

# Nos. 18-125, 18-331

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

**BOZZUTO'S, INC.**  
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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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Bozzuto’s, Inc. (“the Company”) to review an order issued by the National Labor Relations Board (“the Board”) against the Company, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on December 12, 2017, and is

reported at 365 NLRB No. 146. (SA. 1-22.)<sup>1</sup> The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (the “Act,” 29 U.S.C. §§ 151, 160(a)), which empowers the Board to prevent unfair labor practices affecting commerce.

The Board’s Order is final with respect to all parties. The Court has jurisdiction over this appeal under Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f). Venue is proper because the Company transacts business in this Circuit. The petition and application were both timely because the Act imposes no time limits for such filings.

### **STATEMENT OF ISSUES**

1. Whether the Board is entitled to summary enforcement of those portions of its Order related to its finding that the Company violated Section 8(a)(1) of the Act by announcing and implementing wage increases, and by maintaining a policy of conditioning continued employment on an agreement by employees to refrain from talking about discipline and their terms and conditions of employment.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) by interrogating employee McCarty.

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<sup>1</sup> “A.” references and “SA.” references are to the Joint Appendix and Special Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

3. Whether the Board is entitled to summary enforcement of its finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending McCarty, and whether substantial evidence supports the Board's finding that the Company violated that section by discharging him.

4. Whether the Board is entitled to summary enforcement of its finding that the Company violated Section 8(a)(1) of the Act by warning employee Greichen, and whether substantial evidence supports the Board's finding that the Company violated that Section of the Act by discharging him.

5. Whether the Board acted within its broad remedial discretion in ordering Greichen's reinstatement with backpay and a public reading of the remedial notice.

### **STATEMENT OF THE CASE**

Acting on unfair-labor-practice charges filed by the United Food and Commercial Workers Union, Local 919 ("the Union"), the Board's General Counsel issued a complaint alleging, as relevant here, that the Company violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by announcing and implementing a wage increase, by interrogating employee Todd McCarty, and by maintaining a policy that conditions continued employment on an agreement by employees to refrain from talking about any discipline they may have received or about their terms and conditions of employment. The complaint also alleged that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(1) and

(3), by suspending and discharging McCarty, and violated Section 8(a)(1) by warning and discharging employee Patrick Greichen. (SA. 1, 14-15; A. 786-98, 805.) After a hearing, an administrative law judge issued a decision and recommended order finding that the Company committed those violations. (SA. 14-22.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted the recommended Order, with modifications. (SA. 1-13.)

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

### **A. Background**

The Company, which distributes food products from wholesale warehouses in Connecticut, employs 450 production workers, including loaders, selectors, and forklift operators. (SA. 15; A. 59-60, 816-18.) The selectors receive orders for products, drive motorized vehicles to where the products are stored, and load them onto pallets. (SA. 15; A. 74-75, 806-08.) The Company maintains production standards for the various products picked by the selectors. Employees who exceed the standards can earn more money, but if they fail to meet 95% of the standards they could be subject to discipline and discharge. (SA. 15, 16 and n.2; A. 76-81, 87, 132, 315, 369-74, 403, 440-41, 554-56, 820-24.)

In May 2013, the Company added a volume of business from a new customer, resulting in mandatory six-day work weeks and the suspension of employees' vacations. (A. 81-83, 316-17.) In the summer, the Company

announced changes to its production standards, decreasing the time allotted to employees for performing certain assigned tasks. (SA. 16; A. 85-96, 317-20, 824.)

**B. McCarty and Greichen Initiate a Union Organizing Campaign; Greichen Files a Complaint Over the Company's Production Standards; the Company Learns of the Organizing Effort**

In September 2013, selector Todd McCarty contacted a representative of the Union. On September 22, McCarty, selector Patrick Greichen, and two other employees met with a representative of the Union, who provided them with authorization cards. The next day, McCarty and Greichen began soliciting employees to support the Union. (SA. 1, 15; A. 314, 320-25, 499-502.) Greichen told coworkers that he thought the Company's production standards were too stringent (SA. 16; A. 319-20), and on September 24, he filed a complaint with the Connecticut Department of Labor stating that productivity "time can be altered and manipulated through [the][m]anagement computer system," thereby impacting employees' wages (A. 529-33, 694-701). By the end of September, the Union, with Greichen and McCarty's help, had obtained 84 signed authorization cards. (SA. 15; A. 502.)

On September 26, an employee posted a message on the "Grapevine," a company message board, with the subject line "Union talk." (A. 68-70, 830.) The employee wrote that authorization cards were getting distributed with "many people on board," and that he was strongly against having a union at the Company.

(A. 830.) On September 30, Vice-President of Human Resources Carl Koch posted a response thanking the employee for his post and advising that the Company was “aware of the current activity.” (A. 809, 830.)

Although McCarty and Greichen were the most active union supporters, they initially tried to keep their involvement under the radar. (SA. 1 and n.4, 15; A. 324-25, 331-32.) Nevertheless, sometime before October 1, an employee who had agreed to help McCarty with the organizing effort informed Senior Vice-President Rick Clark of McCarty’s union activity. The employee gave Clark copies of material that McCarty was using for the organizing effort, including authorization cards, union literature, and a list of warehouse employees. (SA. 1 n.4; A. 57-58, 90, 95-96, 330, 485, 509-10, 600, 809.) Also prior to October 1, company managers found union literature in work areas. (SA. 15; A. 90-91, 600-01.)

### **C. After Telling Employees that It Knows about the Union Campaign, the Company Announces Wage Increases**

Upon learning of the union campaign, the Company responded swiftly by posting a memo informing employees that it knew about the organizing effort and was “aware that the [U]nion has obtained a list of all warehouse associates.” (SA. 15; A. 565, 825.) The memo further stated, “It’s absolutely o.k. to say NO . . . . We do not need a union at [the Company].” (SA. 15; A. 825.) In another memo, the Company announced hourly pay increases ranging from 50 cents to two dollars per hour, retroactive to September 29, for all production employees except day-

shift selectors. (SA. 15; A. 97-100, 328-29, 795, 800, 829.)

**D. The Company Interrogates McCarty, Warns Greichen for Complaining about Production Standards, and Prohibits Employees from Discussing Discipline**

The Company also responded to the union campaign by increasing its managers' presence in the warehouse. (SA. 2; A. 326-27.) On October 1, as McCarty, who had not yet publicized his support for the Union, left a restroom, Vice-President Clark asked, "what's going on with this [u]nion stuff." McCarty replied, "I'm not going to talk about it with you." (SA. 15; A. 327, 332-36.)

Also on October 1, Vice-President Clark summoned Greichen to a meeting to address his workplace complaints about long hours and more stringent production standards, which affected employees' pay and discipline. (SA. 3; A. 119-20, 858.) At the meeting, also attended by Manager of Associate Relations and Development Doug Vaughn and Head of Security Bill Glass, Clark asserted that employees were complaining about Greichen's "erratic and scary behavior," and directed him to "stop disrupting the work environment by making negative comments . . . such as, being forced to work 20 hours per day or comments about needing three legs to do the work." (SA. 3, 16; A. 119-20, 294-95, 297, 858.) Clark issued Greichen a notice of "verbal warning" for "his repeated negative attitude and disrespectful behavior . . . [that] have become disruptive to the workforce and work environment." (SA. 16; A. 857.) Greichen declined to sign

the disciplinary form. (A. 858.) Clark offered Greichen three options going forward: changing his behavior and communicating with other employees and management in the established format; not changing his behavior and receiving discipline under the progressive disciplinary system; or resigning from the Company. (SA. 3; A. 162, 858.)

Also starting on October 1, the Company began issuing disciplinary notices to suspended employees that conditioned their continued employment on their agreeing “[n]ot [to] be involved in any conversations that are deemed hearsay, rumors or non-factual comments that cause any disruption in the business environment.” (SA. 18; A. 112-14, 852-56, 985.)

**E. Greichen Again Expresses Concerns about Production Standards; the Company Suspends Him After He Declines To Attend a Meeting with Vice-President Clark, and Discharges Him a Few Days Later**

On October 8, Greichen complained to his supervisor that he had insufficient time to complete an assignment. Referring to the production standards, Greichen also expressed his belief that the Company was changing the designated times to perform different tasks, to the detriment of employees. (SA. 4, 16; A. 264-65.) After Greichen did not receive a satisfactory response from his supervisor, he presented his concerns about the standards to Operations Manager Jason Winans. (SA. 4, 16; A. 250-57, 981.) Greichen told Winans that “he tells anybody and everybody he can that he believes [the Company is] purposely changing the daily

standards in order to screw the associates.” (SA. 16; A. 257, 981.) Winans asked Greichen why he still worked at the Company if it was “purposely trying to make him miserable.” (SA. 4, 16; A. 981.) Winans then reported the conversation to Vice-President Clark. (SA. 4, 16; A. 258, 981.)

Later that day, at Clark’s direction, Winans instructed Greichen to attend a meeting with Clark and the industrial engineers. Greichen replied that he did not want to attend, and viewed the request as harassment. (SA. 4, 16; A. 982.)

Thereafter, Clark, who makes the final decision on whether to discharge warehouse employees (A. 63-65), instructed Winans to tell Greichen that he “need[ed] to come to a meeting . . . to explain [the production standards] to [him] . . . the repercussion of [not attending] is insubordination and termination.” (SA. 4; A. 126.) Winans, along with Vaughn, relayed Clark’s message to Greichen. (SA. 4; A. 222-24, 982.)

Greichen reiterated that he did not want to attend the meeting. He added that all he “did was voice [his] concern” about having insufficient time to complete an order, “and now everybody . . . is swooping in and getting involved,” and the situation was “get[ting] blown . . . out of proportion.” (A. 637-38.) Greichen also noted that he had been called into a meeting the week before, on October 1, where the Company accused him of “behavior problems.” (A. 644.) Finally, Greichen noted that he felt “harassed to talk . . . when everything could be addressed . . .

without upper management.” (A. 644, 702.) The Company then suspended Greichen for insubordination “pending termination,” and discharged him a few days later. (SA. 5, 17; A. 126, 646-49, 702.)

**F. In January 2014, McCarty Informs the Company of His Lead Role in the Union Organizing Campaign; the Company Suspends and Then Discharges Him for Poor Productivity Based on Falsified Productivity Numbers**

McCarty, who began working for the Company in 1999, had a good production record and often earned premium pay based on his performance over and above standards. (SA. 17; A. 314, 338.) On September 4, 2013, the Company highlighted him in its newsletter as a “high achiever” who “was chosen due to his expertise and dedication to always doing the right job.” (A. 145-46, 859.)

In early January 2014, McCarty was talking to Supervisor William Engelhart about his vacation time. Engelhart told McCarty, “you’re really lucky to have all this vacation time. If you had a [u]nion in here, you might not be so lucky.” (A. 337.) McCarty replied, “I don’t know what you’re talking about with this [u]nion stuff.” (A. 337.) Engelhart then stated, “we all know you’re involved.” (A. 337.) In response, McCarty acknowledged, “I’m not just organizing . . . I am the organizer.” (A. 337.)

Also in early January, McCarty saw that his reported production numbers seemed too low and that the computerized reporting system had failed to credit him with “down time,” the time taken for approved employee breaks. Counting down

time as time worked would lower McCarty's productivity score and subject him to discipline. Recognizing that something was not right, McCarty began recording his productivity statistics. (SA. 17; A. 339-40, 486.) McCarty complained to Operations Manager Winans that his down time had been improperly eliminated, but Winans said his productivity numbers would stand. (SA. 17; A. 342-45.)

On January 15, McCarty informed Supervisor Engelhart that his down time still had not been recorded. Engelhart told McCarty "not to worry," but later that day McCarty received a five-day suspension signed by Winans for low productivity. (SA. 17; A. 356-57, 360, 622, 789.)

On January 18, during his suspension, McCarty met with a labor consultant hired by the Company. During the meeting, McCarty admitted that he was the key union organizer and explained why he supported the Union. (A. 332-36.)

McCarty returned to work on February 18, after the suspension and a planned vacation. That day, the Company discharged him for having a productivity standard of 94 percent for the week of January 11. The Company's calculation improperly failed to account for McCarty's down time. (SA. 17; A. 359-60, 587.)

Thereafter, McCarty presented evidence to the Board's Regional Office that the productivity figures used to justify his discharge had been altered. The evidence included "before "and "after" pictures taken by McCarty and his

coworkers reflecting that McCarty's down time had been eliminated. The Board provided the information to the Company on April 9. (SA. 4, 17-18; A. 382, 662-75.) Following an internal investigation, the Company determined that a supervisor with access to the computer system had eliminated McCarty's down time for a three-week period after he had finished working for the week, which lowered his productivity score for those weeks. (SA. 18; A. 140, 149-56, 166-69, 381-82, 386-97, 675, 860-911.)

On May 14, the Company offered McCarty unconditional reinstatement to his former position, which McCarty rejected on May 28. (SA. 19-20; A. 362, 490, 687-88, 987.)

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

On December 12, 2017, the Board (Chairman Miscimarra, and Members Pearce and McFerran) adopted, in the absence of exceptions, the administrative law judge's findings that the Company violated Section 8(a)(1) of the Act by announcing and implementing wage increases, and by maintaining a policy that conditioned continued employment on agreement by employees to refrain from talking about discipline. (SA. 1 n.1, 5.) The Board also found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act by issuing Greichen a written warning. (SA. 1, 3, 7.) The Board, in further in agreement with the judge (Chairman Miscimarra dissenting), found that the Company violated

Section 8(a)(1) of the Act by interrogating McCarty, and by discharging Greichen. (SA. 1-13.)<sup>2</sup> Finally, the Board found, in agreement with the judge, that the Company violated Section 8(a)(1) and (3) of the Act by suspending and discharging McCarty. (SA. 1, 3, 7.)

The Board's Order requires the Company 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, 29 U.S.C. § 157. (SA. 5-6.) Affirmatively, the Order requires the Company to rescind the rule conditioning employment on an agreement to refrain from talking about discipline, to offer Greichen full reinstatement to his former job, to make Greichen and McCarty whole for any loss of benefits, to compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to compensate them for their search-for-work and interim employment expenses regardless of whether those expenses exceeded interim earnings. (SA. 6 (Chairman Miscimarra dissenting with respect to Greichen's make-whole order)). The Order also requires the Company to post a remedial notice, and (Chairman Miscimarra dissenting) to hold a meeting where the Board's notice will be read aloud to employees by Vice-President Clark or a

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<sup>2</sup> The Board found it unnecessary to pass on the judge's additional finding that Greichen's warning and discharge violated Section 8(a)(3), "as those findings would not materially affect the remedy." (SA. 3 n.14.)

Board agent in Clark's presence. (SA. 5-6, 13.)

### STANDARD OF REVIEW

The Court's "review of Board orders is quite limited." *NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.3d 755, 763 (2d Cir. 1996). The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477. *Accord Pier Sixty*, 855 F.3d at 121-22. Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo*; as the Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board." *Abbey's Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). The Court will uphold the Board's legal conclusions if they have a "reasonable basis in law," and will reverse only if they are "arbitrary and capricious." *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008) (internal quotation omitted).

Once the Board has found a violation of the Act, its remedial power under Section 10(c) of the Act, 29 U.S.C. § 160(c), is "a broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S.

203, 216 (1964). The Court reviews the Board's selection of a remedy for abuse of discretion. *Katz's Delicatessen*, 80 F.3d at 77. An objecting party must show that the Board's remedial choices represent "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1993).

### **SUMMARY OF ARGUMENT**

1. The Board is entitled to summary enforcement of the portions of its Order remedying findings that the Company did not contest before the Board. Specifically, the Company did not except to the administrative law judge's findings that it violated Section 8(a)(1) of the Act by announcing and implementing wage increases within days after it learned of the union campaign, and by maintaining its policy that conditioned continued employment on employees refraining from discussing their discipline or their terms and conditions of employment. Accordingly, the Board adopted those unchallenged findings in the absence of exceptions, and the Court should summarily enforce those portions of the Order.

2. Substantial evidence supports the Board's finding that Vice-President Clark further violated Section 8(a)(1) by interrogating McCarty, an instigator of the union campaign. In so finding, the Board reasonably relied on the circumstances of Clark's inquiry, including his high-ranking position, the fact that he initiated the

questioning before McCarty disclosed his union sympathies, and McCarty's declining to answer.

3. The Board is also entitled to summary enforcement of the portion of its Order remedying its finding—which the Company fails to contest in its opening brief—that it violated Section 8(a)(3) and (1) of the Act by suspending McCarty for a false and pretextual reason after he became known as a leading union adherent. By failing to contest that finding in its opening brief, the Company waived any challenge to it. Further, substantial evidence supports the Board's finding that the Company violated the same Section of the Act by discharging McCarty. Undisputed evidence shows that the Company relied on the same admittedly false and manufactured reason—low productivity—for both his suspension and discharge. This provides compelling evidence of the Company's unlawful motivation, and establishes that the Company necessarily failed to show that it would have discharged McCarty absent his union activity.

4. The Board is likewise entitled to summary enforcement regarding its finding, which the Company fails to challenge in its opening brief, that it violated Section 8(a)(1) of the Act by warning Greichen for his protected activity of complaining about the Company's production standards. Moreover, substantial evidence supports the Board's finding that the Company violated the same section of the Act by discharging Greichen just one week later, after he again raised

complaints about the standards. The Board reasonably found that those complaints were related to the earlier complaints that led to his unlawful warning, and that the Company's stated reason for discharging him—his refusal to attend a meeting where engineers purportedly would explain how the standards were created—was pretextual.

5. Finally, the Board acted well within its broad remedial discretion in ordering Greichen's reinstatement with backpay, the standard remedy for an unlawful discharge. Likewise, given the serious and widespread unfair labor practices, the Board acted within its broad discretion by ordering a public reading of the Board's remedial notice aloud to employees. As the Board found, a notice reading is warranted to dissipate any lingering effects of the Company's unlawful conduct, which included raising employee wages within a week after the union campaign started, and discharging two of the leading union supporters over the next several months. Such violations have serious and long lasting effects on employees.

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS ORDER FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ANNOUNCING AND IMPLEMENTING WAGE INCREASES, AND BY MAINTAINING A POLICY OF CONDITIONING CONTINUED EMPLOYMENT ON EMPLOYEES REFRAINING FROM DISCUSSING THEIR DISCIPLINE AND TERMS AND CONDITIONS OF EMPLOYMENT**

It is undisputed that on October 1, 2013, the Company, while “explicitly acknowledging its awareness of the union organizing campaign,” announced and implemented a wage increase. (SA. 1 n.1.) It is also undisputed that on the same day, the Company began maintaining a policy that “conditioned continued employment on an agreement by employees to refrain from talking about any discipline that they have received or about their terms and conditions of employment.” (SA. 1 n.1.) On these facts, the administrative law judge found that the Company violated Section 8(a)(1) of the Act by announcing and implementing the wage increases,<sup>3</sup> and by maintaining its policy regarding the discussion of discipline and terms and conditions of employment.<sup>4</sup> (SA. 15-16, 18-19.) The

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<sup>3</sup> *NLRB v. Cell Agr. Mfg. Co.*, 41 F.3d 389, 395 (8th Cir. 1994) (employer that granted a wage increase “to thwart a representation campaign, clearly violate[d] the . . . Act”).

<sup>4</sup> *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C Cir. 2015) (employer unlawfully instructed employee not to discuss discipline with coworkers).

Company did not file exceptions to the judge's findings, which the Board adopted. (SA. 1 n.1.)

Section 10(e) of the Act provides in relevant part that “no exception that has not been urged before the Board . . . shall be considered by the court,” absent “extraordinary circumstances.” 29 U.S.C. § 160(e). No such circumstances are present here. The Company does not dispute its failure to file exceptions to the judge's findings. Thus, even if the Company had contested those unfair labor practices in its opening brief, which it did not do, the Court would lack jurisdiction to consider such a challenge. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (“[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.”). *Accord KBI Sec. Serv., Inc. v. NLRB*, 91 F.3d 291, 294 (2d Cir. 1996). Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to the uncontested findings. *NLRB v. Consolidated Bus Transit, Inc.*, 577 F.3d 467, 474 n.2 (2d Cir. 2009).

Moreover, the contested violations must be considered “against the background of the acknowledged violations.” *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994) (citing *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (uncontested violations “remain, lending their aroma to the context in which the [challenged]

issues are considered.”)).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING McCARTY**

### **A. Applicable Principles**

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §157. Section 8(a)(1) of the Act implements that guarantee by making 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. 158(a)(1).

An employer’s conduct violates Section 8(a)(1) of the Act if it has a reasonable tendency to coerce employees, regardless of whether they are actually coerced. *New York Univ. Med. Ctr. v. NLRB*, 156 F3d 405, 410 (2d Cir. 1998). Moreover, any assessment of statements by an employer to its employees “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

In particular, an employer violates Section 8(a)(1) of the Act by interrogating employees regarding their support for a union, if “under all of the

circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176, 1177 (1984), *enforced sub nom. Hotel Employees & Rest. Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Factors tending to show such coercion include: a history of employer hostility towards or discrimination against union supporters; the nature of the information sought; the position of the questioner in the employer’s hierarchy; the place and method of the exchange; and evasive or untruthful replies by the questioned employee. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002), *enforced*, 71 F. App’x 441 (5th Cir. 2003). The Court has recognized that these factors are not exhaustive or definitive, and the absence of any one does not exonerate the employer. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975); *NLRB v. Rubin*, 424 F.2d 748, 751 (2d Cir. 1970).

Thus, “[e]ven a single question put to a single employee may be a violation, if there is a background of union hostility.” *NLRB v. Camco, Inc.*, 340 F.2d 803, 804 n.6 (5th Cir. 1965). *See also Norton Audubon Hosp.*, 338 NLRB 320, 321 (2002) (unlawful “interrogation occurred against a background of other unfair labor practices committed by the [employer] in its effort to avoid unionization”); *Westwood Health Care Ctr.*, 330 NLRB 935, 941 (2000) (unlawful interrogation occurred “most significantly” against “a background of hostility and unlawful

conduct”); *Med. Ctr. of Ocean Cty.*, 315 NLRB 1150, 1154 (1994) (unlawful interrogation where, in context of other unfair labor practices, employee asked “[w]hat’s going on; what’s happening?”).

### **B. Vice-President Clark Unlawfully Interrogated McCarty**

Substantial evidence supports the Board’s finding that Vice-President Clark unlawfully interrogated McCarty on October 1. (SA. 1-2, 15, 18.) Clark—a high-ranking company official—approached McCarty as he left the bathroom, of all places, asking him “what’s going on with this [u]nion stuff.” (SA. 1-2, 15; A. 327.) McCarty declined to answer, stating that he would not talk about “it” with Clark. (SA. 15; A. 327.) Thus, as the Board noted (SA. 2), Clark initiated a conversation “in which he questioned an active, but not yet open union supporter,” a factor that strongly supports the Board’s finding of coercion. *See Ozburn-Hessey Logistics, LLC*, 357 NLRB 1456, 1488-89 (2011) (high-ranking management official unlawfully questioned employee who was not an open union supporter), *enforced*, 605 F. App’x 1 (D.C. Cir. 2015).

Significantly, McCarty “did not answer Clark’s question.” (SA. 2.) An employee’s evasive answers to questioning by a high-ranking official “lends additional support for the Board’s finding that, under the circumstances, the questioning was in fact coercive.” *Tellepsen Pipeline Servs. Co v. NLRB*, 320 F.3d 554, 561 (5th Cir. 2003). *Accord Chipotle Services LLC*, 363 NLRB No. 37, slip

op. at 11–12 (2015), 2015 WL 6050739, *enforced*, 849 F.3d 1161 (8th Cir. 2017); *Town & Country Supermarkets*, 340 NLRB 1410, 1423–24 (2004).

Finally, as the Board explained, Clark’s inquiry occurred, “at or near the same time” as the Company’s unlawful discrimination against union supporter Greichen, including his disciplinary warning and discharge, and its unlawful wage increases to employees. (SA. 2.) These other contemporaneous unfair labor practices—two of them unchallenged, and occurring on the same day as the interrogation—provide additional support for the Board’s finding of coercion. The Company (Br. 23, 27) provides no basis for disturbing the Board’s finding that the interrogation, the wage increase, and the discipline all took place on October 1. (SA. 3.) In any event, as the Board explained, “even if the interrogation predated the unlawful wage increase and disciplinary warning by hours or a couple of days,” it can consider subsequent unfair labor practices in context. (SA. 3.) As the Board noted, it has “found that ‘a question that might seem innocuous in its immediate context may, in light of later events, acquire a more ominous tone,’ and the Board may take into account ‘events or statements that occurred before or after the particular incident in question that may throw light on its significance.’” (SA. 3 (quoting *Westwood Health Care Ctr.*, 330 NLRB at 940 and n.17).) Accordingly, the Board properly considered and relied on the unlawful wage increases and disciplinary warning in analyzing the interrogation’s coercive effect.

### C. The Company's Arguments Lack Merit

The Company gains no ground in asserting (Br. 25-26) that Vice President Clark's interrogation of McCarty was lawful because there is no evidence of its hostility, Clark did not seek specific information about a particular person, and he purportedly had a good relationship with McCarty. Contrary to the Company's assertions, its contemporaneous unfair labor practices, including the uncontested wage increases and Greichen's warning, provide ample evidence of its hostility toward union activity. Likewise, the circumstances surrounding Clark's questioning fully support the Board's finding of unlawful interrogation. Thus, it is undisputed that Clark conducted the questioning soon after the Company learned from a coworker about McCarty's leading role in the organizing effort, and Clark failed to provide a valid purpose for his inquiry. Accordingly, the questioning would have a reasonable tendency to coerce because it was plainly meant to confirm information provided by another employee. Indeed, in *Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77, 78 (1999), the Board found a similar question—"What do you think of this union stuff?"—unlawfully coercive because it was intended to "ferret out and report on the union leanings of unit employees."<sup>5</sup>

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<sup>5</sup> *U-Haul Company of California*, 347 NLRB 375 (2006), cited by the Company (Br. 28 n.19), is not to the contrary. Unlike the instant case, it involved an employer that asked an employee about a different facility that had voted for union representation. In addition, the employer posed the question at a regularly scheduled meeting to a known union supporter who answered truthfully. *Id.* at

Similarly, despite the Company's claim (Br. 9) that McCarty had a "good relationship" with Clark, it is telling "that McCarty did not feel comfortable telling Clark 'what was going on' with the organizing campaign." (SA. 2 n.6.)<sup>6</sup> And the Company cites no evidence to support its bald assertion that McCarty responded in a "clear, forthright and confident manner." (Br. 9.) In any event, as the Board noted, it has found that a "supervisor's statements may be coercive regardless of his friendship with an employee and regardless of whether the remark was well intended." (SA. 2 n.6) (quoting *Mgmt. Consulting, Inc.*, 349 NLRB 249, 250 n.6 (2007)). *Accord Acme Bus Corp.*, 320 NLRB 458, 458 (1995) (friendly relationship between supervisor and employee does not necessarily diminish the interrogation's coerciveness), *enforced mem.*, 198 F.3d 233 (2d Cir. 1999).

Next, the Company asserts (Br. 12, 23, 27) that the Board erred by finding that Clark's interrogation occurred before McCarty openly supported the Union. The Board reasonably found, however, that "the record does not support the conclusion that McCarty was an open union supporter *at the time of the*

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375-76. In those very different circumstances, the Board found that the question would not tend to coerce employees at the facility regarding their union activity.

<sup>6</sup> In these circumstances, the Board reasonably distinguished this case from *Rossmore House*, 269 NLRB at 1176, 1178, "where the employee had identified himself to the employer as a member of the in-plant organizing committee and answered the employer's inquiries about the union candidly and without hesitation." (SA. 3.)

*interrogation* . . . regardless of whether the interrogation occurred on or about October 1 (as the record supports) or on September 27,” as the Company claims. (SA. 2-3) (original emphasis). Indeed, the record establishes that McCarty initially tried to maintain a low profile when engaged in union activity. (SA. 1-3, 15; A. 324-25, 331-32.) Moreover, the Company does not dispute the Board’s finding that “the record reflects that McCarty did not disclose his union support until *January 2014.*” (SA. 3 (original emphasis); A. 337.)<sup>7</sup> Nor does McCarty’s testimony that “within that first week I was not secret about [the union campaign] at all” (A. 489), undermine the Board’s finding. As the Board explained, his testimony “does not establish that McCarty was open at the time of the interrogation.” (SA. 2 n.10.). Rather, “he did not disclose his involvement in the organizing campaign to management until January 2014.” (*Id.*) Significantly, the Company does not dispute the Board’s finding that it learned of McCarty’s involvement “from another employee early in the organizing campaign,” which does not, as the Board explained “equate[] to openness on McCarty’s part.”<sup>8</sup> (*Id.*)

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<sup>7</sup> Although the judge mistakenly stated that McCarty first revealed his union activity to the Company “during and after October 2013,” the Board’s decision does not adopt that statement. (SA. 1-3, 17.)

<sup>8</sup> The Board reasonably found that even if McCarty had been an open union supporter at the time of the interrogation, it would still be unlawful because “[o]penness is only one factor to take into consideration.” (SA. 3 n.11.) Here “the other factors—the identity of the questioner, who was a high-ranking official; the fact that the interrogation occurred around the same time as other unfair labor

**III. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING McCARTY, AND SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED THAT SECTION BY DISCHARGING HIM**

The credited evidence establishes, and the Company does not dispute, that it suspended and then discharged McCarty after he became known as the leading union supporter, ostensibly for failing to meet productivity requirements. In its opening brief, the Company also does not dispute the Board’s finding that its stated reason for suspending him—namely, his purported failure to meet productivity standards—was demonstrably false and a pretext to mask its unlawful motive. (SA. 1, 18.) Nor does the Company challenge the Board’s finding that it therefore violated Section 8(a)(3) and (1) of the Act by suspending McCarty for that false reason. (*Id.*) By failing to contest those findings in its opening brief, the Company has waived any challenge to them. *Gaetano & Associates v. NLRB*, 183 F. App’x 17, 22 (2d Cir. 2006) (the Court “deem[s] waived arguments not raised until reply brief”). *See also* F.R.A.P. Rule 28(a)(8). Accordingly, the Board’s findings are entitled to summary affirmance, and the Court should also summarily enforce the

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practices; and McCarty’s refusal to answer the question—weigh in favor of finding a violation.” (SA. 3 n.11.)

corresponding portions of the Board's Order. *Torrington Extend A-Care*, 17 F.3d at 590.

Moreover, as shown below, the Company's unlawful suspension of McCarty for a demonstrably false reason provides ample support for the Board's further finding that the Company again violated Section 8(a)(3) and (1) of the Act by subsequently discharging him for the same false reason.

**A. Section 8(a)(3) and (1) of the Act Prohibits Employers from Discriminating Against Employees for Engaging in Union or Other Protected Activity**

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) by disciplining or discharging an employee for engaging in union activity. *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001).<sup>9</sup> The critical inquiry in such cases is whether the employer's action was unlawfully motivated. *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957 (2d Cir. 1988).

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<sup>9</sup> Such discrimination also derivatively violates Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1). *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *Office & Prof'l Employees Int'l Union*, 981 F.2d 76, 81 n.4 (2d Cir. 1992).

In *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), the Supreme Court approved the Board's test for determining motivation in unlawful discrimination cases first articulated in *Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, courts will enforce the Board's finding of an unlawful discharge if substantial evidence supports the Board's finding that an employee's protected activity was "a motivating factor" in the employer's decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer's affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395. *Accord G & T Terminal Packaging*, 246 F.3d at 116. If the reasons advanced by the employer for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer necessarily fails to meet its burden, and the inquiry is logically at an end. *Transp. Mgmt. Corp.*, 462 U.S. at 395, 398-403; *Abbey's Transp. Servs.*, 837 F.2d at 579; *Wright Line*, 251 NLRB at 1084, 1089.

Motive is a question of fact, and the Board may rely on direct as well as circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *NLRB v. Windsor Indus., Inc.*, 730 F.2d 860, 863 (2d Cir. 1984). Evidence of unlawful motivation includes the employer's knowledge of its employees' protected activity; the timing of the adverse action; its hostility toward the activity, including the

commission of other unfair labor practices; and disparate treatment. *S.E. Nichols*, 862 F.2d at 958; *Abbey's Transp. Servs.*, 837 F.2d at 580. The employer's reliance on pretextual or shifting reasons to justify the adverse action also demonstrates unlawful motive. *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 62-63 (2d Cir. 1982).

### **B. The Company Unlawfully Discharged McCarty**

Substantial evidence supports the Board's finding that the Company unlawfully discharged McCarty, not for failing to meet productivity requirements at it falsely asserted, but because of his union and other protected activity. (SA. 3, 17-18.) Indeed, the Company's failure to dispute the Board's finding that it unlawfully suspended McCarty for the same false reason provides overwhelming support for the Board's further finding that his subsequent discharge was likewise unlawful. In these circumstances, any claim that the Company would have discharged McCarty for productivity reasons absent his union activity necessarily fails.

Initially, the Company does not dispute that McCarty was a leading union supporter, and that it was well aware of his union activity when it acted against him. McCarty initiated contact with the Union and thereafter distributed authorization cards and spoke to employees about the Union. The Company learned of his union activity from another employee, and eventually from McCarty

himself. Moreover, as the Board noted, the Company “was aware” that at the time of McCarty’s suspension and discharge, he was “the sole active union supporter,” as the Company had already discharged Greichen by that time. (SA. 17.) *See* pp. 38-45, below.

Critically, after the Company unlawfully suspended McCarty based on an undisputedly false claim regarding his productivity, it then discharged him for the same admittedly false reason. Simply put, “the ostensible reason for his suspension and discharge was manifestly false.” (SA. 18.) As the Board further found, and the Company does not dispute, “a supervisor with access to the computer system had eliminated McCarty’s ‘down time’ in a way that lowered the productivity percentage numbers that were the basis of his suspension and discharge.” (SA. 18.) Because the Company unlawfully suspended McCarty for an indisputably false and manufactured reason, and then acted on the same false reason to discharge him, the Board had ample grounds for finding that his discharge was unlawfully motivated.<sup>10</sup> *See U-Haul Co. of California*, 347 NLRB 375, 388-89 (2006) (finding reason for discharge pretextual “buttresses the . . .

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<sup>10</sup> The Board’s findings that the Company also unlawfully interrogated McCarty, warned and discharged Greichen, and committed other uncontested unfair labor practices (*see* pp. 18-26, 34-35) provide additional evidence of its demonstrated hostility towards employees’ organizing activity. *Abbey’s Transp. Servs.*, 837 F.3d at 580.

affirmative evidence of discrimination” and supports an inference of unlawful motive), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007).

Given that the Company’s asserted reason for McCarty’s suspension—failing to meet productivity requirements—was admittedly false, and therefore not the real reason for his suspension, the Company is no position to dispute the Board’s reasonable conclusion that it failed to show it would have discharged him for legitimate reasons absent his union activity. (D&O 18.) *See U-Haul Co. of California*, 347 NLRB at 388 (pretextual reason for discharge “dooms [employer’s] defense”); *NLRB v. Baltimore Luggage Co.*, 382 F.2d 350, 352 (4th Cir. 1967) (employer’s defense asserted to justify discharge fails where Board made an “express finding that the claimed event never happened”). *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (when employer’s stated motives for its actions are found to be false, Board may infer that its true motive is an unlawful one that it “desires to conceal”). Thus, the Board was fully warranted in finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging McCarty.

### **C. The Company’s Arguments Are Without Merit**

The Company’s arguments that it did not unlawfully discharge McCarty fail to withstand scrutiny. Thus, it does not help itself by asserting (Br. 13, 29) that it acted consistently with its productivity standards and treatment of other employees,

given the undisputed evidence that McCarty had, in fact, met those standards. Likewise, the Company's scurrilous attacks on McCarty's overall productivity record (Br. 10, 29-30) carry no weight because whatever corrective action McCarty may have previously received for production deficiencies, it is undisputed that absent the Company's falsification of his production records in January 2014 it would not have discharged him.<sup>11</sup>

The Company also errs in relying (Br. 31) on its eventual offer of reinstatement, which it made only after the Union filed an unfair-labor-practice charge challenging McCarty's suspension and discharge, and after the Board's Regional Office provided the Company with evidence that the stated reason for those actions was demonstrably false. Accordingly, whether the Company chose to limit its liability by offering McCarty reinstatement has no bearing on the Board's finding that his discharge was unlawful.

The Company has the audacity to suggest (Br. 10-11, 13, 30-31) that if McCarty had only provided more detailed information of its own officials falsifying his records sooner, then it would not have discharged him. McCarty had

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<sup>11</sup> The evidence reflects that the Company thought highly of McCarty. Indeed, the Company recognized him as a "high achiever" just months before discharging him. (A. 852.) Moreover, company officials, including Clark (A. 139-40, 147), Koch (A. 857), and Winans (A. 267), all acknowledged that McCarty was a very productive employee. Winans (A. 215) further referenced McCarty's production as among the top five or ten for all selectors.

no duty to inform the Company of its own misdeeds, particularly when it admittedly suspended him for the same false reason. In any event, the Company ignores that McCarty twice informed management that it had improperly eliminated down time from his productivity. Despite these warnings, there is no evidence that the Company made any attempt to investigate the matter before suspending and discharging him. In these circumstances, McCarty can hardly be faulted for presenting his evidence of the Company's malfeasance to the Board's Regional Office rather than providing it directly to the Company.

Finally, the Company's reliance (Br. 30) on the status of the union campaign when it discharged McCarty is unavailing. Regardless of the strength of employee support at that time, the Company's admittedly unlawful suspension of McCarty just weeks earlier for the same false reason it relied on to discharge him provides compelling evidence that the discharge was unlawful. In any event, in light of the Company's other unfair labor practices—including its warning and discharge of lead union supporter Greichen at the outset of the union campaign—it is hardly surprising that the union effort may have stagnated by early 2014.

**IV. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY WARNING GREICHEN, AND SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED THAT SECTION BY DISCHARGING HIM**

The credited evidence establishes, and the Company does not dispute, that it warned Greichen for concerted raising complaints about production standards, and then discharged him a week later, ostensibly for failing to attend an October 8 meeting to explain the genesis of those standards. In its opening brief, the Company does not challenge the Board’s finding that it violated Section 8(a)(1) of the Act by warning Greichen for making those protected workplace complaints, and not for his supposedly “negative attitude and disrespectful behavior,” which was merely a pretext to mask its unlawful motive. By failing to contest those findings in its opening brief, the Company has waived any challenge to them. *See* pp. 27-28, above.<sup>12</sup> Accordingly, the Board’s findings are entitled to summary affirmance, and the Court should also summarily enforce the corresponding portions of the Board’s Order. *Torrington Extend A-Care*, 17 F.3d at 590.

Moreover, as shown below, the Company’s admittedly unlawful warning, paired with its failure to specifically dispute the Board’s conclusion that the October 8 meeting was a pretext for his discharge, provide ample grounds for the

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<sup>12</sup> In a footnote, the Company (Br. 15 n.11) mentions Greichen’s warning, but this passing reference is insufficient to present the issue for review. *See Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000).

Board's further finding that the Company again violated the Act by discharging him for the same protected complaints that prompted the warning.

**A. An Employer Violates Section 8(a)(1) of the Act by Taking Adverse Action Against an Employee for Engaging in Protected Concerted Activity**

Section 7 of the Act guarantees employees not only the right to self-organization, but also to “engage in other concerted activities for the purpose of . . . mutual aid or protection . . . .” 29 U.S.C. § 157. Section 8(a)(1) of the Act implements those guarantees by making 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. § 158(a)(1). “The broad protection of Section 7 applies with particular force to unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’” *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (quoting *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962)). Accordingly, it is well settled that an employer violates Section 8(a)(1) by taking adverse action against an employee for engaging in protected concerted activity. *NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001); *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 88 (2d Cir. 1990).

Activity is concerted if 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), *affirmed sub nom. Prill v NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)). Moreover, the term “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).

Once it is demonstrated that an employee engaged in protected concerted activity, the critical inquiry, as shown above, is the employer’s motive for taking an adverse action. As shown, under that test, courts will enforce the Board’s finding of an unlawful discharge if substantial evidence supports the Board’s finding that an employee’s protected activity was “a motivating factor” in the employer’s decision to discharge the employee, unless the record as a whole compelled the Board to accept the employer’s affirmative defense that it would have taken the adverse action even in the absence of protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 397, 401-04, and cases cited at p. 29. If the reasons advanced by the employer for its action are pretextual—that is, if they either did not exist or were not in fact relied upon—the employer’s burden has not been met, and the inquiry is logically at an end. *Id.* at 398-403, and cases cited at p. 29.

In assessing the employer’s affirmative defense, the Board need not accept at face value its explanation for a discharge if the evidence and the reasonable

inferences drawn from it indicate that animus against the protected activity motivated the discharge. *Laro Maint. Corp.*, 56 F.3d 224, 230 (D.C. Cir. 1995). The issue “is not just whether the employer’s action also served some legitimate business purpose, but whether the legitimate business motive would have moved the employer to take the challenged action absent the protected conduct.” *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 23 (D.C. Cir. 2015) (quoting *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327 (D.C. Cir. 2012)); see *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984) (“[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.”).

### **B. The Company Unlawfully Discharged Greichen**

Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) by discharging Greichen after he again raised concerns about the Company’s production standards and refused to attend an October 8 meeting on that subject. (SA. 4, 17.) That finding is amply supported by the admittedly unlawful warning issued to Greichen just one week earlier, coupled with the unassailable evidence that his refusal to attend the meeting was related to the warning. Moreover, the Company fails to specifically challenge the Board’s finding that its asserted reason for the meeting—purportedly to provide correct

information about its production standards and their genesis—does not withstand scrutiny. (SA. 4.) In these circumstances, ample evidence supports the Board’s finding that Greichen’s refusal to attend the meeting “was not a lawful basis for discharging him.” (SA. 4.)

As an initial matter, the Company does not dispute the Board’s finding that Greichen engaged in protected activity on October 1 by complaining to coworkers about the Company’s application of its production standards to the workforce. (SA. 17.) As the Board explained, “these standards determine not only whether employees receive premium pay, but also whether they can be disciplined or terminated.” (SA. 17.) It is well settled that employee discussions about such matters are “fairly . . . characterized as concerted activity for the[ir] ‘mutual aid or protection.’” *Eastex*, 437 U.S. at 569-70 (quoting Section 7 of the Act).

Further, as shown above, the Company does not dispute that it unlawfully warned Greichen to stop raising complaints about those standards on pain of further discipline. Nor does the Company dispute the Board’s finding that the record is devoid of any evidence that Gretchen engaged in “threatening” behavior, its asserted basis for the warning. (SA. 17.) Accordingly, there is no dispute that the Company necessarily failed to meet its burden of showing it would have warned Greichen absent his protected activity. *See, e.g., Citizens Inv. Servs. Corp.*, 430 F.3d 1195, 1203 (D.C. Cir. 2005) (employer’s claim that it took adverse action

against employee for negativity and attitudinal issues is “simply another way of indicating that he was terminated because he engaged in protected concerted activity” by complaining about the employer’s compensation plan).

Moreover, ample evidence supports the Board’s further finding that Greichen’s complaints on October 8 were inextricably linked with his earlier protected conduct and his unlawful October 1 warning. (SA. 4, 17) Thus, on October 1, after Greichen raised complaints about the Company’s production standards with coworkers, the Company not only unlawfully warned him, but encouraged him to resign, and specifically instructed him that absent a change in his behavior he was subject to further discipline. Just one week later, on October 8, the Company made good on its warning after Greichen again raised concerns about the Company’s production standards with his direct supervisor. Specifically, as the Board noted, “Greichen believed that the [Company] was manipulating the standards during peak periods to the disadvantage of employees.” (SA. 4.) When, at Vice-President Clark’s direction, Operations Manager Winans told Greichen to attend a meeting, Greichen, as the Board further noted, “referenced the October 1 unlawful verbal warning, claimed that he was being harassed, and refused to attend the meeting.” (SA. 4.) In these circumstances, the Board reasonably concluded that the Company’s “insistence that Greichen attend the October 8 meeting to discuss his ongoing concerns about the [Company’s] productivity standards was an

outgrowth of . . . [its] earlier unlawful warning to Greichen for discussing those standards with other employees.” (SA. 4.)

Moreover, as noted at pp. 35-36, the Company does not specifically dispute the Board’s finding that its asserted reason for the October 8 meeting—to provide correct information about its production standards and their genesis—does not withstand scrutiny. (SA. 4.) As the Board explained, “the meeting was not organized in a manner typical to those held to address complaints about production and safety standards.” ( SA. 4.) Indeed, Jamie Wright, the Company’s director of industrial engineers, who Clark directed to participate in the meeting, testified that contrary to past practice, Clark was “vague and [unspecific,] saying [he] want[ed] to have a meeting with an associate about standards.” (SA. 4, 17 n.3; A. 366, 414-16.) Moreover, Clark declined Wright’s request to provide him any more information, except to reiterate that the meeting was about standards. (SA. 4, 17; A. 416-19.) As Wright further testified, he was not told about the nature of the complaint, or provided with any information to prepare for the meeting. (SA. 4, 17 n.3; A. 414-20.) In sum, Wright acknowledged that he had no idea what the meeting was about, and characterized the process as “a head scratcher” (A. 419-20), as well as “atypically vague” and “frustrating.” (SA. 4; A. 424.)

In addition to failing to provide Wright with any information to properly address Greichen’s concerns, the Company took no broader steps to address the

concerns that he had raised with coworkers regarding production standards.

Indeed, the Board's finding—that “following Greichen's discipline, the [Company] did nothing to mitigate any misinformation circulating amongst its employees as a result of Greichen's comments” (SA. 4)—stands unrefuted. As the Board noted, “[i]f addressing the spread of misinformation in the workplace was the [Company's] true goal, it would have done more than simply discharge Greichen.” (SA. 4.)

Having found that the Company's stated reason for the meeting was a pretext, the Board reasonably inferred that it scheduled the meeting “for the purpose of interfering with Greichen's protected concerted activity.” (SA. 4.) *See* cases cited at pp. 29, 31-32. Accordingly, the Board was fully warranted to find that Greichen's “refusal to attend the meeting, which the [Company] deemed insubordination, was not a lawful basis for discharging him,” particularly “given the clear and direct connection between the unlawful warning and the purported insubordination.” (SA. 4-5.)

The Board's finding, as it explained, is consistent with the “‘principle . . . that employers should not be permitted to take advantage of their unlawful actions, even if employees may have engaged in conduct that—in other circumstances—might justify discipline.’” (SA. 4, quoting *Supershuttle of Orange County, Inc.*, 339 NLRB 1, 3 (2003) (employer could not lawfully discharge employee based on

misconduct “*triggered by and elicited during*” unlawfully motivated investigation, given “clear and direct connection between the employer’s unlawful conduct and the reason for discipline”) (original emphasis).) *See also Metro One Loss Prevention Services Group, Inc.*, 356 NLRB 89, 102-05 (2010) (employer’s discharge of employee for insubordination that followed unlawful discipline was also unlawful because the incident that led to the alleged insubordination would not have occurred absent the unlawful warning).

### **C. The Company’s Contentions Are Without Merit**

The Company primarily argues (Br. 12, 14-16) that the October 8 meeting was unrelated to the protected conduct that led to Greichen’s unlawful warning on October 1. It acknowledges warning Greichen on October 1 for complaining about production standards, but asserts it had a different, unrelated reason for scheduling the October 8 meeting—to discuss his claims that it was purposely changing its production standards to cheat employees out of productivity based incentive pay. The Company parses Greichen’s complaints too finely, as they all involved fundamental concerns with the Company’s treatment of employees regarding its production standards. As the Board explained, “a complaint that production standards were too stringent or required more work *is* related to a complaint that the [Company] was making its standards more difficult to meet and, therefore, that employees were not able to obtain production based pay enhancements.” (SA. 4

n.16) (original emphasis). *See also Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999) (employee is engaged in concerted activity if it “represents either a ‘continuation’ of earlier concerted activities or a ‘logical outgrowth’ of concerted activity”).<sup>13</sup>

Given this strong evidence that the Company’s October 8 meeting request was a pretext and designed to interfere with Greichen’s protected activity, the Company does not advance its position by claiming (Br. 12, 15-17) that it was simply applying its longstanding rule against insubordination by discharging him for not attending a meeting. Moreover, as the Board noted, “had the unlawful warning not been issued, it is unlikely that the meeting would have been initiated and, consequently, there would have been no meeting for Greichen to refuse to attend.” (SA. 5 n.19.)

Moreover, as shown above, the Board acted consistently with the principle that an employer should not be permitted to take advantage of its unlawful actions, even if an employee may have engaged in conduct that might justify discipline in a different context. That principle is particularly applicable here, where contrary to the Company’s contention (Br. 12, 15, 17), the Company did not assure Greichen

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<sup>13</sup> Greichen’s concerns are also related to the complaint he filed two weeks earlier with the Connecticut Department of Labor, alleging that productivity “time can be altered and manipulated through [the][m]anagement computer system,” thereby impacting wages. (A. 694-701.)

that there would be no adverse action if he attended the meeting. Rather, in response to a question from Greichen, the Company only said he would not be discharged if he attended the meeting, and did not mention other possible adverse consequences. (A. 644.) Thus, as the Board found, the record shows that although “Greichen understood that he would not be *discharged* if he attended the meeting,” the Company never assured him “he would not be *disciplined* as he had been just a week earlier.” (SA. 4 n.15) (emphasis in the original).<sup>14</sup>

Finally, the Company errs in relying (Br. 19) on *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335 (4th Cir. 1976), where the court stated that “[w]hen good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose the bad one.” 539 F.2d at 1337. The case predates *NLRB v. Transportation Management Corporation*, which upheld the Board’s *Wright Line* test placing the burden on the employer to demonstrate it would have taken the action for a legitimate reason independent of the protected conduct. *See NLRB v. Transp. Management Corp.*, 462 U.S. at 393, 400-401 (approving *Wright Line*).

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<sup>14</sup> Although the Company also told Greichen it would not do “anything negative” (A. 647), it made that comment in connection with a different issue, stating that it would pay him for the meeting, and that his attendance would not affect his production times.

**V. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING GREICHEN'S REINSTATEMENT WITH BACKPAY AND A PUBLIC READING OF ITS REMEDIAL NOTICE**

**A. The Board Properly Exercised Its Discretion in Ordering Greichen's Reinstatement with Backpay**

Well-settled principles defeat the Company's meritless challenge (Br. 11, 19-23) to the Board's Order requiring it to reinstate Greichen with backpay. Under Section 10(c) of the Act, Congress granted the Board the authority, upon finding a violation of the Act, to order an employer "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of [the Act]." 29 U.S.C. § 160(c). Consistent with that provision, the Supreme Court has explained that the basic purpose of a Board remedial order is "a restoration . . . , as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). *Accord NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965). Accordingly, from the earliest days of the Act, "[r]einstatement [has been] the conventional correction for discriminatory discharges." *Phelps Dodge Corp.*, 313 U.S. at 194. *Accord NLRB v. Int'l Van Lines*, 409 U.S. 48, 54 (1972). As this Court has explained, "[t]he finding of an unfair labor practice . . . is presumptive proof that some back pay is owed by the employer." *NLRB v. Consolidated Bus Transit*, 577 F.3d 467, 477 (2d Cir. 2009) (quoting *NLRB v. Mastro Plastics Corp.*,

354 F.2d 170, 178 (2d Cir. 1965)). *Accord NLRB v. Ferguson Elec. Co., Inc.*, 242 F.3d 426, 431 (2d Cir. 2001). Accordingly, the Board did not abuse its discretion by ordering the Company to reinstate Greichen with backpay to remedy the Company's unlawful discrimination against him.

The Board's Order is not undermined, as the Company claims (Br. 11, 19-23), by a further provision in Section 10(c) that states: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). Because the Act does not define the term "for cause," the Board has exercised its authority to interpret the term's meaning. *See Lechmere v. NLRB*, 502 U.S. 527, 536 (1992) ("[T]he NLRB is entitled to judicial deference when it interprets an ambiguous provision of a statute that it administers."). Exercising that authority, the Board has explained that, in the context of Section 10(c), "[for] cause . . . effectively means the absence of a prohibited reason." *Anheuser-Busch, Inc.*, 351 NLRB 644, 647 (2007), *pet. for review denied sub nom. Brewers & Malsters, Local Union No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). As a result, "[i]t is important to distinguish between the term 'cause' as it appears in Sec[tion] 10(c) and the term 'just cause,' [which] encompasses principles such as the law of the shop, fundamental fairness, and related arbitral decisions." *Taracorp Indus.*, 273 NLRB

221, 222 n.8 (1984).

Furthermore, “[t]here is no indication . . . that [Section 10(c)] was designed to curtail the Board’s power in fashioning remedies when the loss of employment stems directly from an unfair labor practice . . . .” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 217 (1964). Thus, the Board is authorized without doubt to order reinstatement and backpay as a remedy under Section 10(c) where an employer’s adverse action “is motivated by [an employee’s] protected activity,” and therefore the adverse action is “unlawful under Section 8(a)(1) and/or (3), and is not ‘for cause.’” *Anheuser-Busch, Inc.*, 351 NLRB at 648. *Accord Taracorp*, 273 NLRB at 222 n.8 (an employer may “discharge for good cause, bad cause, or no cause at all,” subject to “one specific, definite qualification; it may not discharge when the real motivating purpose is to do that which [the Act] forbids”) (internal quotation and citations omitted).

Here, as shown at pp. 38-43, the Board reasonably concluded that Greichen was discharged for a prohibited reason—namely, his protected activity—and that the Company’s “claim that it discharged Greichen for insubordination was [a] pretext.” (SA. 5 n.20.) Accordingly, the Board reasonably found that the “discharge was not ‘for cause’ within the meaning of Section 10(c) of the Act,” and did not abuse its discretion by ordering that Greichen be reinstated with backpay. (SA. 5 n.20.)

The Company does not advance its position by citing cases (Br. 21) where Section 10(c) proscribed reinstatement and backpay because an employer discharged an employee for a reason unrelated to its unfair labor practices. For example, in *Anheuser-Busch, Inc.*, 351 NLRB 644, 644-50 (2007), the employer's unfair labor practice was its refusal to bargain with the union over its installation of surveillance cameras. The employer subsequently discharged employees for work-site drug use observed on those cameras. The Board found that their "for cause" misconduct (the drug use) was entirely independent of the employer's unlawful refusal to bargain. In those very different circumstances, Section 10(c) precluded a reinstatement remedy because it could not be said that the employer discharged the employees for engaging in protected concerted activities. *Id.* at 646. *See Consolid. Bus Transit*, 577 F.3d at 478-79 (distinguishing *Anheuser-Busch* on this basis).

Similarly, in *Taracorp Industries*, 273 NLRB 221, 221 (1984), the employer acted unlawfully by not permitting an employee to have union representation during an investigatory interview that the employee had a reasonable belief would result in discipline. The employer's unfair labor practice, however, had no bearing on the employee's earlier misconduct that led to his discipline. *Id.* Here, by contrast, Greichen was engaged in protected activity and the Company discharged him for a pretextual reason. Accordingly, his discharge was not "for cause," and the Board's order directing his reinstatement with backpay does not constitute "a

patent attempt to achieve ends other than those which can fairly be said to effectuate the policies the Act.” *Virginia Elec. & Power Co.*, 319 U.S. at 540.<sup>15</sup>

**B. The Board Properly Exercised Its Discretion in Ordering a Public Reading of the Remedial Notice**

It is well settled that the Board’s broad remedial powers include the authority to direct that its remedial notice be read aloud to the employees. *See S.E. Nichols*, 862 F.2d at 962; *Textile Workers Union v. NLRB*, 388 F.2d 896, 903-05 (2d Cir. 1967). As the Board has explained, with judicial approval, a public reading of the notice “‘ensure[s] that the important information set forth in the notice is disseminated to all employees, including those who do not consult the [employer’s] bulletin boards.’” *UNF West, Inc. v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016) (quoting *Excel Case Ready*, 334 NLRB 4, 5 (2001)). Further, the Board’s notice-reading remedy helps erase the lingering effects of the unfair labor practices by providing employees the opportunity to “fully perceive that the [employer] and its managers are bound by the requirements of the Act.” *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). As this Court has explained, notice reading “guarantees effective communication of the Board’s order,” and “insures that the full counteracting force

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<sup>15</sup> The Company likewise errs in relying (Br. 21) on *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989), which did not involve Section 10(c) of the Act. The issue there was whether the employee’s conduct was so egregious that it lost the Act’s protection.

of the remedial order will be felt by the employees.” *S.E. Nichols, Inc.*, 862 F.2d at 962. Moreover, having a notice read by a company official “is nothing more nor less than an official statement of the statutory rights and obligations found to have been violated by the [e]mployer.” *Conair v. NLRB*, 721 F.2d 1355, 1387 (D.C. Cir. 1983).

Here, the Board exercised its broad remedial discretion by directing Vice-President Clark, or a Board agent in Clark’s presence, to read the notice aloud to employees at a meeting during work time. The Board also directed that the Company allow a union representative to be present at the public reading. (SA. 5.) In the circumstances of this case, the Company cannot show that the Board’s choice of remedy is improper.

Contrary to the Company’s contention (Br. 32-33), the Board (SA. 5) reasonably determined that because the Company’s unfair labor practices were sufficiently serious and widespread, a notice-reading remedy was warranted to dissipate any lingering effects of the unlawful conduct. As the Board explained, the Company’s unfair labor practices “began as soon as the [Company] became aware of the union organizing campaign and affected every unit employee.” (SA. 4-5.) Those unfair labor practices included unlawfully increasing wages, which “sent a message to employees that they did not need a union.” (SA. 4.) In addition, the Company discharged the two individuals who started the union

campaign within its first four months, thereby “sen[ding] a message to employees that those who supported the Union did so at their own peril.” (SA. 4.) In these circumstances, a public reading of the remedial notice is appropriate. *See NLRB v. Homer D. Bronson Co.*, 273 F. App’x 32, 39-40 (2d Cir. 2008) (employer’s official required to read notice where unfair labor practices affected a large number of employees and included various threats and the discharge of one employee); *see also Carey Salt Co.*, 360 NLRB 201, 201-02 (2014) (ordering notice reading where employer withheld a wage increase and refused to bargain with the union).

The Board also reasonably directed Vice-President Clark to read the notice, or be present at its reading by a Board agent, because he “committed or was involved in a majority of the violations.” (SA. 5.) Indeed, Clark interrogated McCarty and was responsible for discharging McCarty and Greichen. In these circumstances, the Board acted well within its discretion by ordering a public notice-reading. *See McAllister Towing & Transport. Co.*, 341 NLRB 394, 400 (2004) (notice reading by Board agent, in presence of responsible management official, directed where general manager was personally involved in the unlawful conduct), *enforced*, 156 F. App’x 386 (2d Cir. 2005); *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005) (finding sufficient particularized need for a public reading where high-level management officials committed many violations); *Conair*, 721 F.2d at 1385-87 1983) (notice reading by

president was needed “to dispel the atmosphere of intimidation created in large part by the president’s own statements and actions”). Contrary to the Company’s suggestion (Br. 33), reading the Order serves as an “effective but *moderate* way to let in a warming wind of information and, more important, reassurance.” *UNF West*, 844 F.3d at 463 (emphasis added).

## CONCLUSION

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

Respectfully submitted,

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National Labor Relations Board  
August 2018

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

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|--------------------------------|---|-------------|
| BOZZUTO’S, INC.                | ) |             |
|                                | ) |             |
| Petitioner/Cross-Respondent    | ) |             |
|                                | ) | Nos. 18-125 |
| v.                             | ) | 18-331      |
|                                | ) |             |
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| NATIONAL LABOR RELATIONS BOARD | ) |             |
|                                | ) |             |
| Respondent/Cross-Petitioner    | ) |             |

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12,260 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 21st day of August, 2018

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

I hereby certify that on August 21, 2018, 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 serving a true and correct copy at the addresses listed below:

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