct and cross examination. Brown testified “emphatically” about her concerns for patient safety, and that she ensured Bernales and Metellus were not on break before she started hers. (JA 88; JA 200, 208-11, 213-15, 218-220.) Metellus and Bernales corroborated Brown’s testimony that she and Sabelino were on break when they rested or closed their eyes, and corroborated each other as to what they were each doing around the time that Brown and Sabelino went on break. (JA 100; JA 164-66, 183-86, 200, 282, 285-89, 299-300, 306-07, 309-12.) Although each employee “estimated the timing of events and did not look at the clock to confirm the time as the events progressed,” their testimony nevertheless “established a logical sequence of events” and, in Bernales’s case, was further corroborated by documentary evidence. (JA 88, 94 n.25; JA 513.) Thus, in crediting the witnesses, the judge duly considered their demeanors, their apparent interests, corroboration or lack thereof, and consistencies or inconsistencies both within their testimony and between witnesses when testifying about the same event. (JA 88.) *See King Soopers*, 859 F.3d at 33 (declining to overturn credibility findings because judge “relied on important

contextual factors, including demeanor, her knowledge of industrial practices, the record, and the presence of consistencies or inconsistencies in a witness' story”).

In contrast, Novato witness Gilman directly contradicted General Counsel witnesses Bernales, Brown, Metellus, and Sabelino as to what happened during the October 6-7 night shift, and the administrative law judge found her version of events was unreliable. (See JA 88, 93-94; JA 429-56.) To start, the judge found the timeline of Gilman's story, and her claim that she witnessed the employees sleeping for an extended period of time, unbelievable. (JA 88, 94 n.25, see JA 84 n.1.) Gilman testified that the clock in her car read 3:50 a.m. when she was a few blocks from the facility. (JA 88; JA 425, 489-90.) She then claimed that it took 15 minutes or less to drive several blocks to the facility, park her car, walk in to the facility, go to her office, set her things down, log on to her computer (which takes three or four minutes to start up), open her email, check her emails, walk to the kitchen, check the temperature logs hanging on the wall, walk to the stove, open the oven doors and inspect the stove, check the labels and dates of the stored food items in her refrigerators, walk to the break room, collect Novato's opposition campaign flyers (on which someone had written "derogatory stuff"), use the restroom, walk back to her office, and review the flyers "for a few minutes"—before she approached Station 4. (JA 88, 93-94; JA 425-29, 474-75, 490-92.) As the judge found, Gilman's "time estimates are unlikely and unbelievable due to the

length of time she allocated to each task she completed” upon arrival at the facility, particularly compared to the “rather long time” she allocated to her time spent rounding the facility. (JA 94 n.25; compare JA 430 with JA 456, 460.)

Further, the administrative law judge also found Gilman’s actions, or inaction, that morning far-fetched in light of Novato’s concern about adequate staffing and patient safety. (JA 88, 100.) Despite Gilman’s claim that it was “mindboggling” to see all four assigned Station 4 employees sleeping for an extended period of time, she did not attempt to wake the employees, did not immediately call Treude or Nobleza for advice on how to deal with the situation, and did not ask employees in other stations whether employees were allowed to rest during their breaks on the night shift, despite otherwise engaging them in conversation. (JA 88, 93-94, 100; JA 440-41, 445-46, 450, 452, 455-57, 476-78, 480-81, 488, 494-96.) Instead, according to her testimony, she actively tried *not* to rouse the Station 4 employees from their purported naps—hiding behind a wall after taking Sabelino and Brown’s photo and allegedly choosing not to take any more photographs because she was afraid that the sound of her camera would wake the employees. (JA 88, 94; JA 453-56, 479.) As the Board found, Gilman’s failure to “act immediately,” such as by waking the employees up, when faced with such a purportedly grave danger to Novato’s patients undermines her claim that the employees were sleeping for an extended period of time. (JA 100.)

Gilman’s credibility is further undermined by her inability to recall that each employee wore prominently displayed union lanyards and pins that night, while at the same time testifying that she got within “arm’s reach” of the employees; studied each of them for several seconds while they slept; and remembered details like the color of their scrubs, what position they were in while purportedly sleeping, and whether they had pillows behind their heads. (JA 88, 99; JA 431-33, 435-37, 439, 444-45, 493-94.) Gilman also emphatically denied wearing an anti-union lanyard, only to later recant this testimony, by stipulation, admitting that she did, in fact, wear a lanyard urging employees to “KEEP YOUR VOICE VOTE NO.” (JA 88, 91; JA 472, 501, 508-09.) These discrepancies and implausibilities were more than enough to lead the judge to “reject [Gilman’s] version of events completely.” (JA 88.)

Novato’s reliance on the time-stamped photograph as “undeniable” evidence that the administrative law judge erred in making her credibility findings is misplaced. (Br. 19.) Even if the months-later addition of the 4:21 a.m. time-stamp were authentic, Novato ascribes far more probative value to the photograph than it is due.<sup>4</sup> Nothing in the photo, time-stamped or not, refutes the credited testimony

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<sup>4</sup> The time stamp purportedly appeared four months after Gilman took the photograph (in February 2016) when she upgraded her phone camera software. (JA 95 n.27; JA 398, 468-69, 533, 534.)

of the General Counsel’s witnesses, nor does it somehow suggest that “the remainder” of Gilman’s testimony is to be believed, as Novato argues.<sup>5</sup> (Br. 19-20.) At most, the photograph shows two employees—Brown and Sabelino—at the nurses’ station with their eyes closed at 4:21 a.m. (JA 534.) The photograph does not show all four Station 4 employees asleep. It does not show whether Brown and Sabelino were taking their 10-minute breaks at the time, or when they started and ended their 10-minute breaks. Most importantly, the photograph did not bear the time stamp when Treude made his decision to suspend and discharge all five employees. (JA 95 n.27; JA 397.) In making her credibility findings, the judge appropriately considered this piece of evidence, reconciled it with witness testimony, and ultimately gave it “little weight.” (JA 88, 94 n.25, 95 n.27.)

**C. Novato Violated Section 8(a)(3) and (1) of the Act When It Suspended and Discharged Rodriguez**

Rodriguez’s suspension and discharge were also unlawful. An employer’s discipline of a neutral—or even anti-union—employee to facilitate or cover up discriminatory conduct against known union supporters violates Section 8(a)(3) and (1) of the Act. *Bay Corrugated Container*, 310 NLRB 450 (1993), *enforced*, 12 F.3d 213 (6th Cir. 1993). *See Alpo Petfoods, Inc. v. NLRB*, 126 F.3d

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<sup>5</sup> As the judge noted, none of the witnesses could confirm the precise time they began their break. (JA 94 n.25.) And Gilman herself “guesstimate[d]” that she saw the four employees awake as early as 4:20 a.m. (JA 460.)

246, 255-56 (4th Cir. 1997) (collecting cases). Although the unaffiliated employee is a “pawn[] in an unlawful design, rather than [a] direct target[],” her discipline is no less unlawful. *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), *enforced*, 782 F.2d 64 (6th Cir. 1986).

Here, substantial evidence supports the Board’s finding (JA 101) that the union activity of the Station 4 employees was “a motivating factor” in Novato’s decision to suspend and discharge Rodriguez, whose union affiliation was unknown. *See Bay Corrugated*, 310 NLRB at 451. In an attempt to legitimize discharging four union activists two days before the election, Novato “consciously chose not to consider any other disciplinary actions against Rodriguez.” (JA 101.) Indeed, Novato’s attorney advised Treude, by email, to discharge Rodriguez even though she was “a bit of a different story” than the Station 4 employees because “the Charge Nurse appears to have tolerated her sleeping.” (JA 528-32.) Novato’s attorney was concerned that “the risk that letting her remain employed somehow dilutes our arguments with the other 4” before the Board or a court. (JA 528-32.) The judge reasonably discredited Treude’s attempt to distance himself from this email because “[d]espite claiming that he did not read [his attorney’s] email recommendations, Treude exactly followed [his] advice.” (JA 101, see JA 96 n.39, 97.)

Confusingly, Novato argues that the Board's pawn-in-an-unlawful-design precedent is inapplicable here because Rodriguez is not an "innocent bystander." (Br. 22-23.) But Novato misunderstands Board law, which does not hinge on the neutral employee's "innocence" of any wrongdoing.<sup>6</sup> *See, e.g., Metro-W. Ambulance Serv., Inc.*, 360 NLRB 1029, 1056 (2014) (employer's discipline of neutral employee for being "off post" was designed to cover up unlawful discipline of his partner, a union adherent, for the same reason); *Bay Corrugated*, 310 NLRB at 451 (employer "would have had no justification for not terminating [neutral employee] along with the two known union supporters for the printing error in which all were involved"). Rather, in harmony with *Wright Line*'s mixed-motive analysis, the question is whether union animus is "a motivating factor" in the employer's decision to discipline or discharge an employee, even though the employee herself may not support the union. *Bay Corrugated*, 310 NLRB at 451. *See Wright Line*, 251 NLRB at 1089.

Novato also argues (Br. 13, 21-23) that because the record contains no contradictory evidence of what happened in Station 1 that night, the Court should

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<sup>6</sup> In some cases, courts have described neutral employees who are unlawfully swept up in an employer's discriminatory conduct as "innocent." *See NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 628 (7th Cir. 1981) (citing cases). Tellingly, however, it appears that in those cases, the term "innocent" is used to describe employees who are "innocent" of union proclivities, not "innocent" of alleged misconduct.

adopt Gilman’s version of events, notwithstanding that the judge “reject[ed] her version of events completely” (JA 88). That argument is a distraction. This violation does not depend on a resolution of whether Rodriguez was sleeping, on a break, or permitted by her supervisor to nap. Novato cannot credibly argue that it would have discharged Rodriguez notwithstanding the Station 4 employees’ union activity when documentary record evidence (JA 528-32) shows that Treude intentionally lumped Rodriguez in with the other four to improve its position in the very litigation in which it is now engaged. The Board’s finding that Novato suspended and discharged Rodriguez “to ‘cover’ its unlawful suspension and termination of the other 4 employees,” is amply supported. (JA 101.)

**II. NOVATO VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEE METELLUS ABOUT HIS VOTE IN THE UPCOMING UNION ELECTION**

Substantial credited evidence supports the Board’s finding that Novato violated Section 8(a)(1) of the Act when Rocha interrogated Metellus about his vote in the upcoming representation election. (JA 84-85, 98.) Section 8(a)(1) prohibits an employer from questioning employees about their union activities if, under the totality of the circumstances, the interrogation reasonably tends to coerce employees in the exercise of their rights under the Act. *Perdue Farms, Inc., Cookin’ Good Div. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998) (citing *Rossmore House*, 269 NLRB 1176 (1984), *enforced sub nom., Hotel Employees &*

*Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985)). The test is an objective one, and proof of actual coercion is not necessary to establish a violation of Section 8(a)(1). *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004).

The Board and this Court recognize a number of “useful indicia that serve as a starting point for assessing the ‘totality of the circumstance[s]’” of an interrogation. *Perdue*, 144 F.3d at 835 (citation omitted). *Accord Westwood Health Care Ctr.*, 330 NLRB 935, 939 (2000). Those factors include: the history of the employer’s attitude toward its employees, the nature of the information sought, the rank of the questioner in the employer’s hierarchy, the place and manner of the conversation, and the truthfulness of the employee’s reply. *Perdue*, 144 F.3d at 835 (citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964)).

Additionally, an interrogation tends to be more coercive when an employer communicates no legitimate purpose for its questioning or gives the employee no assurances against reprisal. *Perdue*, 144 F.3d at 836. *See Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1137 (D.C. Cir. 2003) (unlawful interrogation was “unaccompanied by any assurance against reprisal, took place when [employee] was alone, and had no apparent legitimate purpose”).

Using the above indicia as a guide, the Board reasonably found that “Rocha’s questioning of Metellus was unlawful.” (JA 98, see JA 84-85.) Rocha

asked Metellus, who was alone, “who [he] was going to go vote for and about voting.” (JA 279.) She questioned him “in the midst of a heated union campaign,” *Shamrock Foods*, 346 F.3d at 1137, and just ten days before the election. (JA 84-85, 98.) She was rarely present on the night shift, when Metellus worked, and had never before approached Metellus during his shift. (JA 280.) And she played a role in Novato’s union opposition campaign. As the Board reasonably found, “Rocha’s position as a high-level management official with no regular working relationship with Metellus compounded the coercive tendency of her question.”<sup>7</sup> (JA 85, 98.) *Samsung Elecs. Am., Inc.*, 363 NLRB No. 105, 2016 WL 453584, at \*4 (Feb. 3, 2016) (finding interrogation unlawful where questioner, a high-level supervisor, had never personally contacted employee prior to interrogation).

Crucially, Rocha asked Metellus how he planned to vote in the union election. “[Q]uestions like Rocha’s—going specifically to how an employee himself intends to vote—have a uniquely coercive tendency.” (JA 85.) “The Board jealously guards the secrecy of the voting booth,” and has often found questions about a specific employee’s voting intentions coercive. *Royal Sonesta*,

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<sup>7</sup> That Metellus did not know Rocha’s last name does not make the questioning *less* coercive, as Novato claims (Br. 25). Contrary to Novato’s assertion (Br. 6, 25), Metellus knew Rocha’s title and her supervisory role at the facility. (JA 92 n.22; see JA 277-78 (Metellus identifying questioner as “DSD” and discussing her job responsibilities), 125 (“DSD” stands for “Director of Staff Development”). If anything, Metellus’s inability to identify Rocha’s last name shows that the two were not on friendly terms, making the interrogation *more* coercive.

*Inc.*, 277 NLRB 820, 830 (1985). *See Mountaineer Petroleum*, 301 NLRB 801, 806 (1991); *Gladieux Food Serv., Inc.*, 252 NLRB 744, 746 (1980); *Clark Printing Co., Inc.*, 146 NLRB 121, 122 (1964). *Cf. Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997) (“An employer ‘poll’ may in itself interfere with employees’ exercise of their § 7 rights because ‘any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee . . . .’” (citation omitted)).

Not only was the topic of Rocha’s interrogation “uniquely coercive” (JA 85), but Rocha finished her questioning by warning Metellus that if he voted “yes,” the Union could take a portion of his pay.<sup>8</sup> As the Board reasonably found, Rocha’s warning that the Union could take part of his paycheck, on the heels of asking Metellus to reveal his voting intentions, “clearly communicated [Novato’s]

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<sup>8</sup> Before the Board, Novato did not contend, as it does before the Court (Br. 25-26) that Rocha’s subsequent comments were protected by Section 8(c) of the Act, 29 U.S.C. § 158(c). (See JA 34-72.) Therefore, the Court lacks jurisdiction to consider that contention. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) precludes courts from reviewing claim not raised to the Board); *Nova S.E. Univ. v. NLRB*, 807 F.3d 308, 313, 316 (D.C. Cir. 2015) (“where a petitioner objects to a finding on an issue first raised in the Board’s decision, a petitioner must file for reconsideration to afford the Board an opportunity to correct the error, if any”). In any event, the Board’s finding that Rocha’s questioning “reasonably tended to restrain, coerce, or interfere with Metellus’s rights under Section 7” did not rely primarily on Rocha’s subsequent comments. (JA 85.)

preference” that Metellus should change his mind and “vote against representation.” (JA 85.) Moreover, Rocha did nothing to ameliorate the interrogation’s coercive tendency, nor did she offer any “explanation for her question” or “provide assurances against reprisal.” (JA 98.)

Contrary to Novato’s suggestion, the balance of the relevant factors militates in favor of finding the interrogation unlawful, notwithstanding that Metellus answered truthfully or that the interrogation took place by the vending machine and not in the “boss’s office.” (Br. 23-26.) *See Perdue Farms*, 144 F.3d at 835 (interrogation unlawful even though “place and method” of questioning were not particularly coercive); *Mountaineer Petroleum*, 301 NLRB at 806 (interrogation unlawful notwithstanding open union supporter’s honest response). Novato’s embellished description of the exchange—*e.g.*, that Metellus “*forthrightly* declared his support for the Union and *swept aside* Rocha’s stated concerns” (Br. 24-25 (emphasis added), *see* Br. 16)—suggests that Novato believes that Metellus was not actually intimidated or coerced. But, as this Court acknowledges, the inquiry is objective: “the Board need not find that the employer’s language or acts were coercive in actual fact, but only that it had a tendency to coerce employees.” *United Servs. Auto. Ass’n*, 387 F.3d at 913 (internal quotation marks and citations omitted).

Novato also argues that Rocha's interrogation was not unlawful because Metellus wore a union lanyard at the time, suggesting a bright-line rule where an employer is free to question an open union supporter, as long as such questioning contains no threat or attempt to change the employee's union sympathies. (Br. 23-24.) But that is not the test. *See Rossmore House*, NLRB at 1178 n.20. The Board, with court approval, has found, on numerous occasions, interrogations of open union supporters unlawful after examining the totality of the circumstances, as it did here. *See, e.g., Beverly California Corp. v. NLRB*, 227 F.3d 817, 835 (7th Cir. 2000); *Cardinal Home Prod., Inc.*, 338 NLRB 1004, 1007 (2003); *Norton Audubon Hosp.*, 338 NLRB 320, 321 (2002); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1479 (1992) *enforced*, 984 F.2d 556, 559 (1st Cir. 1993); *Mountaineer Petroleum*, 301 NLRB at 806.

*Cardinal Home Products*, 338 NLRB at 1004, the sole authority cited by Novato for this purported "line of cases" (Br. 24), does not command a different result. In that case, the Board reiterated that "even open union adherents can be subjected to invalid coercive interrogation," *id.* at 1007. Moreover, the facts are readily distinguishable. There, a front-line supervisor, and not a high-level manager, asked an employee "which way *did* you vote?" in an exchange the employee described as "friendly." *Id.* at 1009 (emphasis added). Here, Novato's high-level supervisor, not usually present during the night shift, asked Metellus

which way he *intended* to vote—just ten days before the election, three days before suspending him, and one week before discharging him—and then followed up with a statement clearly expressing Novato’s preference that he change his mind. Under the totality of the circumstances, the interrogation was unlawful.

## CONCLUSION

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

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National Labor Relations Board  
April 2018

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NOVATO HEALTHCARE CENTER	)	
	)	
Petitioner/Cross-Respondent	)	
	)	Nos. 17-1221, 17-1232
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	20-CA-168351
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 8,858 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC  
this 18th day of April, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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 serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
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