Proof Brief **Oral Argument Not Yet Scheduled**

Nos. 18-1107 & 18-1119

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TITO CONTRACTORS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE BROCK BROIDO
Supervisory Attorney

KELLIE ISBELL
Senior Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-2482

PETER B. ROBB
General Counsel
JOHN W. KYLE
Deputy General Counsel
LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board certify the following:

A. Parties, Intervenors, and Amici:

1. Tito Contractors, Inc. was the respondent before the NLRB and is the petitioner/cross-respondent before the Court.

2. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

3. The labor union International Union of Painters and Allied Trades, AFL-CIO, District Council 51, was the charging party before the NLRB and has intervened on behalf of the NLRB.

B. Rulings Under Review: This case is before the Court on Tito's petition for review and the NLRB's cross-application for enforcement of a Decision and Order issued by the Board on March 29, 2018, and reported at 366 NLRB No. 47.

C. Related Cases: This case has not previously been before the Court.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, D.C.
This 18th day of January 2019

TABLE OF CONTENTS

Headings **Page(s)**

Statement of subject matter and appellate jurisdiction 1

Statement of the issues 2

Relevant statutory and regulatory addendum 3

Statement of the case 3

I. Proceedings before the Board 3

II. The Board's findings of fact 4

A. Tito's construction employees contact the Union and file an overtime lawsuit 4

1. President Pierola threatens employees and equates union activity with disloyalty 5

2. Tito tells employees their hours will be cut because of their lawsuit and institutes a new overtime policy, saying it applies only to the plaintiffs 5

3. The Union names its supporters and files a representation petition; Pierola disciplines Amaya, then suspends him for defending a coworker who testified at a Board hearing 6

4. Pierola disparages and threatens employees, and promises to resolve grievances if they vote against the Union 7

5. Tito disciplines Araujo and other employees for working overtime without approval 8

6. President Pierola threatens Berganza for raising pay issues with the Union 8

7. Tito lays off Latapy and Sanchez, discharges Latapy, and threatens employees with discharge because of the lawsuit 9

8. Tito discharges union supporter and named plaintiff Bautista 9

B. Tito retaliates against recycling employees after they meet with the Union and seek representation 10

Headings **Page(s)**

1. The Union identifies recycling employees among its supporters 10

2. Tito threatens to suspend Chavez for complaining about safety goggle problems; she and other recycling employees contact the Union 11

3. After initially supporting the Union, Supervisor Berganza backs out and tries to identify its supporters 12

4. Supervisor Berganza tests employee productivity; Tito discharges Sanchez for union activity 13

5. Tito discharges Ramos for union activity 14

6. Tito discharges Sorto for union activity 15

7. Tito discharges Ramirez because of her union and other protected activity 17

8. Tito discharges Chavez for union and other protected activity 19

9. Berganza threatens employees with immigration consequences and discharge if they vote for the Union 20

III. The Board's conclusions and order 21

Summary of the argument 22

Standard of review 24

Argument 25

I. The Board is entitled to summary enforcement of its uncontested findings that Tito repeatedly violated section 8(a)(1) and (3) the the Act 25

II. Substantial evidence supports the Board's findings that Tito discriminatorily promulgated and applited an overtime policy against empolyees engaged in union and other protected concerted activity 29

A. The Act protects employees engaged in union and other concerted activity 29

Headings **Page(s)**

B. Tito promulgated and discriminatorily applied the new overtime policy to retaliate against employees for engaging in union and other protected concerted activity 32

1. Tito's own statements to employees establish that it promulgated and applied the policy for a discriminatory purpose 32

2. The Board was not compelled to accept Tito's defense that it would have promulgated and discriminatorily implemented the overtime policy absent employees' union and other protected concerted activity 37

C. The Board acted within its discretion by deferring backpay calculations to compliance 40

III. Tito violated section 8(a)(3) and (1) of the Act by orchestrating the discharges of five recycling empolyees because of their union and other protected activities 43

A. An employer violates section 8(a)(3) and (1) of the Act by discharging employees for engaging in union and other protected concerted activities 43

B. Tito explicitly discharged Sanchez and Ramos for their union activities 44

1. Supervisor Berganza's statements to Sanchez and Ramos establish Tito's unlawful motive 44

2. The record did not compel the Board to accept Tito's affirmative defense that it would have discharged Sanchez and Ramos in the absence of their union activity 47

C. Tito discharged Sorto, Ramirez, and Chavez because of their union activity 49

1. Tito knew about and was hostile toward the employees' protected union activity 49

2. The Board was not compelled to accept Tito's pretextual reasons for discharging Sorto, Ramirez, and Chavez 51

Headings **Page(s)**

D. Tito's remaining challenges to the Board's findings must fail 54

1. Tito has not shown that the Board's credibility determinations are hopelessly incredible 54

2. Tito orchestrated MES's removal requests 57

Conclusion 59

Statutory and Regulatory Addendum.....Addendum A

Overtime Table .....Addendum B

TABLE OF AUTHORITIES

Cases **Page(s)**

Akron Paint & Varnish Co.,
304 NLRB 1096 (1991), *enforced*,
985 F.2d 852 (6th Cir. 1992).....42

Ark Las Vegas Restaurant Corp. v. NLRB,
334 F.3d 99 (D.C. Cir. 2003).....42

Bruce Packing Co. v. NLRB,
795 F.3d 18 (D.C. Cir. 2015).....37

**Cadbury Beverages, Inc. v. NLRB*,
160 F.3d 24 (D.C. Cir. 1998)..... 31, 37

Care One at Madison Ave., LLC v. NLRB,
832 F.3d 351 (D.C. Cir. 2016).....35

Chevron Mining, Inc. v. NLRB,
684 F.3d 1318 (D.C. Cir. 2012).....37

**Clark & Wilkins Indus., Inc. v. NLRB*,
887 F.2d 308 (D.C. Cir. 1989).....46

Corson and Gruman Co. v. NLRB,
899 F.2d 47 (D.C. Cir. 1990).....42

Daikichi Corp.,
335 NLRB 622 (2001), *enforced mem.*,
56 F. App'x 516 (D.C. Cir. 2003).....56

Daily News of Los Angeles v. NLRB,
73 F.3d 406 (D.C. Cir. 1996).....42

**Davis Supermarkets, Inc. v. NLRB*,
2 F.3d 1162 (D.C. Cir. 1993)..... 30, 52

Dillon Cos., Inc.,
340 NLRB 1260 (2003).....35

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

TABLE OF AUTHORITIES

Cases **Page(s)**

E&L Transport Co. v. NLRB,
85 F.3d 1258 (7th Cir. 1996) 52

Eastex, Inc. v. NLRB,
437 U.S. 556 (1978).....29

Fibreboard Paper Prods. Corp. v. NLRB,
379 U.S. 203 (1964).....40

Flagstaff Med. Ctr., Inc. v. NLRB,
715 F.3d 928 (D.C. Cir. 2013).....31

**Fort Dearborn Co. v. NLRB*,
827 F.3d 1067 (D.C. Cir. Apr. 12, 2016)..... 25, 37

Golden State Bottling Co. v. NLRB,
414 U.S. 168 (1973).....40

Grondorf, Field, Black & Co. v. NLRB,
107 F.3d 882 (D.C. Cir. 1997).....26

Herman Bros, Inc. v. NLRB,
658 F.2d 201 (3d Cir. 1981).....52

NLRB v. J.H. Rutter-Rex Mfg. Co.,
396 U.S 258 (1969).....40

**L'Eggs Prod., Inc. v. NLRB*,
619 F.2d 1337 (9th Cir. 1980) 32, 33, 43, 45

**Laro Maint. Corp. v. NLRB*,
56 F.3d 224 (D.C. Cir. 1995).....24

Lee Lumber & Bldg. Material Corp. v. NLRB,
310 F.3d 209 (D.C. Cir. 2002).....26

Meda-Care Ambulance, Inc.,
266 NLRB 1208 (1983), *enforced*,
740 F.2d 971 (7th Cir. 1984).....58

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

TABLE OF AUTHORITIES

Cases **Page(s)**

Metro. Edison Co. v. NLRB,
460 U.S. 693 (1983) 30

Music Express East, Inc.,
340 NLRB 1063 (2003) 46

NLRB v. Gen. Fabrications Corp.,
222 F.3d 218 (6th Cir. 2000) 28

NLRB v. Madison Courier, Inc.,
472 F.2d 1307 (D.C. Cir. 1972) 40

NLRB v. RELCO Locomotives, Inc.,
734 F.3d 764 (8th Cir. 2013) 37

**NLRB v. Transportation Management Corporation*,
462 U.S. 393 (1983) 30, 43

Ozburn-Hessey Logistics, LLC v. NLRB,
833 F.3d 210 (D.C. Cir. 2016) 24, 49

Parsippany Hotel Mgmt. Co. v. NLRB,
99 F.3d 413 (D.C. Cir. 1996) 55

Pellegrini Bros. Wines, Inc.,
239 NLRB 1220 (1979) 46

Property Resources Corp. v. NLRB,
863 F.2d 964 (D.C. Cir. 1988) 31

**PruittHealth - Virginia Park, LLC v. NLRB*,
888 F.3d 1285 (D.C. Cir. 2018) 25, 46, 49, 54

**Quality Control Elec., Inc.*,
323 NLRB 238 (1997) 45

Quicken Loans, Inc. v. NLRB,
830 F.3d 542 (D.C. Cir. 2016) 29

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

TABLE OF AUTHORITIES

Cases **Page(s)**

Shamrock Foods Co. v. NLRB,
346 F.3d 1130 (D.C. Cir. 2003) 30

Sheet Metal Workers Int'l Ass'n, Local 270, AFL-CIO v. NLRB,
561 F.3d 497 (D.C. Cir. 2009) 41

**Southwest Merch. Corp. v. NLRB*,
53 F.3d 1334 (D.C. Cir. 1995) 31

**Sure-Tan, Inc. v. NLRB*,
467 U.S. 883 (1984) 41

Tasty Baking Co. v. NLRB,
254 F.3d 114 (D.C. Cir. 2001) 31

Teamsters Local Union No. 639 v. NLRB,
924 F.2d 1078 (D.C. Cir. 1991) 25

Tenneco Auto., Inc. v. NLRB,
716 F.3d 640 (D.C. Cir. 2013) 24

Tito Contractors, Inc.
366 NLRB No. 47 (Mar. 29, 2018) 2

Torrington Extend-A-Care Employees Ass'n v. NLRB,
17 F.3d 580 (2d Cir. 1994) 28

U.S. Marine Corp. v. NLRB,
944 F.2d 1305 (7th Cir. 1991) 28

UFCW Local 204 v. NLRB,
447 F.3d 821 (D.C. Cir. 2006) 40

**United Servs. Auto. Ass'n v. NLRB*,
387 F.3d 908 (D.C. Cir. 2004) 31, 43, 45

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 24

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

TABLE OF AUTHORITIES

Cases **Page(s)**

**Woelke & Romero Framing, Inc. v. NLRB*,
456 U.S. 645 (1982) 26

**Wright Line*,
251 NLRB 1083 (1980), *enforced*,
662 F.2d 899 (1st Cir. 1981) 30, 31, 44, 45, 54

Statutes

National Labor Relations Act, as amended
(29 U.S.C. §§ 151, et seq.)

*29 U.S.C. § 157 29
29 U.S.C. § 158(a)(1) 3, 30
*29 U.S.C. § 158(a)(3) 3, 30
29 U.S.C. § 160(a) 2
*29 U.S.C. § 160(c) 40
*29 U.S.C. § 160(e) 2, 24, 25
29 U.S.C. § 160(f) 2

Regulations

29 C.F.R. § 102.48(c)(1) 26
29 C.F.R. § 102.54-.59 41

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

PROOF BRIEF GLOSSARY

Documents Referred to in the Board's Brief	Designation
Hearing transcript	Tr.
Hearing exhibits • General Counsel exhibits • Tito exhibits	 GCX RX
NLRB's Decision and Order (March 29, 2018)	DO
Organizations Referred to in the NLRB's Brief	
International Union of Painters and Allied Trades, AFL-CIO, District Council 51	The Union
Maryland Environmental Service	MES
National Labor Relations Board	The Board
Tito Contractors, Inc.	Tito

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18-1107, 18-1119

TITO CONTRACTORS, INC.
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51
Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This unfair-labor-practice case is before the Court on the petition of Tito Contractors, Inc., to review, and the cross-application of the National Labor Relations Board to enforce, a Board Order issued on March 29, 2018, and reported

at 366 NLRB No. 47. (DO 1-26.)[1] The International Union of Painters and Allied Trades, AFL-CIO, District Council 51 ("the Union") has intervened on the Board's behalf.

The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final. The Court has jurisdiction over this proceeding under Section 10(f) of the Act, which allows petitions for review of Board orders to be filed in this Court, and Section 10(e), which allows the Board to cross-apply for enforcement. 29 U.S.C. § 160(e) and (f). Both Tito's petition for review and the Board's cross-application for enforcement were timely filed.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of its uncontested findings that Tito violated the Act by discharging, suspending, laying off, disciplining, threatening, disparaging, and interrogating employees because of their union or other protected concerted activities; ordering an employee to return his company vehicle; equating protected concerted activity with disloyalty; creating

[1] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

the impression of surveillance; and soliciting grievances and promising to no longer disregard them if the employees voted against the Union?

2. Does substantial evidence on the record as a whole support the Board's findings that Tito violated the Act by promulgating and discriminatorily enforcing an overtime policy against construction employees because of their union or other protected concerted activities?

3. Does substantial evidence on the record as a whole support the Board's findings that Tito violated the Act by discharging five recycling center employees because of their union and other protected concerted activities?

RELEVANT STATUTORY AND REGULATORY ADDENDUM

Addendum A attached to this brief contains all applicable statutory and regulatory provisions.

STATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD

The Union filed an unfair-labor-practice charge alleging that Tito's actions in response to its employees' overtime lawsuit and union organizing violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3). The Board's General Counsel issued an unfair-labor-practice complaint, and an administrative law judge conducted a hearing and issued a recommended decision, finding that Tito's conduct violated the Act. (DO 11-26.) After reviewing the parties'

exceptions, the Board adopted the judge's findings and recommended order as modified. (DO 1-11.)

II. THE BOARD'S FINDINGS OF FACT

A. Tito's Construction Employees Contact the Union and File an Overtime Lawsuit

Tito provides construction workers and laborers primarily to state and local governments, including production workers at state-run recycling facilities in Maryland. Maximo "Tito" Pierola owns the company and serves as its president. His son Alex is vice president, Kenneth Brown is general manager, and Davys Ramos is office manager. (DO 12.) On the construction side, Manuel Alarcon and Fermin Rodriguez are construction superintendents. (DO 12.)

Some of Tito's construction employees began meeting with union officials in September 2013 to discuss concerns, including Tito's failure to correctly pay them for overtime work. (DO 12.) The Union put the employees in contact with a law firm that agreed to represent them *pro bono*. (DO 12.) The firm notified Tito of its obligations to pay overtime on October 16. Two days later, it filed a collective and class action lawsuit on behalf of Tito's employees and seven named employees: Roberto Ayala, Mauricio Bautista, Geremias Berganza, Sabino Diaz, Hector Delgado, Jose Jimenez, and Domingo Zamora. (DO 4 n.13; GCX 12, 13.) Employees Jose Amaya, Jose Diaz, Luis Palacios, Hernan Latapy, and Nestor

Sanchez joined the lawsuit in November, and Norberto Araujo joined in February 2014. (DO 4 & n.14, 5.)

1. President Pierola threatens employees and equates union activity with disloyalty

President Pierola knew about the lawsuit by October 11, 2013, when he telephoned employees Amaya and Berganza to complain about it. Pierola told Amaya that he was "disappointed" by the legal action, which Amaya "shouldn't have taken." (Tr.1140-41.) Pierola also asked if Amaya had children and urged him to first "think about [his] family." (DO 1 n.1, 4 n.14, 13; Tr.1141.) In a call to Berganza, Pierola said "you guys are stabbing me in my back," and he did not "want [back]stabbers in the Company." Pierola warned Berganza that if he didn't like the company, "there's thousands of jobs outside." (DO 1; Tr.820-21.)

2. Tito tells employees their hours will be cut because of their lawsuit and institutes a new overtime policy, saying it applies only to the plaintiffs

On October 25, just days after employees filed the overtime lawsuit, President Pierola held a mandatory employee meeting where he expressed surprise about the action and told employees he would now need to cut their hours. (DO 3; Tr.930, 967.) Tito managers then distributed a new overtime policy requiring employees to obtain management approval in advance before working overtime. Prior to the lawsuit, advance approval was not required. (DO 3; Tr.932, 1068, 1232-35, GCX 7.)

After the meeting, Pierola told employee Araujo that his hours would not change because he had not joined the lawsuit. (DO 3; Tr.968-69.) Araujo continued to work overtime without obtaining prior approval—until he joined the lawsuit. (Tr.969-70, 977-78, GCX 9, 67.)

Also on October 25, Project Superintendent Alarcon told employee Zamora, a named plaintiff, that the overtime policy memo "says that those of you that are in the lawsuit cannot work more than 40 hours a week." (DO 3; Tr.931.) On separate occasions throughout October, Field Superintendent Rodriguez told Zamora, as well as Berganza, a named plaintiff, and Latapy, who joined the suit in November, that the new overtime policy applied only to those who joined the lawsuit. (DO 3, 13 & n.5; Tr.816, 928, 1067.)

3. The Union names its supporters and files a representation petition; Pierola disciplines Amaya, then suspends him for defending a coworker who testified at a Board hearing

On November 14, the Union sent Tito a letter identifying 35 employees who supported the Union, and the next day it filed a representation petition seeking to represent the construction and recycling employees. (DO 16; GCX 2-3.) The Union's list of supporters included a number of construction employees who joined the lawsuit: Amaya, Ayala, Bautista, Berganza, Delgado, Sabino and Jose Diaz, Jimenez, Latapy, Palacios, Sanchez, and Zamora. The list also included five recycling employees who were later discharged by Tito. (DO 16; GCX 3.)

A week later, Tito instituted a new requirement that all crew leaders email a job report to the office at the end of each day. On December 11, Amaya, a crew leader who was also a plaintiff, submitted his report somewhat late; President Pierola gave him a disciplinary warning.

At a December 24 meeting with several employees, Pierola distributed copies of testimony given by union supporter and named plaintiff Bautista at a Board hearing on the representation petition and told them not to trust him. Pierola became angry when Amaya defended Bautista. A few days later, Tito suspended Amaya for seven days for failing to submit daily job reports, even though Amaya had previously informed managers that his company cell phone, required for submitting the reports, was not working. Other employees who had failed to submit daily reports or submitted them late were not disciplined or suspended. (DO 18; Tr.1148, 1150, 1160-62.)

4. Pierola disparages and threatens employees, and promises to resolve grievances if they vote against the Union

On February 27, 2014, President Pierola held a mandatory meeting of the construction employees where he encouraged them to vote against the Union. He described employees Bautista and Zamora (both union supporters and named plaintiffs) as “rotten apples” and told employees not to listen to them. He also said that if the Union kept bothering him, he could close the company, subcontract the work, or go bankrupt. Pierola then offered to resolve employee grievances,

including overtime claims, through private mediation. When employee Araujo noted that Tito had been promising to resolve their grievances for 25 years without result, Pierola assured him this would change. When employee Amaya asked whether a recycling employee had been discharged for supporting the Union, Pierola singled him out as a friend of Zamora and called him a faggot. (DO 2-3, 5, 18-19; Tr.970-75, 1070-72.)

5. Tito disciplines Araujo and other employees for working overtime without approval

As noted above, employee Araujo joined the lawsuit on February 10. The day after the February 27 meeting where he questioned President Pierola's promise to resolve grievances, Tito disciplined him for working overtime without prior approval. Tito also disciplined other employees for the same reason. (DO 5; Tr.977-78, 1438, GCX 9.) On April 23, Vice President Alex Pierola ordered Araujo to return his company vehicle, which he had been assigned since 1992. (DO 19; Tr.984.)

6. President Pierola threatens Berganza for raising pay issues with the Union

Also in February, union supporter and named plaintiff Berganza had been assigned to work at the home of Vice President Pierola, who paid him in cash without making any deductions. Berganza complained to Union Organizer Baiza

that he had not been paid properly. In April, President Pierola threatened Berganza with a defamation lawsuit and discharge. (DO 19; Tr.824-26.)

7. Tito lays off Latapy and Sanchez, discharges Latapy, and threatens employees with discharge because of the lawsuit

In April, Tito removed employees Latapy and Sanchez from their painting assignments at the D.C. Convention Center. Both were union supporters who had joined the overtime lawsuit. The D.C. government site supervisor protested their removal, but Tito insisted on the action. Despite having plenty of work, Tito did not give them any further assignments. (DO 19; Tr.881, 887-88, 1076.)

In May, Superintendent Rodriguez called Latapy and offered him employment as a subcontractor, not an employee. Rodriguez encouraged Latapy to take the offer, warning that after the lawsuit ended, President Pierola "would fire all those son-of-a-bitch[es]." (DO 19; Tr.1088-89.) In June 2014, Rodriguez told Sanchez there was plenty of work and he should "fix it with Tito or with the lawyers." (DO 19; Tr.887.) On June 25, Tito discharged Latapy for failing to appear at a work site to which the company had never ordered him to report. (DO 19-20; Tr.1095.)

8. Tito discharges union supporter and named plaintiff Bautista

During his 10 years of employment with Tito, Bautista primarily worked at the Arlington County detention center and had never been disciplined. As noted above, however, after he became one of the original named plaintiffs in the

overtime lawsuit and was identified as a union supporter, Pierola called him a "rotten apple." (DO 1 n.1, 4 n.13, 18).

On July 24, Tito transferred him to an elementary school in Rockville. Although the jobsite superintendent had specifically requested a carpenter with experience installing continuous hinge doors, Bautista had never done that work, and Tito made no attempt to ascertain whether he possessed the requisite skills. On August 1, Tito discharged Bautista, saying it was because he couldn't do the work. (DO 20-21; Tr.777, 1521, 1528, 1531, 1552.)

B. Tito Retaliates Against Recycling Employees After They Meet with the Union and Seek Representation

1. The Union identifies recycling employees among its supporters

In addition to its construction business, Tito has contracts with Maryland Environmental Service (MES) to provide laborers at the Derwood recycling center in Maryland. Tito's employees worked along a conveyor belt sorting recycling material and included five individuals who were identified by the Union as supporters in its November 14 letter: Maria Chavez, Yasmin Ramirez, Aracely Ramos, Maria Sanchez, and Reyna Sorto. (DO 14, 16; Tr.311-12, GCX 3.)

Tomas Berganza, Tito's on-site supervisor, oversaw those five employees and others who worked alongside them. Mark Wheeler was MES's on-site operations manager; he reported to David Wyatt, the MES field operations supervisor. (DO 14; Tr.655, 663, 744, 747.) MES also employed two production

workers, Juana Rosales and Norma Garcia, to oversee the Tito employees on the sorting line. (DO 14; Tr.326-27.)

2. Tito threatens to suspend Chavez for complaining about safety goggle problems; she and other recycling employees contact the Union

Tito does not allow its recycling employees to discuss issues or complaints directly with MES managers. (DO 17; Tr.189, 551-52.) On September 25, 2013, after employees experienced headaches and other problems with their new safety goggles, Chavez and Ramos raised the issue with Supervisor Berganza. (DO 17; GCX 90(j).) Five employees, including Ramirez, complained to him on another occasion. (DO 17; Tr.519-20.) When their complaints went unresolved, Chavez told Berganza that she wanted to speak to Wheeler and Wyatt about the goggles. Although Berganza told her she was not permitted to complain directly to MES, he went ahead and called the MES representatives to his office, where Chavez explained the problem. Later that day, Tito's safety manager, Stedson Linkous, told Chavez she was prohibited from contacting MES directly, would be suspended for seven days unless she apologized to Berganza for going over his head. Linkous added that she would be discharged if it happened again. (DO 17; Tr.551-58, GCX 90(k).)

Meanwhile, Sorto reached out to Union Organizer Baiza to discuss employee concerns over vacation, holidays, and safety goggles. In early October,

Baiza met with Sorto and four other recycling employees (Chavez, Ramirez, Lemus, and Ramos) to discuss their concerns over treatment by Supervisor Berganza, as well as safety goggles, bathroom and water breaks, overtime, and the lack of holiday pay, vacation leave, and sick leave. (Tr.81-84, 191-92.) After this meeting, employees received better safety goggles. (Tr.193, 520.) About 10 recycling employees, including Sanchez, met with Baiza in mid-October, and they continued to meet with him in November. (Tr.98-99, 132-34, 521-22, 605.)

3. After initially supporting the Union, Supervisor Berganza backs out and tries to identify its supporters

On October 18, 2013, Supervisor Berganza and construction employee Bautista met with Organizer Baiza. Initially, after signing a union authorization card, Berganza agreed to help organize the recycling employees. (DO 13; Tr.77, 86-88.) A few days later, Baiza asked Berganza whether he had succeeded in getting certain employees to sign cards. Berganza replied that he had not, and asked whether Ramirez, Chavez, Ramos, Sorto, and Lemus had signed cards. (DO 13 & n.7; Tr.88-90, 163-64.) Baiza refused to answer. Berganza explained that he wanted to know because these employees always complained about him. (Tr.90.)

Later that day, another union organizer, James Coats, encouraged Berganza to continue helping the Union. Berganza said he would only if Coats gave him the names of employees who had already signed cards. Coats told him that “Maria” had signed but refused to give him any more information. (DO 13 n.7; Tr.333-34,

336, GCX 87(b) p.7.) A week later, Coats called again, seeking more help getting employees to sign cards, but Berganza no longer wanted to participate in the union drive and did not answer his calls. (DO 12; Tr.338, GCX 62.)

4. Supervisor Berganza tests employee productivity; Tito discharges Sanchez for union activity

Previously, in the summer of 2013, Wheeler and Wyatt learned that the facility's production of recyclable material had declined. In response, Supervisor Berganza devised a productivity test for Tito's employees, even though they were not required to meet production quotas. (DO 14; Tr.691, 693-95.) In the fall, MES tested the female workers' productivity to see how many bins (called hoppers) they could fill on two test days.[2] (DO 14; GCX 14, Tr.343-44, 346.) Results ranged from 5 to 13 hoppers. (GCX 14.) Chavez filled the most hoppers; Sorto and Ramos were among the top performers. (DO 14; GCX 14.) No action was taken against the poorer performers. (DO 14; Tr.696.)

Sanchez began working at the recycling center in May 2013 after having previously worked for Tito as a construction helper. (DO 14; Tr.601-02.) She filled eight hoppers on the first day of her productivity test and nine hoppers on the second. (GCX 14.) Sanchez had never been disciplined or received any warnings

[2] Although Tito also employed male production workers, none participated in these tests. (Tr.502-03.)

about her performance. (DO 15 & n.12; Tr.350, 608, 611.) In mid-October she attended a union meeting and signed an authorization card, after learning about the organizing effort from employees Sorto and Chavez. (Tr.604-05.)

On October 30, MES employee Rosales heard from another employee that Sanchez had called her a whore. Although Rosales complained to Supervisor Berganza, who told her to tell Operations Manager Wheeler, Rosales did not report the name-calling to Wheeler or Wyatt. Previously, Rosales had never had any problems with Sanchez. (DO 14-15; Tr.1388, 1390-92.)

Later that day, Berganza called Sanchez into his office, saying that he had "bad news" for her, and that he had heard she "communicat[ed] with the Union." (DO 15 n.12; Tr.607.) He then told her that she was discharged for not doing her job correctly. (Tr.608.) A few days later, she received a termination letter stating that MES had requested her immediate removal for "unsatisfactory work behavior." (DO 15; Tr.609, GCX 16.)

5. Tito discharges Ramos for union activity

Ramos had worked at the recycling center for three years and was one of the top performers on the productivity test, filling 10 hoppers on each of the two days of testing. (DO 14; GCX 14.) She attended four or five union meetings and signed a union authorization card. (Tr.190, 192.)

On October 31, Supervisor Berganza emailed Tito's office manager, stating that Ramos had let material pass by her in order to bother coworkers and that Wyatt wanted her removed if it happened again. (DO 15; GCX 17.) Less than two hours later, Berganza informed Tito's managers that MES Operations Supervisor Wyatt had requested Ramos's removal "because of her attitude problem." (DO 15; GCX 18.) Although MES's contract with Tito allowed it to request that Tito remove an employee, Wyatt had never previously done so.[3] (DO 14 & n.8, 23; Tr.750, GCX 95 ¶ 3.3.2.) In addition, Ramos had never previously received any complaints about her productivity, and Berganza had never spoken to her about letting material pass by her station. (Tr.213.) Her sole disciplinary warning was in June 2013, for calling Berganza racist and unfair. (DO 15; Tr.372, GCX 19.)

Later that day, Berganza called Ramos to his office and discharged her for her "inappropriate attitude." (Tr.199-200.) During this meeting, Berganza said he had noticed her speaking with the Union, and now that she was "with the Union," she should call Baiza "to find you a job." (DO 1, 5 n.18; Tr.200-01.)

6. Tito discharges Sorto for union activity

Sorto worked for Tito at the recycling center for almost 11 years. In 2012, a piece of glass stuck in her hand while she was sorting materials. She returned to

[3] As for MES Manager Wheeler, in 11 years on the job he had made such a request only once. (DO 23; Tr.687-90.)

work several months after surgery with medical limitations and continued to provide Supervisor Berganza with doctor's notes as she received care. (Tr.253-54, 264, 268, GCX 49, 52-59.) Initially, to accommodate her injury, Berganza assigned her to work at easier sorting stations. (Tr.272-73.) Despite the injury, Sorto was one of the highest performers on the productivity test, filling 10 hoppers on the first day and 12 on the second. (GCX 14.) She had received only one warning during her long tenure, for not wearing safety goggles in 2011. (Tr.391, GCX 26.)

In late September 2013, Sorto initiated the recycling employees' contact with the Union, after receiving Baiza's phone number from Ramirez. (Tr.82, 246.) As noted above, in October and November she attended multiple union meetings, along with other recycling employees. (Tr.247-49.)

On November 1, Berganza emailed Tito's office manager to say that he had been watching Sorto for a week, she was working very slowly, but he had not mentioned it to Wheeler. (DO 15; GCX 20.) The same day, Berganza told Sorto for the first time that he had been watching her and she was working too slowly. Berganza had never previously counseled Sorto about her productivity. (DO 15; Tr.250-51.) When Sorto explained that her injured hand was hurting, Berganza told her to get a doctor's note within two weeks. On November 8, Berganza asked Sorto if she had gone to the doctor. Sorto explained that she took the first available

appointment, on November 21. Berganza said he did not have light duty work for her. (Tr.252-53, 275.)

On November 14, Berganza informed Tito's office manager that Wheeler and Wyatt had requested Sorto's removal because she did not meet MES production goals and bothered coworkers by telling them not to work hard. (DO 16; GCX 25.) Berganza then called Sorto to his office and discharged her for "not producing enough." (Tr.255.) He gave her a letter stating that Wyatt and Wheeler had requested her removal because she was "not achieving the goal" MES set for production and was bothering coworkers and telling them not to perform well. (GCX 50.) He then told her to "go to the Union so they could help [her]." (DO 5 n.18; Tr.254-55.)

7. Tito discharges Ramirez because of her union and other protected activity

Ramirez, whose husband was a named plaintiff in the overtime lawsuit, had worked for Tito for six years. (DO 14 n.9, 16, 24 n.34; Tr.510-11.) Her only prior warning was for failing to wear safety goggles in 2011. (DO 16; Tr.400, GCX 29.) She had not previously been counseled for any issues related to her performance, and had an average performance on the productivity test, filling 8 hoppers the first day and 7 the second. (Tr.527, GCX 14.) Ramirez became involved with the union organizing effort, attended several union meetings in October and November, and was identified as a union supporter in the Union's November 14

letter. (Tr.515, 521-22, GCX 3.) She and other employees had complained to Berganza about their safety goggles before raising the issue with the Union. (Tr.519-20.)

Previously, in October, coworker Martha Serpas had complained to Supervisor Berganza and Wheeler that Ramirez had teased her and called her old and stupid. After this, Wheeler told Berganza that he would begin monitoring Ramirez's work production. (DO 16; Tr.393-94.) On November 27, Wheeler and Berganza met with Serpas, who again complained about the October incident. Berganza then emailed President Pierola and his son Alex, as well as Tito's office manager, about the episode. (DO 16; GCX 27.) On December 2, Berganza notified Tito that Wheeler had requested Ramirez's removal for disrespecting her coworkers. No mention was made of her work performance. (DO 16-17; GCX 28.) Berganza then telephoned Tito's office manager to ask if Ramirez could be transferred to the recycling center in Cockeysville, but the manager said Alex had rejected the idea. (DO 17; Tr.397-98.)

After monitoring Ramirez's production in November, Wheeler requested her removal for poor performance. (DO 16; Tr.717-18.) On December 6, Berganza called Ramirez into his office and told her MES wanted her removed because she "express[ed]" herself badly to her coworkers. He did not mention anything about her performance. (Tr.526.) In her termination letter, Vice President Pierola wrote

that MES had requested her removal because of her "unsatisfactory work behavior." (GCX 61.)

8. Tito discharges Chavez for union and other protected activity

Chavez had worked for Tito for approximately 10 years. She was one of the most productive employees, having received the highest score on MES's productivity test by filling 13 hoppers on the first day and 12 on the second. (DO 17; Tr.725, GCX 14.) As noted above, Chavez had repeatedly spoken to Berganza about problems with safety goggles, and she raised the issue directly to Wyatt and Wheeler, prompting Tito to threaten her with disciplinary action. (DO 17.) She attended union meetings throughout October and November and was identified as a union supporter on November 14. (GCX 3, Tr.558-60.)

On December 10, someone swept cold dirty water onto Chavez. She believed an employee named Iris was the culprit, but MES employee Rosales took the blame. (DO 17; Tr.564-67.) Although Chavez and Rosales began arguing, Chavez did not touch Rosales, and Rosales was not afraid she would. (DO 17; Tr.569, 571, 1384.) Nevertheless, Rosales complained to Supervisor Berganza, who reported the incident to Wyatt. But Wyatt told Berganza that it was up to him whether to keep Chavez.

Although Wyatt and Wheeler never requested Chavez's removal, Berganza told Tito's managers on December 10 that Wheeler had said he did "not want to

have people with that kind of behavior in this work place." (DO 17 & n.19; Tr.758, GCX 30.) Berganza also obtained Chavez's personnel file, which included an October 10 memo criticizing her for complaining directly to MES about the goggles. (DO 17; GCX 90(k).) On December 13, after reviewing the file, Berganza and Tito managers decided to discharge Chavez. (DO 17-18; Tr.403.) Berganza handed Chavez a termination letter falsely stating that MES had requested her removal for "unsatisfactory work behavior." (DO 17; GCX 31.)

9. Berganza threatens employees with immigration consequences and discharge if they vote for the Union

On December 18, Supervisor Berganza called the remaining recycling employees into his office one-by-one to ask whether they had signed a union card and how they intended to vote. (DO 2; Tr.168-70, 632-35.) That same day, he held a group meeting where he distributed and read to the employees part of construction employee Bautista's Board testimony averring that few Tito employees had "good" immigration papers. Berganza also told them that if the Union won the election, Tito would give their information to U.S. Immigration and Customs Enforcement, which would "get [employees] arrested." (DO 2; Tr.172-73, 637, GCX 43 p.4.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Pearce, McFerran, and Emanuel) found that Tito violated Section 8(a)(1) and (3) of the Act by discharging, suspending, laying off, disciplining, threatening, coercing, disparaging, and interrogating employees; telling an employee to think about his family before engaging in protected concerted activity; telling an employee that those who joined the overtime lawsuit could not work overtime; telling employees that workplace issues could be resolved if they voted against the Union; calling pro-union employees "rotten apples"; telling employees it could close or subcontract work if the Union persisted; telling an employee that it would "fire all those son-of-a-bitch[es] after everything finishes with the [overtime] lawsuit"; ordering an employee to return his company vehicle; equating protected concerted activity with disloyalty; creating the impression of surveillance; soliciting grievances and promising to no longer disregard them; promulgating and discriminatorily enforcing an overtime policy; and encouraging MES to request removal of employees because of their participation in union and other protected concerted activity.

The Board's Order requires Tito 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. (DO 8.) Affirmatively, the Board's Order directs Tito to reinstate the discharged and laid-off employees and make them whole; notify MES that it requests the recycling employees' reinstatement; make Amaya whole for his suspension; remove discharge, discipline, and suspension references from named employees' personnel files; make named employees whole for having overtime withheld; rescind the overtime policy; rescind the rule prohibiting employees from taking complaints about working conditions outside the chain of command; restore Araujo's use of a company vehicle; and in both Spanish and English, post the Board's remedial notice and read it aloud to employees. (DO 8-9.)

SUMMARY OF THE ARGUMENT

1. After employees exercised their Section 7 rights by contacting the Union and receiving help in protesting Tito's failure to pay overtime, Tito responded by committing a wide range of unlawful acts, including discharging, suspending, laying off, disciplining, threatening, disparaging, and interrogating employees; equating protected concerted activity with disloyalty; creating the impression of surveillance; and soliciting grievances and promising to no longer disregard them because of its employees' participation in union and other protected concerted activity. Before the Board and in its opening brief, Tito failed to challenge the Board's reasonable findings that it violated Section 8(a)(1) and (3) of

the Act by taking these actions. Accordingly, the Court should summarily enforce the portions of the Board's Order that correspond to the uncontested findings.

2. Substantial evidence supports the Board's further findings that Tito promulgated and discriminatorily applied an overtime policy in retaliation for employees' union and other protected concerted activity, causing them to lose overtime. Tito's owner and other managers told employees—explicitly and repeatedly—that its new policy requiring management approval for overtime applied only to employees who joined the overtime lawsuit against the company. True to its word, Tito discriminatorily enforced its policy. The Board reasonably inferred from Tito's admissions and uncontradicted testimony that Tito's actions were motivated by hostility to employees' protected activity, and found that Tito utterly failed to show it would have taken the same actions in the absence of that activity. Moreover, by leaving the determination of Tito's backpay obligations to subsequent compliance proceedings, the Board properly followed its standard procedure. Tito offers no reason to depart from that process here.

3. Finally, substantial evidence supports the Board's findings that Tito again violated the Act by encouraging MES to request the removal of recycling employees and then discharging them because of their union and protected concerted activity. Not only did Tito admit its anti-union motive for discharging Sanchez and Ramos, it proffered only pretextual explanations for the discharges of

Sorto, Ramirez, and Chavez. Given Tito's shifting explanations for their discharges and their disparately harsh treatment, the Board reasonably concluded that Tito would not have discharged them in the absence of their union and other protected activity.

STANDARD OF REVIEW

The Court "'accord[s] a very high degree of deference to administrative adjudications by the [Board]' and [will] reverse its findings 'only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.'" *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016) (citation omitted). Under that deferential standard, the Court will uphold the Board's findings if they are supported by substantial evidence and will overturn them only if the Board "acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646-47 (D.C. Cir. 2013) (internal quotation marks omitted); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also* 29 U.S.C. § 160(e).

In particular, determining an employer's motive "invokes the expertise of the Board, and consequently, the court gives 'substantial deference to inferences the Board has drawn from the facts,' including inferences of impermissible motive." *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 228-29 (D.C. Cir. 1995) (citation omitted). Thus, the Court's "review of the Board's conclusions as to

discriminatory motive is even more deferential, because most evidence of motive is circumstantial." *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. Apr. 12, 2016) (reissued June 17, 2016) (internal quotation marks omitted).

The Court will uphold the Board's credibility determinations unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018) (internal quotation marks omitted). The Court reviews Board remedial orders for abuse of discretion. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1085 (D.C. Cir. 1991).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT TITO REPEATEDLY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT

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). Before the Board, Tito failed to except to numerous Section 8(a)(1) and (3) findings made by the administrative law judge, which the Board accordingly adopted in the absence of exceptions. (DO 1 n.1.) Further, although the Board found additional violations based on exceptions to the judge's decision that were filed by the General Counsel (DO 1-3), Tito never moved for reconsideration of the Board's findings, as it was entitled

to do under 29 C.F.R. § 102.48(c)(1). Tito does not dispute its failure to challenge those findings below. Moreover, in its opening brief Tito fails to challenge any of those findings. *See, e.g.*, *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997) (issues not raised in opening brief are waived).

But even if Tito had contested those unfair labor practices in its opening brief, which it did not do, Section 10(e) of the Act would bar such a challenge. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). *Accord Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216 (D.C. Cir. 2002). Accordingly, the Board is entitled to summary enforcement of the portions of its Order corresponding to its uncontested findings. *Grondorf*, 107 F.3d at 885.

Specifically, the Court should summarily enforce the Board's findings that Tito violated Section 8(a)(1) of the Act by:

- Telling an employee to think about his family before engaging in protected concerted activity (DO 6);
- Equating employees' protected concerted activity with disloyalty by calling employees who joined the lawsuit backstabbers and telling them if they did not like the company, "there's thousands of jobs outside" (DO 6);
- Threatening employees that Tito would not permit employees participating in the overtime lawsuit to work overtime in the future (DO 6);

- Telling an employee that those who joined the overtime lawsuit could not work overtime (DO 6);
- Threatening to discipline employees who took complaints outside their "chain of command" (DO 6);
- Creating the impression of surveilling union activities (DO 6);
- Interrogating employees about their union activities (DO 6);
- Telling employees at a mandatory meeting that their workplace issues could be resolved if they voted against the Union, that prounion employees are "rotten apples," and that it could close or subcontract employees' work if the Union continued bothering it (DO 6);
- Threatening employees with immigration consequences and discharges for engaging in union activities (DO 6);
- Soliciting employees' grievances and promising to no longer disregard them (DO 6);
- Disparaging an employee during a meeting for his union support (DO 6):
- Disciplining employees for working overtime without advance management approval under the discriminatory overtime policy (DO 7);
- Threatening to sue an employee for defamation and discharge him for complaining to the Union about unpaid overtime wages (DO 7);

- Ordering an employee to return his company vehicle because he engaged in union or other protected concerted activities (DO 7);
- Telling an employee that it would "fire all those son-of-a-bitch[es] after everything finishes with the [overtime] lawsuit" (DO 7); and
- Telling an employee that he could get work if he "fix[ed] it" with Tito by withdrawing from the lawsuit (DO 7).

In addition, Tito failed to contest the Board's findings that it violated Section 8(a)(3) and (1) of the Act by:

- Disciplining and suspending Amaya for his participation in union and other protected concerted activities (DO 7); and
- Laying off Latapy and Sanchez, and discharging Latapy and Bautista because of their participation in protected concerted activities (DO 7).

Courts have stressed that uncontested violations do not disappear simply because a party has not challenged them, but remain in the case, "lending their aroma to the context in which the contested issues are considered." *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000) (citation omitted). *Accord Torrington Extend-A-Care Employees Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991). As shown below, these numerous uncontested violations were part and parcel of Tito's

broader effort to coerce, threaten, discipline, and discharge employees for engaging in union and other protected concerted activities.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT TITO DISCRIMINATORILY PROMULGATED AND APPLIED AN OVERTIME POLICY AGAINST EMPLOYEES ENGAGED IN UNION AND OTHER PROTECTED CONCERTED ACTIVITY

A. The Act Protects Employees Engaged in Union and Other Concerted Activity

The employee rights guaranteed in Section 7 of the Act include "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." 29 U.S.C. § 157. Because "[f]ew topics are of such immediate concern to employees as the level of their wages," employee discussions of pay "are protected under the 'mutual aid or protection' clause of § 7." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978). *Accord Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548 (D.C. Cir. 2016) (employee discussion of wages is a "core Section 7 right").

Section 8(a)(3) of the Act enforces the protections of Section 7 by prohibiting employer "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." 29 U.S.C. § 158(a)(3).[4] Thus, an employer violates Section 8(a)(3) by discharging or taking other adverse employment actions against employees for engaging in union and other protected concerted activity.

When an employee has engaged in union and other concerted protected activity, and has been subject to an adverse employment action, the critical inquiry is the employer's motive for taking the adverse action. To make that determination, the Board applies the test of motivation set forth in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved in *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983); *accord Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1135-36 (D.C. Cir. 2003). Courts will uphold the Board's finding of unlawful motive under *Wright Line* if substantial evidence establishes that protected activity was "a motivating factor" for the adverse action 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 protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03; *accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). If

[4] A violation of Section 8(a)(3) of the Act produces a derivative violation of Section 8(a)(1) of the Act. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7 [of the Act]." 29 U.S.C. § 158(a)(1).

the employer's proffered reasons 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 establish its affirmative defense, and the inquiry is logically at an end. *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 32 (D.C. Cir. 1998); *see also Wright Line*, 251 NLRB at 1084.

"As direct evidence of employer motivation is generally scarce, this [C]ourt has found that 'circumstantial evidence alone may establish unlawful motivation in a [Section] 8(a)(3) case.'" *Property Resources Corp. v. NLRB*, 863 F.2d 964, 966-67 (D.C. Cir. 1988) (citation omitted). Such evidence includes the employer's knowledge of and hostility toward protected activity, the timing of its action, and "'the absence of any legitimate basis for an action'—i.e., the absence of a credible explanation from the employer" or its shifting reasons. *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1340, 1344 (D.C. Cir. 1995) (quoting *Wright Line*, 251 NLRB at 1088 n.12); *accord Tasty Baking Co. v. NLRB*, 254 F.3d 114, 126 (D.C. Cir. 2001). Ultimately, because motive is a question of fact that implicates the Board's expertise, its finding of unlawful motivation is "entitled to substantial deference." *Flagstaff Med. Ctr., Inc. v. NLRB*, 715 F.3d 928, 933 (D.C. Cir. 2013).

Where, however, an employer admits that it took adverse employment action because of employees' union or other protected activities, further analysis of the employer's motive is unnecessary. *United Servs. Auto. Ass'n v. NLRB*, 387 F.3d

908, 916 (D.C. Cir. 2004); *accord L'Eggs Prod., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980).

B. Tito Promulgated and Discriminatorily Applied the New Overtime Policy To Retaliate Against Employees for Engaging in Union and Other Protected Concerted Activity

The record fully supports the Board's findings (DO 3-4) that Tito promulgated and then discriminatorily applied its new overtime policy to retaliate against employees because they sought help from the Union and filed an overtime lawsuit. As we now show, Tito admitted its intention to promulgate and apply the overtime policy to punish those who complained about not receiving overtime pay, and it failed to demonstrate it would have taken those actions absent the employees' union and other protected concerted activities.

1. Tito's own statements to employees establish that it promulgated and applied the policy for a discriminatory purpose

In finding that Tito's "underlying discriminatory purpose" in promulgating the new overtime policy was to "retaliate against those employees who participated in the lawsuit," (DO 3), the Board relied on explicit statements by Tito's owner and managers, including:

- President Pierola's statement to Araujo that his hours would not change because he had not joined the lawsuit (DO 3; Tr.968-69);

- Superintendent Alarcon's statement to Zamora that Tito's overtime policy memo "says that those of you that are in the lawsuit cannot work more than 40 hours a week" (DO 3; Tr.931); and
- Superintendent Rodriguez's statement to Zamora, Berganza, and Latapy that the new overtime policy applied only to those who joined the lawsuit (DO 3, 13 & n.5; Tr.816, 928, 1067).

Tito concedes that Pierola, Alarcon, and Rodriguez made these admissions, which "eliminate any question" concerning Tito's unlawful motive. *L'Eggs*, 619 F.2d at 1343.

As the Board found, given these admissions, which provide direct evidence of Tito's explicitly unlawful purpose, a finding of unlawful motive is established without further analysis. (DO 4 n.11.) Nevertheless, on this record, the Board also reasonably concluded that its finding of unlawful motivation is further supported by circumstantial evidence. (DO 4 n.11.) Thus, as the Board explained, Tito's "own statements and actions reveal[ed]…that its overriding motivation was unlawful animus against Section 7 activity, not reducing its overtime exposure." (DO 4.) The timing of Tito's action also strongly supports the Board's finding of unlawful motive: just six days after employees filed the overtime lawsuit, Tito distributed the new policy memo requiring advance approval for overtime. (DO 3.) And, "true to its word," Tito discriminatorily applied its new policy to deny

overtime to those who engaged in protected activity by pursuing overtime with the Union's help via the lawsuit. (DO 4.) The Board also relied on "uncontradicted evidence" that Tito not only told employees it would discriminate against them, but "that it did so." (DO 22.)

Tito does not contest most of these findings, which conclusively establish its unlawful motive. Instead, Tito simply claims (Br. 53) that it approved all overtime requests by the plaintiffs, suggesting that the employees themselves were to blame for their lost overtime. But this argument ignores the uncontradicted testimony that Tito squarely and indisputably told employees—who previously had not been required to obtain management permission before working overtime—that its new policy applied only to those who joined the lawsuit. (DO 3; Tr.815-16.) In sharp contrast with this new practice, Tito allowed employees who were not named in the lawsuit to continue working overtime without prior approval, including Araujo, who was not required to obtain approval until he joined the lawsuit in February. (Tr.950, 969, 977-78, GCX 9.) Admissions by Tito officials and undisputed employee testimony establish that it was not until employees began complaining about unpaid overtime that Tito instituted its new policy requiring them to obtain advance permission. (DO 20; Tr.909, 932, 1143, 1232-35, 1435-38.)

Given this evidence, Tito's argument that the rule is facially valid and "not meant to discourage protected concerted activity" (Br. 49), must fail. As an initial

matter, even a facially valid rule can be, as it was here, promulgated for a discriminatory purpose. Such a rule is unlawful. *See, e.g.*, *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 363 (D.C. Cir. 2016) (finding violation where employer instituted facially valid rule in response to employees' union activity); *Dillon Cos., Inc.*, 340 NLRB 1260 (2003) (same).

Tito gains no more ground in asserting (Br. 50-54) that it did not reduce the named plaintiffs' overtime hours. To the contrary, substantial evidence supports the Board's finding that Tito not only promulgated the new policy in response to employees' union and other protected concerted activity, it discriminatorily applied that policy. (DO 3, 4 & n.14.) Thus, the seven original named plaintiffs worked, on average, at least 10 hours of overtime per pay period in the six pay periods immediately preceding the lawsuit, and some worked substantially more. (DO 4.) But in the first pay period after the lawsuit was filed on October 18, none of them received a single hour of overtime. (DO 4.)

By contrast, as shown in Addendum B at the end of this brief, in the first pay period after the lawsuit was filed, most of the employees who had not joined in the lawsuit worked more than 15 hours of overtime. In all, although Tito assigned 520 hours of overtime during those two weeks, none of it went to the original named plaintiffs. (DO 4; GCX 10 pp. 2, 4, 8, 12, 17, 20, 23, 30, 33, 35-36, 38, 45, 55, 58, 65, 70, 73, 78-79, 88, 94, 98, 101, 103, 109, 121, GCX 10(a) pp. 66, 74.) In

addition, the payroll records clearly show that overtime increased for nonplaintiff employees.[5] Thus, Tito's statement that overtime "decreased for all of Tito's employees" (Br. 53), is simply not true.

Further, the Board reviewed Tito's payroll records and found that Tito "significantly reduced the overtime hours" of five employees who joined the lawsuit on November 13. (DO 4 n.14.) For example, over the six pay periods prior to the lawsuit, on average, Amaya worked 9.29 hours of overtime, and Latapy worked 26.92 hours. Over the six pay periods after the lawsuit was filed, however, Amaya worked 0 hours of overtime, and Latapy worked 1 hour. (DO 4 n.14; GCX 10 pp. 2-5, 67-70, GCX 10(b) pp. 2-3, 29.) Thus, substantial evidence supports the Board's findings that Tito promulgated a new overtime policy in response to employees' union and other protected concerted activity and then discriminatorily applied that policy.

[5] For example, Manuel Beza worked 80.25 hours overtime in the period ending October 19, but 115 hours in the November 2 period; Hector Cortez worked 85 hours in the period ending October 19, but 121 hours in the November 2 period. (GCX 10 pp. 23, 35-36.)

2. The Board was not compelled to accept Tito's defense that it would have promulgated and discriminatorily implemented the overtime policy absent employees' union and other protected concerted activity

Faced with this compelling evidence of unlawful motivation, it was incumbent on Tito to show that it would have promulgated the policy and cut employees' overtime hours regardless of their protected activity. *See Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1327-28 (D.C. Cir. 2012) ("The emphasis is always on…the particular act that discouraged union activity"). This Tito did not do. It utterly failed to establish that it would have instituted the policy and made *the same* reduction in overtime hours even in the absence of employees' protected activity. *See Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072 (D.C. Cir. 2016); *Cadbury Beverages*, 160 F.3d at 31.

Simply put, to establish its affirmative defense "the [employer's] rationale cannot only be a potential or partial reason for the [adverse action], it must be *the* justification." *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013) (internal quotation marks and citation omitted). Moreover, the question on review is not "whether record evidence could support the [employer's] view of the issue, but whether it supports the [Board's] ultimate decision." *Bruce Packing Co. v. NLRB*, 795 F.3d 18, 22 (D.C. Cir. 2015). The credited testimony, corroborating evidence, and reasonable inferences drawn from the record evidence, all support the Board's finding of a violation.

Tito asserts that it promulgated the new overtime policy simply to comply with federal wage and hour law, but its statements and actions contradict that claim. (Br. 47-48.) As shown above, it is undisputed that Tito's managers explicitly told employees that the new policy applied only to those who joined the overtime lawsuit—in other words, that it was discriminating against those employees who collectively sought their overtime pay by joining the lawsuit.

Tito gains no more ground in asserting that the Board's decision "effectively preclude[d]" it from "taking *any* corrective action in response to the lawsuit." (Br. 48.) As the Board noted, Tito could have simply paid its employees their correct overtime wages. (DO 23.) Instead, it chose to promulgate a new overtime policy in response to employees' protected activity and then apply the policy discriminatorily. Tito is, of course, free to monitor employee overtime and regulate costs. What it may not do, however, is take the actions it took here in adopting an overtime policy in response to protected concerted activity, telling employees that the new policy applied only to those engaged in such activity, and then restricting the overtime of employees because of that activity.

In his testimony, Vice President Pierola was utterly unable to explain why Tito "suddenly shifted the overtime hours of the plaintiffs in the lawsuit to other employees who had not joined the lawsuit." (DO 4, 20; Tr.1445-46.) Similarly, in its opening brief to the Court, Tito makes no attempt to show that the affected

employees would have suffered the same decrease in overtime hours even if they had not engaged in protected activity. Instead, Tito simply takes issue with the Board's analysis of its payroll records and asserts that overtime decreased seasonally and for all employees. (Br. 51, 53-54.) Tito's argument (Br. 52-53) that the Board should have considered whether the plaintiffs worked more or fewer hours than other employees, not whether their own hours were reduced, ignores the record evidence that not all employees worked the same number of overtime hours. It further disregards the employees' uncontradicted testimony that, before they joined the lawsuit, they regularly worked overtime without first seeking management approval. (Tr.836, 932, 1068, 1143.)

Further, as shown in Addendum B, Tito's own payroll records establish that overtime did not decrease across the board. Even if that were true, it would only partly account for the discrepancy in overtime between those who actively sought redress for unpaid overtime and those who did not. As for Tito's claim about the seasonality of its work (Br. 51), it not only ignores the 520 hours of overtime it assigned to nonplaintiffs in the first November pay period after the lawsuit was filed, it also turns a blind eye to uncontroverted employee testimony that before the lawsuit, named plaintiffs had regularly worked overtime, including in the winter. (Tr.857, 1003.) On this record, then, Tito failed to show it would have

promulgated the overtime policy or reduced employees' overtime hours in the absence of their protected activity, and the Board's findings should be affirmed.

C. The Board Acted Within Its Discretion by Deferring Backpay Calculations to Compliance

The Board's remedial power is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord UFCW Local 204 v. NLRB*, 447 F.3d 821, 827 (D.C. Cir. 2006). Section 10(c) of the Act provides that the Board, upon finding that an unfair labor practice has been committed, shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of th[e] Act." 29 U.S.C. § 160(c). A backpay award is a make-whole remedy designed to restore "the economic status quo that [the discriminatee] would have obtained but for the…wrongful [act]." *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 188 (1973) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969)). Indeed, a finding of discriminatory employment action "is presumptive proof that some back pay is owed." *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1316 (D.C. Cir. 1972).

After finding that Tito discriminatorily promulgated and applied its new overtime policy, the Board ordered its standard remedy in such cases, namely that Tito make employees whole for any lost overtime. (DO 7.) Tito narrowly contests this remedy by arguing the Board should not have left the "details" of its remedial

Order to a subsequent compliance proceeding, and mistakenly asks the Court to remand the case to the Board now to determine the specifics of backpay owed in subsequent pay periods. (Br. 55.)

Tito fundamentally misunderstands the well-accepted, two-stage process long utilized by the Board in unfair-labor-practice cases, with judicial approval. In the initial stage, the Board determines—as it did here—whether violations occurred and issues a remedial order, which often provides for backpay. If a reviewing court upholds the Board's unfair-labor-practice findings and enforces its order, and a controversy subsequently arises over the terms of the remedy, the particulars can then be litigated in a subsequent compliance proceeding before the Board. 29 C.F.R. § 102.54-.59; *see also Sheet Metal Workers Int'l Ass'n, Local 270, AFL-CIO v. NLRB*, 561 F.3d 497, 500 (D.C. Cir. 2009) (describing the Board's compliance process).

As the Supreme Court explained long ago, "compliance proceedings provide the appropriate forum where the [parties] will be able to offer concrete evidence as to the amounts of backpay, if any," to which employees are entitled. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). *Sure-Tan* approved the Board's longstanding practice of ordering its conventional backpay remedy, and "leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due." *Id.* *Sure-Tan*'s "if any" language makes clear that even

arguments that an employee is not eligible for any backpay belong in the compliance stage, rather than the merits stage, of the case. *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 107 (D.C. Cir. 2003).

Therefore, during the Board's subsequent compliance proceeding, Tito "remains free to advance any appropriate arguments," and "the Board will undoubtedly come closer to approximating what would have occurred by attempting to estimate back pay, than by denying a back pay remedy altogether." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 415 (D.C. Cir. 1996). Whether backpay is due to individual employees for particular pay periods is exactly the type of determination the Board, with Court approval, leaves to a subsequent compliance proceeding. *See, e.g.*, *Ark Las Vegas*, 334 F.3d at 107 (leaving to compliance whether employee was entitled to any backpay); *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.3 (D.C. Cir. 1990) (leaving to compliance "the determination of the precise number of returning strikers eligible for payment"); *Akron Paint & Varnish Co*., 304 NLRB 1096, 1096-97 (1991) (estimating, during compliance proceeding, backpay owed for missed overtime), *enforced*, 985 F.2d 852 (6th Cir. 1992). Because the determination of the amounts owed in backpay is properly left to the compliance proceeding, the Court should enforce the Board's order and its standard backpay remedy and deny Tito's request for remand.

III. TITO VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ORCHESTRATING THE DISCHARGES OF FIVE RECYCLING EMPLOYEES BECAUSE OF THEIR UNION AND OTHER PROTECTED ACTIVITIES

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Discharging Employees for Engaging in Union and Other Protected Concerted Activities

As shown above in full, an employer violates the Act by taking adverse actions against employees because of their union and other protected concerted activity, and courts will uphold the Board's finding of unlawful motive if substantial evidence establishes that protected activity was "a motivating factor" for the adverse action, 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 protected activity. *Transp. Mgmt.*, 462 U.S. at 397, 401-03, and cites cited at pp. 30-31. But where, as here, an employer admits that employees' union or other protected activities played a part in its decision, further analysis of motive is unnecessary because its admission serves to "eliminate any question" concerning its reason for the action. *L'Eggs*, 619 F.2d at 1343; *accord United Servs.*, 387 F.3d at 916.

Here, the Board found that Tito's motivation for orchestrating the discharge of recycling employees Sanchez, Ramos, Sorto, Ramirez, and Chavez was their participation in union and other protected activity. It further found that Tito admitted this motive in discharging Sanchez and Ramos and provided pretextual

explanations for the remaining discharges. As we now show, those findings are supported by substantial evidence and should be upheld.

B. Tito Explicitly Discharged Sanchez and Ramos for their Union Activities

1. Supervisor Berganza's statements to Sanchez and Ramos establish Tito's unlawful motive

Substantial evidence supports the Board's findings that Tito discharged Sanchez and Ramos because of their union activity. As an initial matter, it is uncontested that both Sanchez and Ramos engaged in union activity by signing union authorization cards and attending meetings.

Further, the Board found that its analysis under *Wright Line* was unnecessary with regard to the discharges of Sanchez and Ramos because the record contains direct evidence that Berganza, Tito's on-site supervisor at the recycling facility, "explicitly referenced their union activities when terminating them." (DO 5.) Thus, immediately before discharging Sanchez, Berganza told her that he had "bad news" for her, and that he heard she had "communication with the Union." (DO 15 n.12; Tr.607.) He then told Ramos that he noticed she had been speaking with the Union, and now that she was "with the Union," she should call Union Organizer Baiza "to find you a job." (DO 1, 5 n.18; Tr.200-01.) Tito does not dispute that Berganza made these comments, nor does it dispute that his statement to Ramos independently violated Section 8(a)(1). (DO 6.)

Not only do these statements clearly establish Berganza's knowledge of their union activity, as the Board reasonably found, they "connect[] Sanchez' and Ramos' terminations to their union activity [and] are independently sufficient to demonstrate unlawful discrimination." (DO 5.) By themselves, these statements are "more than *Wright Line* requires," and constitute "affirmative evidence" that Sanchez's and Ramos's union activity was the "sole motive behind" Tito's decision to discharge them. *Quality Control Elec., Inc.*, 323 NLRB 238, 238 (1997). Indeed, Berganza's statements were "an outright confession of unlawful discrimination [that] eliminated any question concerning the intrinsic merits" of the discharges. *L'Eggs*, 619 F.2d at 1343 (internal quotation marks omitted); *accord United Servs.*, 387 F.3d at 916.

The Board also reasonably adopted the administrative law judge's decision to impute Berganza's knowledge of the employees' union activity to Tito, which had engaged in "obvious discrimination against several of its prounion employees." (DO 5 & n.18.) The judge determined, based in part on credibility determinations, that although Berganza had initially supported the Union, by October 30 he opposed it. (DO 12, 24.) To no avail, Tito cites (Br. 24-25) Berganza's testimony that he was a union supporter through late November or early December, when he learned that supervisors could not be part of the Union (Tr.472). The Board, however, adopted the judge's explicit decision to discredit

that testimony, and to rely instead on Berganza's admission that he "no longer wanted to help" the Union and stopped answering organizers' phone calls. (DO 5 n.18, 12; Tr.338.) This credibility determination should not be disturbed, given Tito's failure to show that it is "hopelessly incredible." *PruittHealth - Virginia Park, LLC v. NLRB*, 888 F.3d 1285, 1294 (D.C. Cir. 2018).

Thus, Tito's contention that Berganza's knowledge should not be imputed to it because he supported the Union ignores Tito's admissions and the administrative law judge's credibility determinations appropriately adopted by the Board. (Br. 21-26.) The Board has long held that a supervisor's knowledge of employee union activity is imputed to the employer. *See, e.g.*, *Clark & Wilkins Indus., Inc. v. NLRB*, 887 F.2d 308, 312 (D.C. Cir. 1989); *Pellegrini Bros. Wines, Inc.*, 239 NLRB 1220, 1220 n.2 (1979). In entirely different circumstances, the Board has declined to impute the knowledge of a prounion supervisor. *See, e.g.*, *Music Express East, Inc.*, 340 NLRB 1063, 1064 (2003) ("ample affirmative evidence" that prounion supervisor did not inform manager of employee's union activity; no finding that prounion supervisor changed his sympathies). But that situation is inapplicable here. Simply put, Tito failed to undermine the Board's finding, based on its admissions and the credited testimony, that Berganza no longer supported the Union by October 30 when he discharged Sanchez. The Board therefore properly imputed Berganza's knowledge to Tito under well-settled principles.

2. The record did not compel the Board to accept Tito's affirmative defense that it would have discharged Sanchez and Ramos in the absence of their union activity

Given the suspect nature of Tito's asserted reasons for discharging Sanchez and Ramos, the Board was not compelled to accept its stated rationale at face value. Thus, Tito claims (Br. 35-36) that Wyatt requested Sanchez's removal because she performed poorly and called Rosales names, but the record shows otherwise. For instance, the Board found "no credible evidence" to support Wyatt's claim that Sanchez's performance was "very low." (DO 15.) Moreover, Sanchez had never been disciplined or warned about her performance before Tito summarily discharged her. (DO 15 & n.12; Tr.350, 608, 611.) To the contrary, Sanchez, who had worked only a few months at the recycling center, filled eight hoppers on the first day of her productivity test and nine hoppers on the second. By contrast, workers who filled fewer hoppers were not discharged. (DO 14; Tr.696, GCX 14.) Meanwhile, Supervisor Berganza claimed that he first noticed problems with her performance "[a]fter she became friends with her coworkers" and the employees "start[ed] talking among themselves." (Tr.352.) In effect, Berganza was acknowledging that her concerted activity prompted his scrutiny.

Nor did the Board find any credible evidence to support Wyatt's allegation of name-calling. The Board adopted the administrative law judge's decision to credit Sanchez's testimony that she never called Rosales a bad name. As for

Rosales, she testified only that someone told her Sanchez had called her a name, but she did not hear it herself. (DO 14-15; Tr.1388.) Rosales also admitted that other employees made fun of her "all the time." (Tr.1390.)

There is even more evidence of pretext. Notably, Supervisor Berganza, whom the judge found to be "not to be a credible witness generally," proffered inconsistent explanations for Sanchez's discharge. (DO 15 n.12.) Initially, in his Board affidavit, Berganza averred that Sanchez was removed for letting too much material pass her on the line. But at the hearing, Berganza changed course and claimed she was removed for calling Rosales a "son of a bitch," an accusation he did not bother to mention when he discharged her. (Tr.347, 608.)

Similarly, although Tito claims (Br. 37) that Wyatt requested Ramos's removal because of low performance, the Board found "no credible evidence to support such a contention." (DO 15; Tr.752.) To the contrary, the record shows that Ramos was one of the top performers on the productivity test, filling 10 hoppers on both days. (DO 14; GCX 14.) And although Wyatt initially testified that Rosales and Garcia told him Ramos allowed material to bypass her on the line to bother her coworkers, Rosales did not corroborate that in her testimony and Garcia did not testify at all. (DO 15.) The Board therefore adopted the judge's determination to discredit Wyatt's testimony, finding it to be "false." (DO 15.) Similarly, the judge discredited Berganza's testimony that Ramos admitted to

deliberately letting material pass her to bother her coworkers—a claim that was controverted by Ramos's denial. (DO 15; Tr.203.) As explained more fully below (pp. 54-56), Tito utterly fails to meet its heavy burden of showing that these credibility rulings were "patently insupportable." *PruittHealth*, 888 F.3d at 1294.

In sum, drawing conclusions from the credited testimony, the Board reasonably found that Wyatt based his decision to demand that Tito remove Sanchez and Ramos on information he received from Supervisor Berganza. And Berganza's statements to Wyatt were motivated by Tito's "desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert." (DO 15.) Given Tito's failure to show that the evidence is "so compelling that no reasonable factfinder could fail to find" in its favor, the Board's findings should be affirmed. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 217 (D.C. Cir. 2016).

C. Tito Discharged Sorto, Ramirez, and Chavez Because of Their Union Activity

1. Tito knew about and was hostile toward the employees' protected union activity

It is undisputed that Sorto, Ramirez, and Chavez were all involved in union activity. Sorto was the first recycling employee to contact the Union after Ramirez gave her Union Organizer Baiza's telephone number. All three employees attended union meetings and signed union cards. Additionally, Supervisor

Berganza questioned Baiza about these employees (as well as Sanchez and Ramos) by name, asking whether they had signed cards. When Baiza would not answer, Berganza asked Coats and learned that "Maria" had signed a card. (DO 13-14 & n.7; Tr.82, 88-90, 333-34, 336.)

Not only were all three employees involved in union activity, but Tito knew about it. As Tito concedes, it knew of Ramirez and Chavez's involvement before discharging them. (Br. 21.) Moreover, the Board found that Tito's knowledge of Sorto's union activity was clearly established when Supervisor Berganza, in discharging her, said she should "go to the Union so they could help [her]." (DO 5 n.18; Tr.255.)

Tito's overt hostility toward employees' union and other protected concerted activity is undisputed. Tito does not contest that, among other unlawful acts, it coerced, interrogated, and threatened construction employees because they joined together to seek their unpaid overtime. Nor does it contest the Board's findings that it created the impression of surveilling Ramos's union activity; prohibited recycling employees from raising common concerns directly to MES; threatened Chavez with discipline for discussing their concerns about ill-fitting safety goggles directly with MES; interrogated the recycling employees about their union activities and support; and threatened them with immigration-related consequences and discharge for engaging in union activities. Moreover, the Board

found a "correlation" between MES's decision to monitor Ramirez's performance and Tito's awareness of the overtime lawsuit in which her husband participated. (DO 24 n.34.) Tito's animus toward the employees who raised common concerns about wages and working conditions is, therefore, well established.

Tito's complaint that, in assessing its animus, the Board overlooked the bifurcated nature of its business (Br. 27), ignores the weight of the evidence. Tito's managers exhibited animus toward both the construction and recycling employees. Indeed, as Tito concedes, Supervisor Berganza created the impression of surveilling the recycling employees' union activities, interrogated them, and threatened them with immigration consequences and discharge. (DO 1-2.) Moreover, Berganza testified that he was in daily contact with Tito's office manager, Davys Ramos, and sought her guidance. (Tr.318-19.) Additionally, Berganza lacked authority to discharge employees; he first had to seek permission from Ramos and Vice President Pierola. (Tr.310-11.) In these circumstances, the Board appropriately determined that Tito harbored animus toward the union activities of its recycling employees.

2. The Board was not compelled to accept Tito's pretextual reasons for discharging Sorto, Ramirez, and Chavez

Substantial evidence supports the Board's finding that Tito's stated reasons for discharging Sorto, Ramirez, and Chavez were pretextual. (DO 5.) Tito contends that it discharged them because they were working slowly (Sorto) or

badly (Ramirez), or acting inappropriately (Chavez). (Br. 39, 41, 43.) But Tito cannot meet its burden on its affirmative defense simply by articulating nondiscriminatory reasons for getting rid of them. *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996); *Herman Bros, Inc. v. NLRB*, 658 F.2d 201, 208-09 (3d Cir. 1981). Rather, as shown above (pp. 30-31), once the evidence supports an inference of unlawful motive, Tito bore the burden of *demonstrating* that it would have taken the same action even in the absence of the employee's protected activity. *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1167 (D.C. Cir. 1993). Tito failed to meet this burden, and the Board was not compelled to find otherwise.

As an initial matter, although Tito claims (Br. 39) it discharged Sorto for working slowly, she received one of the highest scores on the productivity test, filling 10 hoppers on the first day and 12 on the second. (DO 14; GCX 14.) Tito similarly claims (Br. 41) it discharged Ramirez for poor performance, but she had an average score, filling eight hoppers on the first day and seven on the second. (GCX 14.) By contrast, Tito tellingly took no action against the lowest scorers on that test, including those who filled only five or six hoppers. (DO 14; Tr.353-54.)

Tito discharged Chavez after someone swept cold, dirty water onto her, and she argued with Rosales about it. But the argument did not involve any hitting, pushing, or shoving, and MES's onsite officials—Wyatt and Wheeler—did not

request her removal. Instead, it was Berganza who made the decision to seek her discharge after reviewing her personnel file, which contained only one recent incident—namely, Berganza's own note complaining that Chavez had spoken directly to Wyatt and Wheeler about safety goggles. (DO 17 & n.19; GCX 90.)

Tito's harsh treatment of Sorto, Ramirez, and Chavez stands in stark contrast to its more benign treatment of other employees, providing additional evidence that its true motive behind their discharges was hostility toward their union activity. For example, there is no evidence that Wyatt had ever requested an employee's removal, and Wheeler could remember doing so only once before the organizing drive. (DO 23.) In that instance, however, Wheeler documented the employee's performance problems over a three-to-four-month period before requesting her removal. (DO 23.)

The credited record evidence also shows that Tito routinely warned other employees before discharging them. For example, Tito warned Andrea Monroy three times for misconduct, including pushing coworkers; she was finally discharged not for that behavior, but for abandoning her job. (DO 23 n.32; GCX 82.) Similarly, Berganza warned Anely Cavallini three times for working slowly and leaving the line to sleep before discharging her. (Tr.490-92.) When Keila Diaz was found sleeping in her car during work time, Wheeler simply told Berganza her behavior would not be tolerated. He did not even request her

removal. (DO 23; RX 2.) In contrast, after the union organizing drive began, MES requested the removal of four employees, and Tito discharged five, without first warning them about any performance deficiencies or misconduct issues. Tito provided no explanation for its disparately harsh treatment of these union supporters.

Faced with this powerful evidence that Sorto, Ramirez, and Chavez's union activities were a motivating factor in the adverse actions taken against them, Tito needed to show it would have taken the same actions even in the absence of their protected activity. But because Tito's reasons for discharging them were false and thus pretextual, Tito necessarily failed to make that showing, as the Board reasonably found. (DO 5.) *See Wright Line*, 251 NLRB at 1083-84, and cases cited at pp.30-31.

D. Tito's Remaining Challenges to the Board's Findings Must Fail

1. Tito has not shown that the Board's credibility determinations are hopelessly incredible

In challenging the Board's findings, Tito's primary complaint is that the Board erred in adopting the administrative law judge's decision to credit employee testimony and discredit Berganza, Wyatt, and Wheeler. (Br. 12-13, 15-16, 37-38.) But Tito has failed to show, as it must, that those credibility determinations are "hopelessly incredible." *PruittHealth*, 888 F.3d at 1294. Nor could it on this record. The judge found Berganza, Wyatt, and Wheeler not to be credible

witnesses, a reasonable conclusion given the record as a whole. (DO 15.) The judge based his credibility determinations on "the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences" drawn from the record. (DO 12.)

Specifically, the judge found Tito's witnesses not credible and their explanations contradictory or mysterious. Supervisor Berganza, for example, gave conflicting accounts of Sanchez's discharge in his Board affidavit and in his testimony at the hearing (see p. 48 above). His and Wheeler's accounts of monitoring Sorto's performance were also inconsistent and contradictory. (DO 15-16.) Further, Wheeler failed to explain why an employee's complaint that Ramirez called her "old and stupid" prompted him to monitor her work performance for a month. (DO 16.) For his part, Wyatt testified that he requested Ramirez's removal because she worked slowly and teased a coworker, but his Board affidavit provided earlier during the investigatory phase of the case mentioned nothing about her performance. These inconsistencies "provide[] more than a sufficient basis" for the judge's credibility determinations. *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996).

Contrary to Tito's claims (Br. 39, 42), the judge reasonably gave no weight to Wheeler's day-planner notes, which he had not recorded contemporaneously. (DO 14 n.11, 16 & n.13.) Wheeler was unable to explain his belated inclusion of

notes about Sanchez, Ramos, and Sorto in December 2013, after those employees had been discharged but coinciding with a note that he received a call from a Board agent "about the Tito ladies." (Tr.704-05, GCX 48(a).) Another note raised an entirely new accusation against Ramirez that was not mentioned at the hearing—that she worked faster when watched. Wheeler made the same accusation against Sorto, leading the judge to doubt whether either was true. (DO 16 n.13.)

Finally, the judge reasonably discredited Wyatt's testimony that he relied on statements by MES employees Rosales or Garcia in deciding to request the removal of Sanchez and Ramos. The judge noted that Rosales's testimony did not corroborate Wyatt, and Garcia did not testify at all. (DO 15.) Similarly, Berganza testified that he learned Sorto told employees to slow down on the production line from employee Alba Rauda. But Tito did not call Rauda to testify, and the judge concluded there was no credible evidence that the accusation was true. (DO 16.) Given these considerations, the judge appropriately credited the employees' accounts. *See Daikichi Corp.*, 335 NLRB 622, 623 (2001) (judge appropriately relied on employer's failure to offer available witness testimony to controvert employees' testimony in making credibility determinations), *enforced mem.*, 56 F. App'x 516 (D.C. Cir. 2003).

2. Tito orchestrated MES's removal requests

Tito further argues that MES requested the removal of four of the employees, and it was merely following MES's orders. (Br. 29.) As an initial matter, MES never even requested Chavez's removal from the facility. (DO 17.) Nor did MES request that the other employees be *discharged*; instead, it merely asked that they be removed from the facility. Tito itself decided to discharge them instead of transferring them to other recycling facilities or construction jobs where one of them had prior experience. In fact, Vice President Pierola specifically refused Supervisor Berganza's request that Ramirez be transferred. (DO 17; Tr.346, 397-98, 601-02.)

As for Sanchez, Ramos, and Sorto, it was Berganza who provided the impetus for Wheeler and Wyatt to request their removal from the facility. Thus, as the judge reasonably found, Wyatt's negative information about Sanchez and Ramos came from Berganza, who "was motivated by [Tito's] desire to thwart the organizing drive and/or to get rid of employees who complained about working conditions in concert." (DO 15.) As for Sorto, Wheeler requested her removal after Berganza informed him she was telling employees to slow down on the production line, an accusation for which the judge found "no credible evidence." (DO 16.) The judge could find no reasonable explanation, except for the protected

activity of Ramirez and her husband, for Wheeler monitoring her work performance after an employee complained about teasing. (DO 16-17, 24 n.34.)

Thus, Tito's claim that it was simply following MES's orders is belied by the fact that it was the prime mover behind those requests, passing on negative information about the employees to prompt MES to seek their removal. The fact that Wyatt and Wheeler acceded does not absolve Tito of its responsibility for orchestrating their removal requests and thereby discriminating against prounion employees at the recycling facility. *See Meda-Care Ambulance, Inc.*, 266 NLRB 1208, 1213 (1983) (employer orchestrated complaints from customer, creating a pretext for discharge), *enforced*, 740 F.2d 971 (7th Cir. 1984). As the Board found, "the unprecedented nature and number of the MES removal requests during the organizing drive" warranted the conclusion that "none of these requests would have been made without the involvement of [Tito]." (DO 1, 17 n.15.) On this record, substantial evidence supports the Board's finding that Tito failed to show it would have discharged Sanchez, Ramos, Sorto, Ramirez, and Chavez in the absence of their union and other protected activity.

CONCLUSION

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

/s/ Julie Brock Broido
JULIE BROCK BROIDO
Supervisory Attorney

/s/ Kellie Isbell
KELLIE ISBELL
Senior Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-2482

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

January 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TITO CONTRACTORS, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 18-1107 &
	)	18-1119
Respondent/Cross-Petitioner	)	
and	)	
	)	
INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51	)	
	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 12980 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010.

/s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 18th day of January 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TITO CONTRACTORS, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, DISTRICT COUNCIL 51 Intervenor	)	Nos. 18-1107 & 18-1119

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, 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.

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570

Dated at Washington, DC
this 18th day of January 2019

ADDENDUM A

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

TABLE OF CONTENTS

National Labor Relations Act ("the Act"), 29 U.S.C. § 151, et seq.

Section 7 (29 U.S.C. § 157) ii
Section 8(a)(1) (29 U.S.C. § 158(a)(1)) ii
Section 8(a)(3) (29 U.S.C. § 158(a)(3)) ii
Section 10(a) (29 U.S.C. § 160(a)) iii
Section 10(c) (29 U.S.C. § 160(c)) iii
Section 10(e) (29 U.S.C. § 160(e)) iv
Section 10(f) (29 U.S.C. § 160(f)) v

Regulations

29 C.F.R. § 102.48(c)(1) vi
29 C.F.R. § 102.54-.59 vi

THE NATIONAL LABOR RELATIONS ACT

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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

***

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that

membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

* * *

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall

state its findings of fact and shall issue an order dismissing the said complaint. 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 backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

***

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

recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.48. No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

***

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.54-.59. Compliance Specifications

29 C.F.R. § 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to § 102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

29 C.F.R. § 102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

29 C.F.R. § 102.56 Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.
(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

29 C.F.R. § 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

29 C.F.R. § 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

29 C.F.R. § 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

ADDENDUM B

ADDENDUM B

Original 7 plaintiffs	Hours worked over 80 during pay period ending 11/02/13
1. Roberto Ayala	0
2. Mauricio Bautista	0
3. Geremias Berganza	0
4. Hector Delgado	0
5. Sabino Diaz	0
6. Jose Jimenez	0
7. Domingo Zamora	0
Other employees	
8. Angel Alvarado	17
9. Jose Amaya	0
10. Norberto Araujo	60
11. Jose Berganza	33
12. Jose Antonio Diaz Berganza	0
13. Vitalino Berganza	30
14. Manuel Beza	35
15. Edison Carrillo	20
16. Henry Castellon	34
17. Hector Cortez	41
18. Giovany Garza	51
19. Jose Granados	33
20. Enrique Guzman	47
21. Hernan Latapy	0
22. Manuel Medrano	52
23. Luis Palacios	21
24. Jorge Ramos	0
25. Cesar Bueco Rodriguez	0
26. Manuel Rodriguez	21
27. Leonel Rosales	25
28. Nestor Sanchez	0
Total overtime hours	520

Source: GCX 10, pp. 2, 4, 8, 12, 17, 20, 23, 30, 33, 35-36, 38, 45, 55, 58, 65, 70, 73, 78-79, 88, 94, 98, 101, 103, 109, 121 and GCX 10(a) pp. 66, 74.