

Nos. 18-1170, 18-1178, 18-1197, 18-1199

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

SHAMROCK FOODS CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**BAKERY, CONFECTIONARY, TOBACCO WORKERS' AND GRAIN MILLERS
INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC**

Intervenor

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ELIZABETH HEANEY

Supervisory Attorney

JOEL A. HELLER

Attorney

National Labor Relations Board

1015 Half Street SE

Washington, DC 20570

(202) 273-1743

(202) 273-1042

PETER B. ROBB

General Counsel

JOHN W. KYLE

Deputy General Counsel

DAVID HABENSTREIT

Assistant General Counsel

National Labor Relations Board

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

Nos. 18-1170, 18-1178, 18-1197, 18-1199

SHAMROCK FOODS CO.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**BAKERY, CONFECTIONARY, TOBACCO WORKERS' AND GRAIN
MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-
CIO-CLC**

Intervenor

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. Parties and Amici

Shamrock Foods Co. is the petitioner before the Court and was respondent before the Board. The Board is respondent before the Court; its General Counsel was a party before the Board. Bakery, Confectionary, Tobacco Workers and Grain Millers Local 232 is an intervenor before the Court, and was the charging party before the Board.

B. Rulings Under Review

This case is before the Court on Shamrock's petitions to review Board Orders issued on June 22, 2018, and reported at 366 NLRB No. 107 and 366 NLRB No. 117. The Board seeks enforcement of those Orders.

C. Related Cases

The case on review was not previously before this Court and or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

Dated at Washington, DC
this 27th day of February, 2019

/s/David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of issues.....	1
Relevant statutory provisions.....	1
Statement of the case.....	2
I. The Board’s findings of fact.....	2
A. Background: Shamrock’s operations, structure, and history of labor violations.....	2
B. A new organizing campaign begins	4
C. January 2015: Shamrock officials hold meetings to discuss unions and solicit employee concerns, question employees about their union views, and show up uninvited to a union meeting	5
D. February: Shamrock’s “union education” meetings continue	7
E. March-April: Shamrock discharges Wallace	9
F. April: Phipps publicly announces the campaign, and Shamrock promises no layoffs, tells employees that union organizing “will hurt all of you,” and continues the questioning	11
G. Early May: Shamrock officials search Lerma’s belongings for union material and counsel him that he might “get in some serious trouble”; CEO McCelland sends an all-employee letter	13
H. Late May: Shamrock confiscates union material and raises wages.....	16
I. Summer-Fall 2015: Phipps and Meraz distribute union flyers, meet with fellow employees about the organizing campaign, and participate in Board proceedings	17

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
J. January-February 2016: Shamrock begins more strictly enforcing its break policy and supervises and disciplines Phipps regarding his breaks	18
K. February 2016: Shamrock disciplines Meraz	21
II. Procedural history.....	23
III. The Board’s conclusions and orders	23
Standard of review	25
Summary of argument.....	26
Argument.....	28
I. The Court should summarily enforce the uncontested portions of the Board’s orders.....	28
II. Shamrock responded to the warehouse employees’ organizing campaign with a sustained barrage of unfair labor practices	29
A. Shamrock committed numerous acts of interference, restraint, and coercion against its employees during the organizing campaign	29
1. Vice president Engdahl threatened employees with reprisals and intransigence if they organize	29
2. Shamrock supervisors coercively interrogated employees about their union views.....	34
3. Shamrock supervisors surveilled union activity	36

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
a. Floor captain Manning surveilled union activity and is a statutory supervisor.....	37
i. Manning’s acts of surveillance	37
ii. The Board’s finding of supervisory status was premised on credited testimony and appropriate evidentiary sanctions.....	39
b. Garcia’s acts of surveillance	42
4. Shamrock discouraged unionization by soliciting employee grievances and promising a response	44
5. Shamrock promised and granted benefits to dissuade employees from organizing.....	46
6. CEO McClelland promulgated a new rule in response to union activity.....	49
7. Shamrock unlawfully discharged Thomas Wallace and conditioned his separation agreement on an unlawful waiver.....	53
a. Retaliatory discipline violates the Act	53
b. Shamrock discharged Wallace because of his protected activity.....	55
c. Wallace’s separation agreement contained unlawful waivers	58
B. Shamrock retaliated against Mario Lema, Steve Phipps, and Michael Meraz for their union activity	60
1. Shamrock disciplined Lerma for his union activity.....	61

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
2. Shamrock followed changes in break-policy enforcement with closer supervision and discipline of Phipps.....	63
a. Shamrock enforced its break policy more strictly in response to union activity	63
b. Shamrock singled out Phipps for closer supervision.....	67
c. Shamrock disciplined Phipps for his union activity	70
3. Shamrock disciplined Meraz for his union activity.....	72
C. The Board’s notice-reading remedy was an appropriate exercise of its discretion	75
Conclusion	77

TABLE OF AUTHORITIES

Cases	Page(s)
<i>800 River Road Operating Co. v. NLRB</i> , 784 F.3d 902 (3d Cir. 2015)	38
<i>Alden Leeds, Inc. v. NLRB</i> , 812 F.3d 159 (D.C. Cir. 2016).....	59
* <i>Altercare of Wadsworth</i> , 355 NLRB 565 (2010)	61
<i>Alois Box Co. v. NLRB</i> , 216 F.3d 69 (D.C. Cir. 2000).....	40
<i>Auto Nation, Inc.</i> , 360 NLRB 1298 (2014)	33
<i>Avecor, Inc. v. NLRB</i> , 931 F.2d 924 (D.C. Cir. 1991).....	29
<i>Banner Health System v. NLRB</i> , 851 F.3d 35 (D.C. Cir. 2017).....	26, 75
<i>Boeing Co.</i> 365 NLRB No. 154, 2017 WL 6403495 (2017).....	60
<i>Care One at Madison Avenue, LLC</i> , 361 NLRB 1462 (2014).....	50,51
<i>Centre Engineering, Inc.</i> , 246 NLRB 632 (1979)	31
<i>Clark Equipment Co.</i> , 278 NLRB 498 (1986)	43

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Conair Corp. v. NLRB</i> , 721 F.2d 1355 (D.C. Cir. 1983).....	76
<i>Consolidated Bus Transit, Inc.</i> , 350 NLRB 1064 (2007)	68
<i>Consolidated Diesel Co.</i> , 332 NLRB 1019 (2000)	62
<i>Federated Logistics & Operations</i> , 340 NLRB 255 (2003)	30, 31,33, 76
* <i>Federated Logistics & Operations v. NLRB</i> , 400 F.3d 920 (D.C. Cir. 2005).....	30, 31,75
<i>Flexsteel Industries, Inc.</i> , 311 NLRB 257 (1993)	37
<i>Flexsteel Industries, Inc.</i> , 316 NLRB 745 (1995)	64
<i>Flying Food Group, Inc. v. NLRB</i> , 471 F.3d 178 (D.C. Cir. 2006).....	28
<i>General Electric Co. v. NLRB</i> , 117 F.3d 627 (D.C. Cir. 1997).....	46
<i>Gold Coast Restaurant Corp. v. NLRB</i> , 995 F.2d 257 (D.C. Cir. 1993).....	54
<i>Golden Stevedoring Co.</i> , 335 NLRB 410 (2001)	39
<i>Hawaii Tribune-Herald</i> , 356 NLRB 661(2011)	49,52,67

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Hertz Corp.</i> , 316 NLRB 672 (1995)	47
<i>Homer D. Bronson Co.</i> , 349 NLRB 512, (2007)	32
<i>Howard Johnson Motor Lodge</i> , 261 NLRB 866, 871 (1982)	38
<i>Hospital of Barstow, Inc. v. NLRB</i> , 897 F.3d 280 (D.C. Cir. 2018).....	26
* <i>Inova Health System v. NLRB</i> , 795 F.3d 68 (D.C. Cir. 2015).....	25, 53, 55, 66
<i>International Ladies’ Garment Workers’ Union v. Quality Manufacturing Co.</i> , 420 U.S. 276 (1975).....	59
<i>Intermedics, Inc.</i> , 262 NLRB 1407 (1982).....	43
<i>Intertape Polymer Corp.</i> , 360 NLRB 957 (2014)	35
* <i>Manor Care of Easton, Penn., LLC</i> , 356 NLRB 202 (2010)	44,45,46,47,48,54,75
<i>McAllister Towing & Transportation Co.</i> , 341 NLRB 394 (2004)	40, 41
<i>Monfort of Colorado, Inc.</i> , 284 NLRB 1429 (1987)	76

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Munsingwear, Inc.</i> , 149 NLRB 839 (1964)	38
<i>Music Express East, Inc.</i> , 340 NLRB 1063 (2003)	38
<i>NLRB v. Allied Medical Transport, Inc.</i> , 805 F.3d 1000 (11th Cir. 2015)	73
<i>NLRB v. Almet, Inc.</i> , 987 F.2d 445 (7th Cir. 1993)	52
<i>NLRB v. Curwood, Inc.</i> , 397 F.3d 548 (7th Cir. 2005)	47
<i>NLRB v. Marsh Supermarkets, Inc.</i> , 327 F.2d 109 (7th Cir. 1963)	31
<i>NLRB v. Nueva Engineering, Inc.</i> , 761 F.2d 961 (4th Cir. 1985)	37
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983).....	53, 54
<i>North Hills Office Services, Inc.</i> , 344 NLRB 1083 (2005)	34,37
<i>Overstreet v. Shamrock Foods Co.</i> , 2016 WL 8505125 (D. Ariz. Feb. 1, 2016)	23
<i>Ozburn-Hessey Logistics, LLC v. NLRB</i> , 609 F. App’x 656 (D.C. Cir. 2015).....	54, 57, 62, 72

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>*Ozburn-Hessey Logistics, LLC v. NLRB</i> , 833 F.3d 210 (D.C. Cir. 2016).....	54, 58, 60
<i>Parsippany Hotel Management Co. v. NLRB</i> , 99 F.3d 413 (D.C. Cir. 1996).....	36, 43
<i>*Perdue Farms, Inc. v. NLRB</i> , 144 F.3d 830 (D.C. Cir. 1998).....	25, 35, 40, 47
<i>Pier Sixty, LLC</i> , 362 NLRB No. 59 (2015).....	31
<i>Progressive Electric, Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006).....	30
<i>*Property Resources Corp. v. NLRB</i> , 863 F.2d 964 (D.C. Cir. 1988).....	53, 56, 69, 74
<i>Quicken Loans, Inc. v. NLRB</i> , 830 F.3d 542 (D.C. Cir. 2016).....	49
<i>Real Foods Co.</i> , 350 NLRB 309 (2007)	46
<i>Reno Hilton</i> , 319 NLRB 1154 (1995)	30,32
<i>Riverdale Nursing Home, Inc.</i> 317 NLRB 881 (1995)	42
<i>S. Freedman & Sons, Inc.</i> , 364 NLRB No. 82, 2016 WL 4492371 (2016).....	59

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Shamrock Foods Co.</i> , 337 NLRB 915 (2002).....	4
<i>Shamrock Foods Co.</i> , 346 F.3d 1130 (D.C. Cir. 2003).....	25,34, 35,53,57,64
<i>Sheraton Universal Hotel</i> , 350 NLRB 1114 (2007)	40
<i>St. Luke’s Hospital</i> , 258 NLRB 321, 322 (1981)	30
<i>St. Francis Hospital v. NLRB</i> , 729 F.2d 844 (D.C. Cir. 1984).....	48
<i>St. Francis Medical Center</i> , 340 NLRB 1370 (2003)	36
<i>St. John’s Community Services</i> , 355 NLRB 414 (2010)	63
<i>Somerset Welding & Steel, Inc.</i> , 314 NLRB 829 (1994)	31
<i>Tasty Baking Co. v. NLRB</i> , 254 F.3d 114 (D.C. Cir. 2001).....	30
<i>Tawas Industries, Inc.</i> , 336 NLRB 318 (2001)	52
<i>Teamsters Local 171 v. NLRB</i> , 863 F.2d 946 (D.C. Cir. 1988).....	35
<i>Traction Wholesale Center Co. v. NLRB</i> , 216 F.3d 92 (D.C. Cir. 2000).....	44

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

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>U.S. Testing Co. v. NLRB</i> , 160 F.3d 14 (D.C. Cir. 1998).....	25
<i>UFCW v. NLRB</i> , 852 F.2d 1344 (D.C. Cir. 1988).....	75
<i>Vincent Industrial Plastics, Inc. v. NLRB</i> , 209 F.3d 727 (D.C. Cir. 2000).....	53, 55
<i>Williams Services, Inc.</i> , 302 NLRB 492 (1991)	54,57, 71
<i>Winchester Spinning Corp. v. NLRB</i> , 402 F.2d 299 (4th Cir. 1968)	35
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	53,54,60,63,69

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

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 2(11) 29 U.S.C. § 152(11)	39
Section 7 (29 U.S.C. § 157)	29
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	24,29,36,44,53,60
Section 8(a)(3) (29 U.S.C. § 158(a)(3)).....	24,60,61,63
Section 8(c) (29 U.S.C. § 158(c))	33
Section 10(a)(29 U.S.C. § 160(a))	1
Section 10(e) (29 U.S.C. § 160(e))	1,25,59
Section 10(f) (29 U.S.C. § 160(f)).....	1
Section 10(j) (29 U.S.C. §160(j)).....	17

GLOSSARY

National Labor Relations Board	Board
National Labor Relations Act	Act
Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 232	Local 232
Opening Brief of Shamrock Foods Co.	Br.
Joint Appendix	JA

STATEMENT OF JURISDICTION

Shamrock Foods Co. petitions for review of, and the National Labor Relations Board cross-applies to enforce, two Board Orders issued on June 22, 2018 (366 NLRB No. 107; 366 NLRB No. 117). The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), and the Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f), 29 U.S.C. § 160(e) and (f). The petitions and applications are timely, as the Act provides no time limits for such filings.

STATEMENT OF ISSUES

- I. Whether the Board is entitled to summary enforcement of uncontested portions of its Orders.
- II. Whether substantial evidence supports the Board’s findings that Shamrock interfered with, restrained, or coerced its employees’ exercise of their rights under the Act and discriminated against employees for engaging in union activity.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions appear in the addendum to this brief.

STATEMENT OF THE CASE

This case involves Shamrock's broad-based and wide-ranging campaign of unfair labor practices in response to an organizing effort among its warehouse employees. As set forth below, Shamrock's timeline of violations included:

- 1/28/15: threat, solicitation of grievances, interrogation, surveillance
- 2/5: solicitation of grievances
- 2/24: asking employees to report union activity
- 4/6: retaliatory discharge
- 4/27: impression of surveillance
- 4/29: promise of benefits, coercive statements, interrogation
- 5/1: surveillance and impression of surveillance
- 5/5: threat, retaliatory discipline
- 5/8: retaliatory promulgation of new work rule with references to reporting and prosecuting violations
- 5/25: confiscation of union flyers, interrogation
- 5/29: grant of benefits
- 1/24/16: stricter enforcement of break schedules
- 1/26-2/11: closer supervision and retaliatory discipline of union supporter
- 2/1: retaliatory discipline

I. THE BOARD'S FINDINGS OF FACT

A. Background: Shamrock's Operations, Structure, and History of Labor Violations

Shamrock is a wholesale food distributor with a warehouse and corporate headquarters in Phoenix. About 280 employees work in the Phoenix warehouse,

which is Shamrock's largest distribution center. Warehouse employees work in a variety of roles, including receivers, forklift operators, pickers, runners, and loaders. (JA 1711; JA 170-74.)¹

Kent McClelland is Shamrock's president and CEO and his father, Norman, is the chair of the board. Below the McClellands in the corporate hierarchy is vice president for operations Mark Engdahl, followed by the operations manager.

Warehouse manager Ivan Vaivao oversees the Phoenix facility and reports to the operations manager. First-level managers report to Vaivao, and supervisors report to the managers. (JA 1712; JA 168-70, 283, 369, 462, 529.) The warehouse also has floor captains, who are first-line individuals responsible for ensuring that operations in their area are not falling behind and that trucks are loaded and leave on time. (JA 1719; JA 521-28.)

Shamrock maintains a progressive disciplinary policy. The first step is a counseling, followed by verbal warning, written warning, final warning/suspension, and termination. (JA 1732 n.73; JA 1113.)

In 1998, the International Brotherhood of Teamsters attempted to organize warehouse employees and drivers at the Phoenix facility. Shamrock committed numerous unfair labor practices in response, including suspending and discharging

¹ Citations preceding a semicolon are to the Board's findings; cites following a semicolon are to supporting evidence in the record.

a union supporter, coercively interrogating an employee, surveilling employees' union activity, and soliciting an employee to report co-workers' union activity to management. *Shamrock Foods Co.*, 337 NLRB 915 (2002), *enforced*, 346 F.3d 1130 (D.C. Cir. 2003). The organizing campaign ultimately was unsuccessful. (JA 1711; JA 532-33.)

B. A New Organizing Campaign Begins

In November 2014, forklift operator Steve Phipps met with representatives of Bakery, Confectionary, Tobacco Workers and Grain Millers Local 232 about organizing the warehouse. Throughout December and January, Phipps held one-on-one meetings with fellow employees, collected union-authorization cards, and recruited for an organizing committee. Towards the end of January, Phipps and Local 232 organizers began holding small group meetings. Forklift operator Mario Lerma joined the organizing committee that month and began collecting authorization cards and attending union meetings. (JA 1712; JA 530-34, 821-25.)

Although Phipps attempted to keep the campaign covert at first, word of organizing activity spread through the warehouse. Floor captain Zack White approached Phipps on January 25 and asked if Phipps knew anything about organizing in the warehouse, for example, and said he had heard rumors that a union was close. (JA 1712, 1719; JA 532-35, 649.)

Separate from the Local 232 campaign in Phoenix, the Teamsters launched an organizing drive at Shamrock's warehouse in southern California. (JA 1712; JA 900.)

C. January 2015: Shamrock Officials Hold Meetings To Discuss Unions and Solicit Employee Concerns, Question Employees about Their Union Views, and Show Up Uninvited to a Union Meeting

On January 28, vice president Engdahl conducted a town-hall meeting with all warehouse employees to discuss unions. (JA 1712; JA 189-90, 1179-1212.) He told the gathered employees that he felt "a union wouldn't be right here at Shamrock." Instead, he assured employees that "the big advantage that Shamrock has is we talk directly with you, you talk with us, you bring up problems, we try to fix it." (JA 1712; JA 1183-84.) Engdahl went on to discuss what could happen "if, God forbid, a union got voted in here" (JA 1195):

[W]hat happens when a company is represented and you go in to collective bargaining? The slate is wiped clean on wages, the slate is wiped clean on benefits, the slate is wiped clean on working conditions. It's all up to collective bargaining at that point in time. Right? So sometimes a company may say, "You know what, I think we're paying too much and our benefits are too rich" And guess what? At the other end of that pipeline, when you come out with a contract, all of a sudden the people have got less wages, they took away healthcare benefits, this did this, they did that. It actually saves companies money because there's no guarantees when you go into collective bargaining that you're going to come out with anything better than you got. In fact, you could come out with something worse than that you got Everything is up for grabs.

(JA 1712; JA 1188.)

After he spoke, Engdahl opened the floor for questions. Loader Thomas Wallace asked why some of Shamrock's competitors were unionized. Engdahl responded that, in his opinion, unionized food-distribution companies "kind of use that to keep the wages down because everybody's paid the same then." (JA 1712; JA 686, 1192-93.)

After the meeting, Wallace returned to his loading area on the dock and began to work. About a half hour later, his immediate supervisor Jake Myers approached him and asked what he thought about unions. Wallace responded that he had to do some research and had heard that union employees received better benefits. No other employees were nearby during the interaction. (JA 1720-21; JA 683-86.)

Following Engdahl's address, human-resources manager Natalie Wright held a roundtable meeting with a group of 15-20 warehouse employees. The purpose of the meeting was to solicit employees' satisfactions, dissatisfactions, questions, and concerns, and to see if anything could be done to fix those concerns. (JA 1713-14; JA 419-20, 423, 539-40, 1361-1443.) Wright told employees that they could "let me know what's going on where I can help" and give "feedback on what's going on, what you like, what you don't like." (JA 1714; JA 1368-69.) Among the issues that employees raised during the meeting were wages, staffing levels, work levels and hours, and management non-responsiveness. (JA 1714; JA

1375-76, 1383, 1394-95, 1402-04, 1419-20.) Wright acknowledged that “it’s also been a while since we’ve had our round table meetings,” and told them that Shamrock was “doing it a little bit differently” now and was going to “try and do this a little bit more often.” (JA 1714; JA 1368.) The last time Wright had held a roundtable with warehouse employees was October 2013. (JA 1713; JA 420.)

That evening, Phipps and Local 232 representatives held an organizing meeting at a Denny’s restaurant. They had invited only employees who already had signed cards or joined the organizing committee or that they knew supported the union. Phipps had told employees not to invite any captains. About 5 or 6 other employees attended, including Lerma and Wallace. Leaving the restaurant afterwards, Phipps saw floor captain Art Manning in the parking lot talking to a warehouse employee who had been inside at the meeting. The two men were discussing the union and Shamrock’s open-door policy. The employee asked Manning if he was in the union, and Manning responded “hell, no.” (JA 1721; JA 553-55, 632-33, 687, 871, 1007.)

D. February: Shamrock’s “Union Education” Meetings Continue

Warehouse manager Vaivao held a dozen or more meetings in February to follow up on Wright’s roundtables and further discuss the issues that employees had raised. (JA 1714-15; JA 192-93, 936-37.) Vaivao also introduced some of the

meetings as “union education” or “union prevention” sessions. (JA 1715; JA 1217, 1256.) The goal was to meet with every warehouse employee. (JA 195.)

At a February 5 meeting, Vaivao asked the group for their main concerns and the big issues that were bothering them. He explained that he wanted to “get a feel of what’s—what are some of the issues that’s out there, some of the obstacles that Natalie and I can remove or ... make sure those are removed” and that “we want to commit to removing the majority of the obstacles, most of the obstacles, as much as we can.” (JA 1714; JA 195, 1137-40.) In response to complaints about scheduling, Vaivao stated that he was “definitely going to look into it” and that “we’ll make adjustments to it.” (JA 1715; JA 1151-52.) Vaivao, Wright, and the employees also discussed wages, pensions, and health insurance. At the end of the half-hour meeting, Vaivao reiterated that he and Wright were going to “make sure that these concerns are heard ... and in some cases bring it down, a solution to resolve it.” (JA 1714-15; JA 1152-63, 1174.)

At another small-group meeting on February 24, Vaivao discussed reports he had received about union supporters talking to other employees. He told employees who were not interested in the union campaign to “[t]ell them no, you won’t be part of it. Raise your hand, say, hey, man, this guy is bugging me.” (JA 1715; JA 1220.)

E. March-April: Shamrock Discharges Wallace

Shamrock held its annual all-employee state-of-the-company meeting in the warehouse auditorium on March 31. Vice president for human resources Bob Beake conducted the meeting, at which he informed employees about Shamrock's financial situation, including that it had made \$300 million in sales from one location. He also discussed employee benefits and noted that Shamrock paid half of employees' deductible on their health insurance. (JA 1729; JA 1288-1315.) Beake introduced human-resources vice president Vincent Daniels and then told employees that "we're going to close" with a recorded video message from chairman Norman McClelland. (JA 1729; JA 1314.)

After the video, Beake told employees, "that closes out what we wanted to convey to you today." He then opened the floor, stating that there was "a little bit of time" for questions. (JA 1729; JA 1315.) Wallace raised his hand and asked, "[i]s there any way we can get our old insurance back? You know, 300 million dollars—I mean it's through the roof. Is that even being considered or anything?" Other employees applauded Wallace's question and some laughed. After Beake answered that Shamrock could not afford the old plan, Wallace raised his hand again and followed up by asking, "[i]s there any way you could contribute the full 3,000 or the full contribution, because some companies do that. I was just

wondering.” Beake responded that they had no plans to do so and moved on to the next questioner. (JA 1729-30; JA 572-73, 692-93, 1317-18.)

Wallace left the auditorium through the rear doors near where he was sitting and returned to his work station. He saw his supervisor, who had left halfway through the meeting. The two men agreed that they had left because the room was hot and stuffy. The meeting continued about another five minutes after Wallace left. (JA 1730; JA 227, 693-95.)

Wallace worked his normal schedule for the next five days. After his lunch break on April 6, Wallace’s manager told him to grab his stuff and brought him to the human-resources office. There, Wallace met with Vaivao and human-resources manager James Allen. Vaivao told him that he was discharged and that senior staff was offended by his question and thought he was rude and disrespectful. Neither Vaivo nor Allen gave any other reasons for the discharge. Vaivao also conveyed that the decision came from the McClellands that if Wallace was not happy with Shamrock’s benefits then he could find another company with better ones. (JA 1730; JA 695-701.)

Allen presented Wallace with a separation agreement, which provided for the payment of additional benefits if he signed. (JA 1730; JA 699, 1447-54.)

Among other provisions, the agreement specified as follows:

[Y]ou will not, directly or indirectly, use or disclose, or allow the use or disclosure, to any ... entity any confidential, or proprietary

information concerning any of the Released Parties All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate information and information regarding customers, customer lists, costs, prices, earnings, systems, operating procedures, prospective and executed contracts and other business arrangements and sources of supply are presumed to be confidential information

You may not use/disclose any of the Company's Confidential Information for any reason following your termination.

You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties.

(JA 1732-33; JA 1450-51.) Wallace declined to accept the agreement. (JA 1730; JA 699.)

F. April: Phipps Publicly Announces the Campaign, and Shamrock Promises No Layoffs, Tells Employees That Union Organizing "Will Hurt All of You," and Continues the Questioning

On the afternoons of April 26 and 27, Phipps announced in the breakroom that he was a member of the organizing committee and that he was available during lunch and breaks to discuss unions and the campaign. Vaivao and other managers were present in the breakroom during the April 27 announcement. Floor captain Manning approached Phipps later that day and asked if what Phipps had said was true. Phipps responded that they could not talk about it during work time, and Manning told him to "just watch yourself, because they watching both of us, so watch your back." (JA 1721-22; JA 580-82.)

Vice president Engdahl and other high-ranking management officials held another small-group meeting two days later. Engdahl circulated a written document that he described as a follow-up to earlier discussions about layoffs in the February meetings. Shamrock had laid off a number of employees the previous summer, and Engdahl told employees that it had not handled things correctly. He stated that “we’re committed to the point where we put it in writing now, okay, that we will not do these things. And you can take that to the bank. So, we owed you that feedback, now we’ve given it to you. It’s in writing.” It was the first written communication to employees on the subject of layoffs. (JA 1716-17; JA 261-63, 583, 796, 1328.)

Immediately after handing out the paper on layoffs, Engdahl told the employees that he wanted to “have a little discussion with you on what’s going on here with this union organizing stuff.” He told them that “[i]t will hurt Shamrock. It will hurt all of you. It will hurt everybody in the future, okay.” (JA 1717; JA 1328.) Later in the meeting, Engdahl urged the employees:

Remember, the company pays wages, benefits, sets work conditions—not the union. The only thing the union can do is come to collective bargaining and ask. They can ask for things. The company doesn’t have to agree to anything, nothing—other than what they want to. It’s bargaining. Bargaining can go on forever. It can never end. It’s collective bargaining. All you have to do is bargain in good faith. All right?

(JA 1717; JA 1333.)

On break after the meeting with Engdahl, Phipps and fellow warehouse employee Nile Vose were discussing the union campaign. Safety manager Joe Remblance was headed towards his office when he turned and walked the 60-70 yards over to Phipps and Vose and asked whether they were on break. When Phipps and Vose responded that they were, Remblance asked what they were talking about. They told him they were talking about work. Remblance attempted to make small talk, then started to walk away. He turned back to Phipps and asked how much time was left on his break. Phipps said he had a few more minutes, and Remblance told him to be sure to get back to work when the break was over. Remblance had never before spoken to Phipps about breaks and was outside of Phipps's supervisory chain. (JA 1722; JA 587-89, 656.)

G. Early May: Shamrock Officials Search Lerma's Belongings for Union Material and Counsel Him That He Might "Get in Some Serious Trouble"; CEO McClelland Sends an All-Employee Letter

Forklift operator Lerma was taking his break in the receiving dock office on May 1 when he saw his supervisor David Garcia through the office window. Garcia was standing by Lerma's forklift and leafing through the papers on Lerma's clipboard, which included Lerma's pay sheets, notes, and weekly hour calculations. Lerma uses the same forklift every day, which has a unique identification number. There is also a list of assigned forklifts. (JA 1723; JA 843-44, 873-75.)

Lerma asked Garcia what he was doing, and Garcia responded that he was looking for the schedule and then walked away. A copy of the day's schedule, which Garcia had distributed to the forklift operators just before his encounter with Lerma, rested in plain view in a cubbyhole on the forklift. The schedule also was posted on the dock and Garcia had access to it on his computer. Garcia had never before asked to see Lerma's schedule in the years that they had worked together. (JA 1723; JA 844-47, 986-87, 1001.)

Later that day, Lerma approached Garcia and again asked what he had been doing with the clipboard, requesting that Garcia be straight with him. Garcia responded that he was looking for union-authorization cards and had heard that Lerma was distributing them. Lerma was a member of the organizing committee who had distributed such cards to his co-workers, though he had not done so that day. (JA 1723; JA 821, 850-51.)

Four days later, Engdahl and Vaivao met with Lerma in Engdahl's office for a "counseling." (JA 1723, 29; JA 271, 279.) Engdahl explained that he had heard from other employees "that there's some hecklings going on, some insulting going on, and some potential slow down on certain folks who are not sharing a similar point of view" and that Lerma "could get in some serious trouble for that." (JA 1723-24; JA 1345.) He mentioned that he knew Lerma was a "local voice out there" who expressed his opinions to others. Engdahl informed him that "[i]t's

okay to express your opinion, ... but the part that wouldn't be okay is if it was done in such a way where somebody could perceive it as intimidation, or something like that" or where "somehow they are being—you know, they—they feel threatened or intimidated." (JA 1724; JA 1348-50.) Vaivao chimed in to tell Lerma that, "[i]f that's the situation, ... you would find yourself in some deeper troubles." (JA 1724; JA 1350.) Near the end of the meeting, Engdahl expressed that "[w]e can't afford to lose anybody" and "I don't want to have to bring in new people to this place" because "[w]e've got a ton of investment in you." (JA 1724; JA 1352-53.) Lerma told the men that, to protect himself, "it's just better for me just to come to work, stay quiet; don't say shit." The meeting lasted about fifteen minutes. (JA 1724; JA 857, 1351.)

The following Friday, CEO McClelland mailed a letter to all warehouse employees at their homes. He wrote that "[i]t has come to my attention that some associates have recently been subjected to threatening, violent, or unlawfully coercive behavior by other associates." As a result, he stated that Shamrock "will not allow associates to behave in a manner which violates the law through threats of violence, or unlawful bullying." The letter went on to instruct employees that, "if you have been the victim of such behavior, in any way, shape, or form, however minor, please promptly report it." Shamrock would investigate any such complaints and "refer the matter to law enforcement for prosecution to the fullest

extent of the law if that is the right course of action.” (JA 1725-26; JA 589-90, 1359.) McClelland does not regularly send such letters and did not remember the last time he had done so. (JA 1726; JA 389-91, 590.)

H. Late May: Shamrock Confiscates Union Material and Raises Wages

Phipps began distributing union flyers at the warehouse in late May. He was joined in that effort by fellow forklift operator Michael Meraz. On May 25, Phipps handed out flyers to employees in the upstairs break room, including two sanitation workers seated at a table by the door. The flyers were in both English and Spanish, and Phipps placed the Spanish side up on the sanitation workers’ table. Sanitation supervisor Karen Garzon went over to the table and picked up the flyers. When Phipps told her she could not do that, Garzon asked the seated employees “you guys don’t want these, do you?” They shook their heads, and Garzon took the flyers and threw them in the trash. (JA 1727, 2780; JA 590-94, 662, 913-14, 2265.)

At the end of May, Shamrock granted a series of wage increases covering four categories of warehouse employees. Will-call pickers received an additional \$2/hour and throwers an additional \$1/hour, both retroactive to the beginning of the pay period. Return dock employees were to get a \$2/hour raise, and sanitation employees received an extra \$1/hour. Such increases were rare. Raises at

Shamrock are normally in the 3-5 percent range, and retroactive raises are generally unheard of. (JA 1728; JA 595-97, 818.)

I. Summer-Fall 2015: Phipps and Meraz Distribute Union Flyers, Meet with Fellow Employees about the Organizing Campaign, and Participate in Board Proceedings

In June, Local 232 filed charges with the Board alleging that Shamrock had violated the Act on multiple occasions during the first five months of the year in response to the organizing campaign. The Board issued a complaint and, in September, filed for a preliminary injunction under Section 10(j) of the Act, 29 U.S.C. §160(j), in federal district court in Arizona. (JA 1711, 2780; JA 1023, 1025-43, 2532.)

Phipps and Meraz continued handing out union flyers to their fellow warehouse employees during September and December. Meraz distributed the flyers in the lunchroom and kept a stack on his forklift. Phipps met with employees during breaks and took his breaks at different times so that he could meet with different groups of employees. The December flyer mentioned Shamrock's new operations manager, Tim O'Meara, and stated that his arrival would not change Shamrock's culture of managerial abuse. (JA 2780-81; JA 2272, 2277-78, 2423-26, 2432, 2669.)

Also in September, Phipps testified at a Board hearing adjudicating the unfair-labor-practice charges against Shamrock. Meraz attended the hearing. He

also gave a statement to the Board, which Vaivao knew about. Meraz reported back to fellow employees and answered questions regarding the status of the Board proceedings. (JA 2780; JA 2265-67, 2271-72, 2460, 2564-65, 2573-74.)

J. January-February 2016: Shamrock Begins More Strictly Enforcing Its Break Policy and Supervises and Disciplines Phipps Regarding His Breaks

Warehouse employees receive a half-hour lunch and two fifteen-minute breaks. Shamrock long had maintained designated break times, but employees could shift when they took breaks so long as it did not interfere with operations or exceed the allotted time. Forklift operator Matt Sheffer alternated his breaks and never received discipline for doing so, for example. Phipps's experience was similar. Break times also could shift from day to day in response to operational needs. (JA 2780-81; JA 1847, 1914, 2033-34, 2409-11, 2425, 2453-54, 2477-78, 2588-30.)

On January 24, supervisor Johnny Banda met with a group of employees (including Phipps) and informed them that breaks and lunch needed to be taken at the designated times. Phipps stated that the instruction was a change in enforcement policy, and Banda agreed. Sheffer received similar instructions around that time. Shamrock also began posting lunch and break times on the daily schedule. (JA 2780-81; JA 1914, 2410-11, 2436.)

Also on January 24, Shamrock split the forklift operators into inbound/receiving and outbound/shipping crews. They had been consolidated since February 2015, but had been two separate crews prior to then. Inbound and outbound crews break at different times. Phipps is on the inbound crew. Shamrock had designated break times both before and during the period when all forklift operations were consolidated. (JA 2779-81; JA 1978-80, 1986-88, 2204, 2421.)

On January 26, supervisor Richard Gomez saw Phipps and another employee in the breakroom, where they had taken lunch at 11:15, rather than 11:00, due to workload. Gomez told them they needed to stick to assigned break times. He later reported the incident in an email to all inbound supervisors, the inbound manager, an outbound manager, and warehouse manager Vaivao. (JA 2781; JA 1852-54, 2437-38, 2468, 2662.)

Starting February 9, Phipps began circulating a flyer during break times stating “We won” and “Shamrock loses!” because the federal district court had granted the Board’s request for a Section 10(j) injunction against Shamrock. He took his breaks at different times on different days so he could reach a wider audience. (JA 2780; JA 2433-34, 2660.)

Gomez and manager Brian Nicklin approached Phipps shortly after the scheduled break on February 11 and asked him why he was not on break. Phipps

told them that he took his breaks at times when he could meet with other employees on their breaks to discuss the union. He said that Shamrock could not change its enforcement policy during an organizing campaign. (JA 2781-82; JA 2218-19, 2434-36, 2723.) Nicklin and Gomez reported this conversation to Vaivao and O'Meara, and O'Meara told them to send Phipps to him. This was the first time that O'Meara and Vaivao had met with an employee in O'Meara's office. (JA 2782; JA 1919, 2164-66, 2658.) When Phipps arrived, O'Meara asked why he was not following the posted break times. O'Meara told Phipps that Shamrock had a schedule and "if people don't follow it then we have to counsel them" and that "we're counseling you on the schedule." He denied that the meeting could lead to discipline, but said it was "like a counseling session." Phipps told them that Shamrock was changing its enforcement of its break policy in the middle of the organizing campaign. O'Meara denied doing so and reiterated that Phipps should follow the scheduled break times. (JA 2782; JA 2704-10.)

That same day, O'Meara composed a letter to all employees in which he wrote that "it's pretty remarkable that after more than a year, the union apparently still doesn't have cards from enough people to get an election. In my opinion, that's a pretty strong statement." O'Meara sent the letter to employees' homes. (JA 2782; JA 2454, 2711.)

K. February 2016: Shamrock Disciplines Meraz

When moving a pallet, forklift operators scan the pallet and the location where they place it, recording the location in Shamrock's computer system. In the early evening of January 13, Meraz moved a pallet containing 30 cases of buttermilk ranch dressing. He placed the pallet in aisle 20 of the warehouse's cooler section, which is a high-volume area. Two days later, the crew seeking to put the ranch-dressing pallet on a truck for shipping could not find it in the location listed in the computer. Vaivao learned about the missing pallet the next morning and asked Nicklin and Gomez to investigate. (JA 2782-83; JA 1867-68, 1875-76, 1903, 2143, 2385-86, 2650-57.)

Gomez reviewed the scan records and learned that Meraz's move was the last one recorded in the system for the pallet. Gomez looked for it himself, and found the pallet in the next bay over from where Meraz had scanned it, approximately nine feet away. He reported to Vaivao, who instructed him to prepare a disciplinary warning for Meraz. Nicklin reviewed video footage that showed Meraz putting the pallet away, but the footage was short and did not show where he placed it. (JA 2783; JA 1877-79, 2122-25, 2244-45, 2284-86.)

Gomez and fellow supervisor Garcia met with Meraz on January 21 and issued him a verbal warning. The disciplinary form stated that Meraz had "failed to follow putaway procedures" because he scanned the pallet to one location but

physically placed it in another. Meraz refused to sign and told them he would speak to human-resources business partner Daniel Santamaria. (JA 2783-84; JA 2094-95, 2133, 2648.)

Meraz headed immediately for Santamaria's office to discuss the discipline. He denied misplacing the pallet. Meraz told Santamaria that the scanners had been malfunctioning, frequently kicking forklift operators off the system when they tried to scan a pallet or location. Shamrock knew this was an issue and had attempted to repair the system multiple times over the past year. Meraz mentioned that another forklift operator could have moved the pallet after him and been unable to scan the new location into the system because the scanner kicked him out. Santamaria confirmed with another employee nearby that the scanners had been malfunctioning in that area of the warehouse. Santamaria told Meraz that he would get more information and investigate further. He said he would speak with inventory control, who are the personnel called in to find pallets when they are reported missing. (JA 2784; JA 1812, 1819, 1823-27, 2105-06, 2287-90, 2674, 2676-79, 2684-87.)

Santamaria did not contact inventory control. He also did not consider the possibility that another employee could have moved the pallet after Meraz or that a scanner had malfunctioned. (JA 2784; JA 1834-37.)

Santamaria and Vaivao met with Meraz on February 1. Meraz told them that he had spoken to the inventory control clerk who had looked for the pallet on the night it was missing and that the clerk told Meraz the pallet had not been in the location where it was ultimately found. Santamaria and Vaivao confirmed that Meraz would receive a verbal warning, and he signed the disciplinary form. (JA 2784; JA 1841-42, 2378-79, 2689, 2692.)

II. PROCEDURAL HISTORY

Following unfair-labor-practice charges filed by Local 232, the Board's General Counsel issued complaints against Shamrock in Case Nos. 28-CA-150157 and 28-CA-169970. Both cases were heard by administrative law judges. The judge in case 28-CA-150157 found multiple violations as alleged and dismissed other charges that are not at issue in this appeal. The judge in case 28-CA-169970 found violations as alleged.²

III. THE BOARD'S CONCLUSIONS AND ORDERS

In separate Decisions and Orders issued on June 22, 2018, the Board (Members Pearce, McFerran, and Kaplan) affirmed the judges' findings in case 28-

² In a related action, the United States District Court for the District of Arizona granted the Board's petition for an injunction against Shamrock, finding that the Board's General Counsel had a likelihood of success on the alleged violations. *Overstreet v. Shamrock Foods Co.*, 2016 WL 8505125 (D. Ariz. Feb. 1, 2016), *affirmed*, 679 F. App'x 561 (9th Cir. 2017).

CA-150157 as to 23 violations and in 28-CA-169970 as to an additional 4 violations. Specifically, the Board found that Shamrock violated Section 8(a)(1) of the Act by making threats and other coercive statements, soliciting grievances, promising and granting benefits, coercively interrogating employees about their union views, surveilling and creating the impression of surveillance of employees' union activity, telling employees to report their co-workers' union activity, promulgating a new rule in response to union activity and telling employees to report violations for prosecution, confiscating union flyers, discharging Wallace for engaging in protected activity, and offering Wallace a separation agreement containing an unlawful waiver. The Board further found that Shamrock violated Section 8(a)(3) of the Act by disciplining Lerma, Phipps, and Meraz for engaging in union activity and by more strictly enforcing its break policy and more closely supervising Phipps in response to union activity.

The Board's Orders require Shamrock to cease and desist from the violations found and from interfering with employee rights in any like or related manner. Affirmatively, Shamrock must make whole and offer to reinstate Wallace, remove references to the discipline of Wallace, Lerma, Phipps, and Meraz from its files, rescind the unlawful rule and separation-agreement provisions, and post and mail a remedial notice. Finally, the notice in case 28-CA-150157 must be read aloud to

employees by Engdahl, Kent McClelland, or a Board agent at a meeting designated for that purpose.

STANDARD OF REVIEW

The Board’s factual findings “shall be conclusive” if they are “supported by substantial evidence on the record considered as a whole.” 29 U.S.C. § 160(e); *Inova Health System v. NLRB*, 795 F.3d 68, 80 (D.C. Cir. 2015). Under that standard, the Court will reject a finding “only when the record is so compelling that no reasonable factfinder could fail to find to the contrary.” *Inova Health*, 795 F.3d at 80 (internal quotations omitted). The Court also “applies the familiar substantial evidence test to the Board’s ... application of law to the facts” and “accords due deference to the reasonable inferences that the Board draws from the evidence.” *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). It is “even more deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.” *Inova Health*, 795 F.3d at 80 (internal quotations omitted). The Court will not reverse the Board’s credibility determinations unless they are “hopelessly incredible, self-contradictory, or patently unsupportable.” *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1134 (D.C. Cir. 2003) (internal quotations omitted).

The Court reviews the decision whether to impose evidentiary sanctions for abuse of discretion. *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 834 (D.C. Cir.

1998). The Board’s choice of remedy is likewise reviewed for abuse of discretion, *Hospital of Barstow, Inc. v. NLRB*, 897 F.3d 280, 290 (D.C. Cir. 2018), and the Court will “defer to the Board on remedial matters unless its order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act,” *Banner Health System v. NLRB*, 851 F.3d 35, 43 (D.C. Cir. 2017) (internal quotations omitted).

SUMMARY OF ARGUMENT

Shamrock responded to an organizing drive in its Phoenix facility with a series of actions to restrain, interfere with, or coerce its warehouse employees in the exercise of their rights under the Act. Those unfair labor practices ranged from Shamrock’s vice president threatening employees that organizing “will hurt all of you” to granting pay raises in order to discourage unionization to discharging Wallace after he questioned management about health benefits. Shamrock followed up with acts of retaliation against numerous employees, including lead organizer Phipps, for their union support and activity. Substantial evidence supports the Board’s findings, many of which involved credibility determinations, regarding Shamrock’s campaign of over two dozen violations. The findings also are in keeping with Court and Board precedent, both because the law in each of those areas is settled and the facts of this case reflect closely the facts in other cases finding such violations.

On appeal, Shamrock attempts to relitigate almost every Board finding. Many of its arguments rely on incomplete or discredited versions of the facts, however. They also present the violations in isolation, ignoring the context of coercion and retaliation in which they occurred. Finally, Shamrock has not shown an abuse of the Board's broad discretion in the areas of evidentiary sanctions and remedies. Sanctions related to supervisory status and pay increases were warranted for Shamrock's wholesale non-compliance with specified subpoena requests and a notice-reading remedy was appropriate given the sheer number of violations and the personal involvement of upper management in their commission.

ARGUMENT

Following the Court's finding that Shamrock violated the Act during its employees' previous attempt to organize, Shamrock responded to their subsequent union organizing campaign with a similar host of violations. Over the course of a year, Shamrock time and again engaged in conduct that Board and Court precedent has established as unlawful. Shamrock now seeks to relitigate nearly every issue from the Board's decisions, but its arguments ignore context and are premised largely on challenges to factual findings or credibility determinations.

I. The Court Should Summarily Enforce the Uncontested Portions of the Board's Orders

"The Board is entitled to summary enforcement of the uncontested portions of its order." *Flying Food Group, Inc. v. NLRB*, 471 F.3d 178, 181 (D.C. Cir. 2006). On appeal, Shamrock does not challenge the Board's findings that it violated the Act by telling employees in a February 24 "union education" meeting to report union activity by their co-workers, threatening forklift operator and union supporter Mario Lerma in a May 5 meeting with upper-level management that he "could get in some serious trouble," and confiscating union flyers in the breakroom on May 25. Accordingly, the Board is entitled to summary enforcement of the portions of its order remedying those three violations.

II. Shamrock Responded to the Warehouse Employees’ Organizing Campaign with a Sustained Barrage of Unfair Labor Practices

Substantial evidence supports the Board’s findings that, along with the uncontested violations discussed above, Shamrock committed an additional two dozen unfair labor practices in response to the warehouse employees’ organizing campaign.

A. Shamrock Committed Numerous Acts of Interference, Restraint, and Coercion Against Its Employees During the Organizing Campaign

The Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C.

§ 157. An employer violates Section 8(a)(1) of the Act by “interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of” those rights. 29 U.S.C.

§ 158(a)(1). That is an objective standard; what matters for a Section 8(a)(1) violation is an employer statement’s or action’s “tendency to coerce, not ... its actual impact” on any particular employee. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 932 (D.C. Cir. 1991).

1. Vice president Engdahl threatened employees with reprisals and intransigence if they organize

The Board’s finding that vice president Engdahl repeatedly threatened employees during his January 28 and April 29 meetings finds support in the record and caselaw. An employer statement constitutes an unlawful threat if “considering

the totality of the circumstances, the statement has a reasonable tendency to coerce or to interfere with” employees’ rights under the Act. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Otherwise lawful statements can violate the Act “if uttered in a context of other unfair labor practices,” for example. *Reno Hilton*, 319 NLRB 1154, 1155 (1995); *accord Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005) (finding that “other unfair labor practices ... len[t] additional coercive meaning to these managers’ statements” (internal quotations omitted)). Statements by high-ranking officials also are more likely to have a coercive impact. *See, e.g., St. Luke’s Hospital*, 258 NLRB 321, 322 (1981) (finding statements coercive where made by “the departmental head ... during a conversation conducted at her behest”). When evaluating Board findings of threats, the Court “recognize[s] the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

The Board long has recognized that comments like Engdahl’s “the slate is wiped clean” on wages, benefits, and working conditions during collective bargaining (*supra* p. 5) are “dangerous phrases” that often “effectively threaten employees with the loss of existing benefits” as a result of unionizing. *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003) (internal quotations omitted),

enforced, 400 F.3d 920 (D.C. Cir. 2005); *see also NLRB v. Marsh Supermarkets, Inc.*, 327 F.2d 109, 111 (7th Cir. 1963) (finding statement that “if a union got in ... everything would be wiped clean” was unlawful threat); *Centre Engineering, Inc.*, 246 NLRB 632, 634-35 (1979) (“the slate would be wiped clean”). The Court, too, has found that statements “that bargaining would start from zero and benefits would be lost in the event of unionization amount to unlawful threats.” *Federated Logistics*, 400 F.3d at 925. The legality of such statements is context specific, though, and comments that wages or benefits could change as a result of bargaining have been found lawful where the employer made clear that their ultimate status would be the result of good-faith bargaining and that a downturn would not necessarily result. *Federated Logistics*, 340 NLRB at 255; *see also Pier Sixty, LLC*, 362 NLRB No. 59 (2015) (employer lawfully told employees they “could end up with better or worse wages and benefits”); *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 830, 832-33 (1994) (employer explained that “everything would be reviewed, not eliminated”).

Here, Engdahl’s singular focus on decreases in wages and benefits at other unionized employers reasonably suggested to warehouse employees that the same thing would happen at Shamrock. Engdahl provided no counterexamples to temper his dire suggestions, and no assurance of good-faith bargaining or acknowledgment that wages and benefits also could go up or remain steady.

Shamrock offers only the counterintuitive claim (Br. 31) that Engdahl acknowledged employees could gain from collective bargaining by telling them that they might *not* gain (“there’s no guarantees ... that you’re going to come out with anything better than you got” (JA 1188)). That back-handed comment was too roundabout to constitute the type of qualification needed to render the statement lawful. Moreover, the context of a vice president speaking at a formal all-employee meeting amplified the statement’s coercive effect.

Engdahl’s statement at the April 29 meeting (*supra* p. 12) that organizing with a union “will hurt all of you ... [i]t will hurt everybody” (JA 1328) was likewise coercive. Importantly, the comment was made in the context of numerous other unfair labor practices, including other coercive statements by Engdahl himself. Indeed, Engdahl’s statements play off of each other, as the downturn in wages and benefits suggested at the January 28 meeting certainly would “hurt everybody.” And again, courts and the Board frequently have found similar statements unlawful. *See, e.g., Homer D. Bronson Co.*, 349 NLRB 512, 540-41 (2007) (unionizing is “just going to hurt”), *enforced*, 273 F. App’x 32 (2d Cir. 2008); *Reno Hilton*, 319 NLRB at 1155 (union “could hurt you seriously”).

Against that backdrop, Engdahl’s further comments at the same meeting that Shamrock “doesn’t have to agree to anything” and that “[b]argaining can go on forever ... [i]t can never end” (JA 1333) constituted a coercive threat that union

organizing would be futile. *See, e.g., Auto Nation, Inc.*, 360 NLRB 1298, 1333 (2014) (employer unlawfully expressed futility by suggesting it “would not agree to anything in the contract negotiations that it did not want to; and that any such negotiations would take many, many years”), *enforced*, 801 F.3d 767 (7th Cir. 2015). Although neither party is required to accept any particular proposal, comments that “in no way indicate that bargaining was a ‘give and take’ process” do “not accurately reflect the obligations and possibilities of the bargaining process.” *Federated Logistics*, 340 NLRB at 256. And they take on a coercive nature when uttered in the face of other unfair labor practices, such as Engdahl’s previous comments. Rather than a general description of how bargaining can work in the abstract, as Shamrock suggests (Br. 31-32), Engdahl’s statements could be reasonably understood as a prediction of Shamrock intransigence; as the Board observed, employees would view them “not as a mere hypothetical ..., but as the handwriting on the wall.” (JA 1718.)

Given the circumstances, Shamrock can find no refuge (Br. 30-32) in Section 8(c) of the Act, which provides that “[t]he expressing of any views, argument, or opinion ... shall not constitute or be evidence of an unfair labor practice ... if such expression contains no threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). By its terms, Section 8(c) does not cover “threat[s] of reprisal,” which is precisely what the Board found Engdahl’s statements to be.

Although Engdahl described the comments as his “opinion,” statements are not protected opinion just because the employer says so.

Finally, the Board did not abuse its discretion in denying Shamrock’s request for evidentiary sanctions against Local 232 for not producing recordings of other meetings. (Br. 22-23, 31 n.13.) As the Board explained (JA 1705 n.1), no sanction was warranted for the simple reason that Local 232 did not have any additional recordings. In response to Shamrock’s subpoena, Local 232 informed it that “neither [Local 232] nor its counsel have any responsive records ... not already produced.” (JA 1566-67); *cf. North Hills Office Services, Inc.*, 344 NLRB 1083, 1084 n.13 (2005) (declining to impose sanctions where documents did not exist or otherwise were not in party’s control).

2. Shamrock supervisors coercively interrogated employees about their union views

As the Court explained the last time it found that Shamrock unlawfully interrogated its employees, “the questioning of an employee about union activities or sympathies constitutes unlawful interrogation if, under all the circumstances, it reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Shamrock Foods Co. v. NLRB*, 346 F.3d 1130, 1137 (D.C. Cir. 2003) (internal quotations omitted). Relevant factors include the identity of the questioner, the information sought, the place and method of the questioning, the truthfulness of the reply, any history of employer hostility towards union activity, and whether the

questioner gave assurances against reprisal based on the answer. *Id.*; *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

The Board’s three interrogation findings are well supported in the record. Less than an hour after upper-level management’s anti-union meeting on January 28, Thomas Wallace’s direct supervisor Jake Myers asked him point-blank and one-on-one what he thought about unions (*supra* p. 6). *Cf. Winchester Spinning Corp. v. NLRB*, 402 F.2d 299, 302 (4th Cir. 1968) (asking “what do you think about the Union?” constituted unlawful interrogation). Questioning by a direct supervisor is “that much more threatening” given his or her influence on job security and day-to-day work experience, regardless of whether the supervisor is otherwise a low-level official. *Intertape Polymer Corp.*, 360 NLRB 957, 957-58 (2014), *enforced in relevant part*, 801 F.3d 224 (4th Cir. 2015); *see also Teamsters Local 171 v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988) (explaining coercive impact of interrogation by first-line supervisor). Even if Wallace gave an “honest response” (Br. 33) to Myers’s question, the other factors point towards a finding of coercion.

Manager Remblance’s questioning of Steve Phipps and Nile Vose on April 29 (*supra* p. 13) likewise came hard on the heels of that day’s meeting where vice president Engdahl made numerous coercive threats regarding the organizing campaign. In addition, Remblance walked 60-70 yards out of his way to check if

they were on break and ask what they were talking about, something he had never done before and that followed just two days after Phipps publicly announced the campaign. Shamrock’s description of the interaction as “innocuous” (Br. 34) ignores that context. Moreover, Phipps and Vose answered that they were talking about work, even though they actually had been discussing the union.

Finally, sanitation supervisor Garzon questioned two of her direct reports about whether they wanted the union flyers that Phipps was distributing on May 25 (*supra* p. 16). *Cf. St. Francis Medical Center*, 340 NLRB 1370, 1382-83 (2003) (finding unlawful interrogation where employer asked employee “if she was going to read the flyer” union organizer had given her). That incident occurred against the backdrop of months of unfair labor practices and followed immediately after Garzon’s unlawful confiscation of the flyers—a violation that Shamrock does not contest.

3. Shamrock supervisors surveilled union activity

An employer violates Section 8(a)(1) if it monitors employees’ union activity or “creates the impression among employees that they are subject to surveillance.” *Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413, 420 (D.C. Cir. 1996). Even if union activity is public, an employer cannot do anything “out of the ordinary” to observe it. *Id.* (internal quotations omitted). Such monitoring tends to restrain employees in the exercise of their statutory rights

because they “may reasonably fear that participation in union activities will result in their identification by the employer as union supporters.” *NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985). A surveillance violation does not require that the employer “actually saw or knew of an employee’s union activity” or that “the employee intended his involvement to be covert.” *Flexsteel Industries, Inc.*, 311 NLRB 257, 257 (1993). For an employer statement to create an unlawful impression of surveillance, the question is whether employees “would reasonably assume from the statement that their union activities had been placed under surveillance.” *Id.*

a. Floor captain Manning surveilled union activity and is a statutory supervisor

The Board properly determined that floor captain Manning engaged in multiple acts of surveillance of warehouse employees’ union activities and that he is a supervisor whose actions are thus attributable to Shamrock.

i. Manning’s acts of surveillance

Substantial evidence supports the Board’s finding that Manning engaged in unlawful surveillance and gave the impression of surveillance during the organizing campaign. First, he unlawfully surveilled employees attending the January 28 union meeting at Denny’s (*supra* p. 7) by positioning himself in the parking lot where he could see the attendees coming and going and could be seen by them. *Cf. North Hills Office Services*, 344 NLRB at 1088, 1095 (supervisors

parked outside Taco Bell where union organizers were meeting with employees). Shamrock does not challenge the Board’s credibility-based factual finding (JA 1721) that no one had invited Manning to the meeting, which was held at a time when the organizers were still attempting to keep the campaign covert. Manning’s actions are thus distinguishable from the supervisor in *Music Express East, Inc.*, which Shamrock cites (Br. 30), who “believed that he had been invited” to the union meeting and “wanted to attend” for his own sake rather than to observe the employees who were there. 340 NLRB 1063, 1076-77 (2003). Contrary to Shamrock’s suggestion (Br. 30), supervisors have no absolute right to attend union meetings; instead, they can “attend such a meeting on [their] own time *for nonsurveillance purposes.*” *Howard Johnson Motor Lodge*, 261 NLRB 866, 871 (1982) (emphasis added), *enforced*, 702 F.2d 1 (1st Cir. 1983); *see also Munsingwear, Inc.*, 149 NLRB 839, 846 (1964) (“[A]ttendance by management representatives at union meetings constitutes interference, restraint, and coercion ... unless the management representatives are expressly invited to attend.”).

Manning also created the impression of surveillance on April 27 (*supra* p. 11) when, after asking Phipps about his union activity, he warned Phipps to “watch your back” because management was “watching both of us.” *Cf. 800 River Road Operating Co. v. NLRB*, 784 F.3d 902, 917-18 (3d Cir. 2015) (warning employee to “watch [your] back, be careful” created impression of surveillance);

Golden Stevedoring Co., 335 NLRB 410, 416 (2001) (“watch [your] back ... they will be out to get [you]”). Other than challenging Manning’s supervisory status, Shamrock does not contest that violation.

ii. The Board’s finding of supervisory status was premised on credited testimony and appropriate evidentiary sanctions

Shamrock is liable for Manning’s acts of surveillance because he is a supervisor under the Act. Specifically, the Board found that floor captains have the authority to assign and responsibly direct other employees—two of the statutorily enumerated supervisory powers—and that they exercise independent judgment when doing so.³ That finding was based on credited testimony from multiple witnesses that floor captains tell other employees to perform certain tasks without needing to secure permission from higher-level supervisors, including tasks not otherwise within their job description. They also assign employees to different parts of the warehouse and can ask them to stay late, and bear responsibility for the smooth operation of their area. (JA 521-28, 801-02, 816.) The testimony was based on “personal experiences and observations” (JA 1719 n.25), including from Phipps as both the recipient of their direction and a one-time

³ An individual is a supervisor under the Act if he or she has authority over at least one of the following duties, and uses independent judgment when exercising that authority: “hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action.” 29 U.S.C. § 152(11).

applicant for a captain position. (JA 523-25.) Captains also earn more than other employees and attend weekly management meetings (JA 802-04), which are recognized as secondary indicia of supervisory status. *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007).

The Board's supervisory-status finding is further supported by evidentiary sanctions that the Board imposed against Shamrock for failing to respond to a subpoena request (JA 1573-74 ¶¶ 1-7) for documents that would show floor captains' duties and responsibilities. It is well-established that the Board has the authority to impose sanctions for subpoena non-compliance in order to ensure the integrity of its proceedings. *See, e.g., McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), *enforced*, 156 F. App'x 386 (2d Cir. 2005). Among the tools available to the Board are the power to preclude introduction of evidence, limit cross examination, and grant adverse inferences. *Perdue Farms*, 144 F.3d at 833-34; *McAllister Towing*, 341 NLRB at 396. The adverse inference is also premised on the idea that withheld evidence is likely unfavorable. *See, e.g., Alois Box Co. v. NLRB*, 216 F.3d 69, 73, 75 (D.C. Cir. 2000) (upholding adverse inference of supervisory status).

The Board did not abuse its discretion by permitting secondary evidence of supervisory status and prohibiting Shamrock from cross-examining witnesses on the issue (JA 100-02), as well as granting an adverse inference that the subpoenaed

documents “would have corroborated the testimony” of the employee witnesses (JA 1719 n.29). As the Board explained (JA 1705 n.1), those sanctions were proportionate given Shamrock’s wholesale non-compliance with the subpoena paragraphs related to floor captains. Indeed, Shamrock produced “no documents whatsoever” about captains despite its counsel’s acknowledgment that he was “sure that that’s out there.” (JA 97-98.) As to sanctions for that failure to respond, Shamrock’s complaint (Br. 21-22) about the scope of the subpoena as a whole is misplaced. The portion of the subpoena related to captains’ duties and authority sought specific, clearly relevant information and was, as the administrative law judge put it, “the easiest paragraph to respond to.” (JA 102-03.)⁴

Shamrock’s other arguments are premised on mistaken characterizations of the sanctions ruling. The judge’s instruction during the hearing that Shamrock

⁴ Indeed, Shamrock’s arguments regarding the scope of the subpoena are largely red herrings at this stage of the case, as the only Board findings that relied on evidentiary sanctions were Manning’s supervisory status and the legality of the May 29 wage increases (discussed below, p. 49). (JA 1719 n.29, 1728 n.61).

Shamrock also gains nothing by noting that the subpoena was served 14 days before trial (Br. 12), because that timing is consistent with practice and precedent. The Board’s Casehandling Manual provides that subpoenas “normally be ... served at least 2 weeks prior to the return date.” NLRB Casehandling Manual (Part 1) Unfair Labor Practice Proceedings § 11778, *available at* <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/ulpmanual-september2018.pdf>; *see also* *McCallister Towing*, 341 NLRB at 394 & n.2 (imposing sanctions for non-compliance with subpoena issued 2 weeks before trial).

could not cross-examine witnesses on their personal knowledge was not a “reversal” (Br. 28), for example. It was consistent with his ruling at the outset, when he told Shamrock’s counsel only that they could object on the basis of personal knowledge, not that they could cross examine on the subject. (JA 103.) Nor was the adverse inference the sole basis for the supervisory-status ruling, as Shamrock insists (Br. 28-29), given the credited testimony from multiple witnesses. Indeed, the Board granted an adverse inference “that [the documents] would have corroborated the testimony,” (JA 1719 n.29), not, as Shamrock frames it, simply “that Manning was a supervisor” (Br. 28). The situation here is thus distinguishable from Shamrock’s cited case *Riverdale Nursing Home, Inc.* (Br. 28), where the Board declined to grant sanctions because the record otherwise contained only limited testimony from a single employee. 317 NLRB 881, 881-82 (1995). Finally, Shamrock’s suggestion (Br. 29) that responsive documents might not exist conflicts with its counsel’s assurance at the hearing that he was “sure that that’s out there” (JA 98).

b. Garcia’s acts of surveillance

Likewise supported is the Board’s surveillance and impression-of-surveillance findings regarding supervisor Garcia’s search of Lerma’s forklift and clipboard on May 1 (*supra* pp. 13-14). The credited testimony is that Garcia admitted to Lerma that he was looking for union-authorization cards because he

had heard that Lerma was distributing them. *Cf. Clark Equipment Co.*, 278 NLRB 498, 503-04 (1986) (unlawful surveillance to search employee's toolbox adorned with union stickers); *Intermedics, Inc.*, 262 NLRB 1407, 1409, 1415 (1982) (unlawful surveillance to search employees' purses for union-authorization cards), *enforced*, 715 F.2d 1022 (5th Cir. 1983). Shamrock does not present any grounds for overturning that credibility determination (Br. 38), but just states its own version of the facts. Moreover, its claim that Garcia was just looking for a schedule is undermined by the fact that he can access the schedule on his computer and had circulated copies just before he looked at Lerma's clipboard.

Shamrock also contends (Br. 38) that Garcia did not know the clipboard belonged to Lerma, but Lerma kept personally identifiable information on it, such as paysheets and notes about his assignments and hours. Moreover, Lerma usually drives the same forklift, which has a unique identification number on the side, and Garcia had supervised Lerma every workday for the past seven months. Nor does the fact that Lerma's clipboard was sitting in the open (Br. 38) change the result. Although Garcia initially claimed he was looking for a schedule, Garcia had never before taken a copy of the schedule from Lerma's forklift. His search was thus the type of "out of the ordinary" conduct that supports a finding of unlawful surveillance. *Parsippany Hotel*, 99 F.3d at 420.

4. Shamrock discouraged unionization by soliciting employee grievances and promising a response

An employer violates the Act when it responds to organizing efforts by soliciting employee grievances and promising to remedy them. Such conduct restrains union activity within the meaning of Section 8(a)(1) because an employer's "implicit or explicit promises to correct grievances ... suggest[] that union representation is unnecessary." *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 103 (D.C. Cir. 2000) (internal quotations omitted). Although an employer with a past practice of soliciting grievances ordinarily may continue to do so, it "cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation." *Manor Care of Easton, Penn., LLC*, 356 NLRB 202, 220 (2010) (quoting *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003)), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011).

Shamrock violated Section 8(a)(1) by, at the dawn of the organizing campaign, asking employees to share their concerns about terms and conditions of employment and offering to address them. As in *Manor Care*, 356 NLRB at 220, "[c]onveying an intent to fix the problems raised by employees was an integral part of the small group meetings" held by human-resources official Wright and warehouse manager Vaivao in January and February (*supra* pp. 6-8). Wright's request for areas "where I can help" (JA 1368) took place immediately after Engdahl's anti-union town hall where he told employees that "you talk with us,

you bring up problems, we try to fix it” (JA 1183) and, as the Board noted (JA 1714), “it is unlikely that the connection between the two would have been lost on employees.” Similarly solicitous were Vaivao’s follow-up promises to “commit to removing the majority of the obstacles,” and “bring it down, a solution to resolve it.” (JA 1139, 1174.) *Cf. Manor Care*, 356 NLRB at 220 (employer said it “would try to fix” problems and was “going to come up with solutions”).

The subtext in each meeting was that the warehouse employees did not need a union to improve their working conditions. Even without direct evidence that Shamrock knew of Local 232’s organizing campaign at the time of the first meeting (Br. 35), the Board drew a fair inference that Shamrock suspected union activity in the warehouse (JA 1714) given the past history of organizing there and the credited testimony that word of the current campaign was “spreading like wildfire” (JA 649). Moreover, Shamrock officials had made clear in the town hall that they did not want the recent organizing effort at the Southern California facility to reach Phoenix, and an attempt to preemptively restrain union activity is still a restraint on union activity.

Shamrock now characterizes the meetings as a continuation of past practice (Br. 35), but Wright acknowledged at the time that they constituted a change in approach, both in substance and frequency. She told employees that Shamrock was “doing it a little bit differently” now and was going to “do this a little bit more

often” than in the past. (JA 1368.) The credited testimony is that past meetings were more about communicating information to employees, and only “sometimes” involved soliciting feedback. (JA 609-10.) And Wright had not held any meetings with employees in over a year.

5. Shamrock promised and granted benefits to dissuade employees from organizing

The Act “prohibits employers ... from granting benefits to employees ‘with the express purpose of impinging upon [employees’] freedom of choice for or against unionization.’” *General Electric Co. v. NLRB*, 117 F.3d 627, 636 (D.C. Cir. 1997) (quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)). The lawfulness of such grants thus depends on employer motive, and “[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive.” *Manor Care*, 356 NLRB at 222 (internal quotations omitted). To justify a grant or promise under those circumstances, the employer must show that its reasoning was unrelated to the union activity, such as that the new benefit was part of an existing policy and the employer “did not deviate from the policy upon the advent of the union.” *Real Foods Co.*, 350 NLRB 309, 310 (2007) (internal quotations omitted). The same analysis applies to the promise or grant of benefits in the run-up to a representation election and “during an organizational campaign but before a representation

petition has been filed.” *Manor Care*, 356 NLRB at 222; accord *NLRB v. Curwood, Inc.*, 397 F.3d 548, 553-54 (7th Cir. 2005) (citing cases).

Substantial evidence supports the Board’s finding that Shamrock twice promised or granted benefits to discourage unionization. First, vice president Engdahl circulated his no-layoff memo (*supra* p. 12) just two days after Phipps went public with the organizing campaign and as a preface to his speech about how unionization would be futile and “will hurt all of you.” *Cf. Hertz Corp.*, 316 NLRB 672, 688 (1995) (finding no-layoff promise unlawful). Although Shamrock previously had told employees that its goal was to avoid layoffs, Engdahl went further by announcing that “we’re committed to the point where we put it in writing now” and that employees “can take that to the bank.” (JA 1328.) The memo also was the first written communication to employees regarding layoffs. Engdahl’s promise thus was couched as, and indeed was, a new development. That novelty undermines Shamrock’s reliance (Br. 36) on past statements related to layoffs. Shamrock has “[a]t most ... proven that prior to the union campaign it was looking into the possibility” of avoiding layoffs, which is insufficient to render lawful Engdahl’s firmer commitment. *Manor Care*, 356 NLRB at 222.

Shamrock similarly violated the Act by granting wage increases to various warehouse employees in late May (*supra* pp. 16-17). Raising wages to avoid a union is a quintessential unfair labor practice. *See, e.g., Perdue Farms*, 144 F.3d at

836-37; *St. Francis Hospital v. NLRB*, 729 F.2d 844, 850-51 (D.C. Cir. 1984). The record strongly supports the Board’s conclusion (JA 1728) that the raises were intended to discourage unionization. They were a departure from past practice, both in the amount of the increases and their retroactive application to the beginning of the pay period—a finding that Shamrock does not contest. Moreover, they followed Shamrock’s unlawful solicitation of grievances regarding wages and Engdahl’s coercive statement that unionization was futile because “the company pays wages ... not the union” (JA 1333). *Cf. Manor Care*, 356 NLRB at 222 (unlawful raises “were received just weeks after the small group meetings at which employee complaints about pay had been a significant feature” and “[m]any promises were made”).

Shamrock faces both legal and factual obstacles to its claim (Br. 37) that it did not know the particular employees who received the wage increases were part of the organizing campaign. A grant of benefits can be unlawful prior to the filing of an official election petition setting forth what employees would be in the bargaining unit. *Manor Care*, 356 NLRB at 222. In addition, Shamrock indisputably knew that there was an organizing campaign in the warehouse, and nothing suggested that it was limited to certain subsets of employees. Phipps had announced the campaign to all gathered employees in the breakroom, without targeting his announcement to any particular group. He also recently had

distributed union flyers to sanitation employees, one of the groups who received a raise. Moreover, Shamrock's claim of ignorance is inconsistent with its own actions during the campaign, when it targeted all warehouse employees for its "union education" meetings (JA 195).

Finally, Shamrock launches a throwaway challenge (Br. 37) to the Board's imposition of an evidentiary sanction for its failure to produce material documenting the wage increases (JA 127-29). But there was no abuse of discretion in sanctioning Shamrock's failure to respond to a specific subpoena request (JA 1580 ¶¶ 52, 54) for documents directly relevant to a complaint allegation. Moreover, the evidence that the Board gave additional weight as a result of the sanction was already credited and corroborated testimony from multiple witnesses about the raises. (JA 1728 n.61.)

6. CEO McClelland promulgated a new rule in response to union activity

A workplace rule violates the Act if it is "promulgated in response to union activity." *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 545 (D.C. Cir. 2016) (internal quotations omitted). Such a rule is unlawful in those circumstances "even if facially unobjectionable" and it does not expressly restrict protected activity. *Id.* That is, an "otherwise lawful ... policy violate[s] Sec. 8(a)(1) where the employer instituted the rule in response to employees' organizing activities." *Hawaii Tribune-Herald*, 356 NLRB 661, 661 n.4 (2011), *enforced sub nom. Stephens*

Media, LLC v. NLRB, 677 F.3d 1241 (D.C. Cir. 2012). Once shown that the rule was promulgated in the context of a union campaign, the burden of justifying it rests with the employer, which must present a legitimate reason for the rule unrelated to employees' organizing efforts. *Care One at Madison Avenue, LLC*, 361 NLRB 1462, 1464 & n.6 (2014), *enforced*, 832 F.3d 351 (D.C. Cir. 2016).

CEO McClelland's May 8 letter to all warehouse employees announcing a rule against threats or bullying (*supra* pp. 15-16) issued in the midst of the organizing campaign, less than two weeks after the campaign went public. The letter was unusual, in that McClelland does not regularly write to employees (and, indeed, could not remember the last such letter he had sent (JA 391)). In addition, context makes clear that the letter's reference to reports of "threatening, violent, or unlawfully coercive behavior" (JA 1359) by employees as the basis for the rule supports the Board's finding that the rule was promulgated in response to union activity. In the preceding months, Shamrock officials like Vaivao and Engdahl used similar language in telling employees that they had received reports of such behavior in the context of union activity. The previous week, for example, Vaivao told employees that "people are being threatened by other people ... if they don't sign the cards." (JA 1334-35.) And three days before McClelland's letter (as discussed further below), Engdahl warned union-supporter Lerma that other employees should not "feel threatened" by his activities. (JA 1349.) Even if

McClelland's similarly worded letter did not also mention union activity directly, the Board reasonably could conclude that it likewise was a response to such activity.

Given the timing and context, the burden was on Shamrock to provide a neutral reason for promulgating the rule when it did. Substantial evidence supports the Board's finding that it failed to do so. Shamrock does not contend that the purported (and undefined) "coercive behavior" that inspired the rule was not union-related, and as the Board noted (JA 1726), "there is no record evidence of any conduct other than the prounion activity Engdahl and Vaivo discussed ... that might have prompted the letter." Moreover, Shamrock does not challenge the Board's discrediting as "entirely unbelievable" (JA 1726) McClelland's testimony that he did not know the substance of the complaints that he identified as the basis for the rule. In addition, Shamrock did not substantiate the allegations of violent or coercive behavior. For example, it does not challenge the Board's finding (JA 1725) that "none of the complaints were ever investigated or documented." *Cf. Care One*, 361 NLRB at 1464 (employer failed to meet its burden where "there is no record evidence that the [employer] attempted to investigate alleged threats, let alone that any threats actually occurred").

Even if, as Shamrock insists (Br. 25), it lawfully could have prohibited threats or bullying, it could not promulgate its rule in response to the union

campaign. *Hawaii Tribune-Herald*, 356 NLRB at 661 n.4. Shamrock's contention (Br. 25-26) that employees would not understand the rule as prohibiting protected activity is thus beside the point, as are the cases it cites (Br. 25-26) addressing whether employees reasonably would interpret an anti-bullying rule that way. That distinct analysis was not the basis of the Board's finding here, which rested solely on the determination that Shamrock promulgated the rule in response to union activity; the Board expressly declined to pass on whether the rule would be lawful under other circumstances. (JA 1706 n.8.)

Finally, because the rule itself was promulgated in response to union activity, Shamrock's directive to employees to report violations of the unlawful rule and its threat to refer violations for prosecution were likewise unlawful. Similar to here, employers have violated the Act by, for example, instructing employees who "feel they are being subjected to threats and coercion" in the context of union activity to "report such incidents to the Company" so it could "take the appropriate action," *Tawas Industries, Inc.*, 336 NLRB 318, 322 (2001), and by, during a union campaign, directing employees to report if they were "bullied or threatened," *NLRB v. Almet, Inc.*, 987 F.2d 445, 452-53 (7th Cir. 1993).

7. Shamrock unlawfully discharged Thomas Wallace and conditioned his separation agreement on an unlawful waiver

Shamrock discharged Wallace after he questioned a high-ranking official about employee health benefits, then offered him a separation agreement that was conditioned on waiving certain rights under the Act (*supra* pp. 9-11). Substantial evidence supports the Board's findings that both actions violated Section 8(a)(1).

a. Retaliatory discipline violates the Act

An employer violates Section 8(a)(1) by disciplining an employee for engaging in activity protected by the Act. The analysis for such violations is set forth in the Board's *Wright Line* test, which asks whether protected activity was a motivating factor in the discipline. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981); *accord NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400 (1983); *Shamrock Foods*, 346 F.3d at 1135. The Board may rely on circumstantial evidence of unlawful motive, such as evidence that the disciplined employee engaged in protected activity, the employer knew of that activity, and the employer harbored animus against protected activity. *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000). Other relevant evidence includes contemporaneous unfair labor practices, *id.*, suspicious timing, *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015), false or shifting reasons for the discipline, *Property Resources Corp. v. NLRB*, 863 F.2d 964, 967 (D.C. Cir. 1988), departure from past practice, *id.*, disparate

treatment, *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264 (D.C. Cir. 1993), and failure to investigate or to consult with the disciplined employee’s immediate supervisors, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 F. App’x 656, 658 (D.C. Cir. 2015); *Williams Services, Inc.*, 302 NLRB 492, 500 (1991).

If substantial evidence supports the Board’s finding that protected activity was a motivating factor, the discipline was unlawful unless the employer shows, as an affirmative defense, that it would have taken the same action even absent the employee’s protected activity. *Transportation Management*, 462 U.S. at 400; *Wright Line*, 251 NLRB at 1089. To meet that burden, an employer must do more than present an abstractly legitimate reason for its actions; it “must establish not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so.” *Manor Care*, 356 NLRB at 225. If the employer’s proffered reasons are pretextual—that is, either false or not in fact relied upon—however, “the employer fails as a matter of law” to establish its affirmative defense. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016).⁵

⁵ At multiple points, Shamrock states that it need show only an “honest belief” that the disciplined employee engaged in misconduct. (Br. 19, 39, 64.) As the Court has explained, however, such belief is not by itself sufficient to meet the *Wright Line* affirmative defense. Where, as here, an employer argues that the discipline was for actions unrelated to protected activity, the employer must “show not only that it reasonably believed [the employee] had engaged in [misconduct], but that the nature of that behavior ‘would have’ caused her [discipline] regardless of her

b. Shamrock discharged Wallace because of his protected activity

Substantial evidence supports the Board’s finding that Wallace’s discharge was unlawfully motivated. Wallace engaged in protected activity when he asked vice president Beake at the March 31 meeting whether Shamrock would restore its prior health-insurance plan or contribute more to employees’ deductibles. Health insurance is certainly a term and condition of employment, and the other employees’ reaction of laughter and applause showed that Wallace’s questions implicated a shared concern. Because Wallace asked the question to a high-ranking official in the presence of multiple other managers and supervisors, Shamrock clearly knew about his protected activity. Shamrock’s animus towards employee self-advocacy is amply demonstrated by its parade of unfair labor practices in the months leading up to Wallace’s discharge. *Vincent Industrial Plastics*, 209 F.3d at 735.

The record fully supports the Board’s finding of “an abundance of other circumstantial evidence that the discharge was unlawfully motivated,” including shifting and disproven rationales. (JA 1731.) At various points, Shamrock has contended that it discharged Wallace because he “belligerently” interrupted Beake multiple times (JA 1477), made a waving gesture in response to Beake’s answer

protected conduct.” *Inova Health*, 795 F.3d at . An argument that the belief itself was enough “shortchanges [the employer’s] burden of proof.” *Id.*

(JA 477, 750-51), made a dismissive remark (JA 751), disrespected a senior official (JA 184), left the meeting early (JA 226, 755), or some combination thereof. Such “shifting explanation for discharge is evidence of unlawful motive.” *Property Resources*, 863 F.2d at 967. In addition, several of those stated reasons are demonstrably false or exaggerated. Shamrock now acknowledges (Br. 40) that Wallace did not interrupt Beake at all, let alone belligerently or multiple times. And Beake himself admitted as much at the hearing. (JA 473.) There is no evidence of any dismissive remark by Wallace and no other witness corroborated vice president Daniels’s testimony that Wallace made some kind of gesture; Beake did not see a gesture (JA 477-48), and Wallace denied making one (JA 693). Even the “leaving early” rationale that Shamrock has now settled on is, as the Board found (JA 1731), “at best a distortion or exaggeration of the facts.” Beake had stated multiple times that the meeting would “end” or “close” with a message from Norm McClelland, which had already happened at the time Wallace left. (JA 1288, 1314.) Similarly, Wallace did not leave until after Beake confirmed that he had “close[d] out what we wanted to convey to you today.” (JA 1315.) The holes in Shamrock’s proffered rationales further bespeak an improper motive. *Property Resources*, 863 F.2d at 967.

Additional support for the Board’s conclusion is found in the truncated and unusual nature of Shamrock’s decisionmaking process. No one consulted with

Wallace's direct supervisor, or even the next two levels in the management hierarchy, before he was discharged. (JA 758.) *Cf. Williams Services*, 302 NLRB at 500 (vice president discharged employee "without consulting ... [employee's] immediate supervisors"). Nor did anyone talk to Wallace or otherwise investigate why he left the meeting. *Ozburn-Hessey Logistics*, 609 F. App'x at 658 (employer failed to "give the employee ... an opportunity to explain" (internal quotations omitted)). Vice president Daniels testified that he alone made the discharge decision, even though he had never before discharged an employee, is generally involved only with higher-level strategic matters, and was not familiar with Shamrock's progressive-discipline policy. (JA 753-55.)

Shamrock primarily takes issue (Br. 41-42) with the Board's credibility-based finding regarding whether the McClellands (and not just Daniels) were involved in the discharge decision. That issue is largely inconsequential, however, because based on the reasons detailed above, the Board found Wallace's discharge unlawful regardless of whether Daniels was the sole decisionmaker. (JA 1732.) In any event, the credibility determination was not "hopelessly incredible, self-contradictory, or patently unsupportable." *Shamrock Foods*, 346 F.3d at 1134. Wallace reported both at the time and in testimony at the hearing that Vaivao told him the McClellands were involved. (JA 579, 697-98, 1548.) Although Vaivao denied it, the Board found him a generally unreliable witness, due in part to

multiple instances of him denying making statements that contemporaneous recordings reveal that he in fact made. (JA 1715 nn.12-13, 1720, 1730 n.68.)

Moreover, although Daniels claimed that he decided to discharge Wallace the day after the meeting (JA 756), the discharge did not occur for another six days.

During that gap (which Shamrock never explained), Daniels talked about Wallace with Beake, who reports directly to the McClellands. (JA 462, 474-75.) And as noted above, Daniels lacked both knowledge and experience regarding discipline at Shamrock.

In sum, ample evidence supports the Board's finding that Shamrock's proffered reasons for Wallace's discharge were pretextual. For that reason, Shamrock has failed as a matter of law to make out an affirmative defense that it would have discharged him absent his protected activity. *Ozburn-Hessey Logistics*, 833 F.3d at 219.

c. Wallace's separation agreement contained unlawful waivers

As the Board explained (JA 1707 n.12), Shamrock followed up on Wallace's unlawful discharge by offering him a separation agreement containing unlawful provisions. The agreement's confidentiality and non-disparagement provisions required Wallace to waive his right to communicate with fellow employees and the Board regarding terms and conditions of employment. Although an employer can condition an agreement on the employee's waiver of certain rights under the Act

“if the waiver is narrowly tailored to the facts giving rise to the settlement,” *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, 2016 WL 4492371, at *2 (2016), no such tailoring was present here. Wallace’s discharge had nothing to do with confidential information or purported disparagement. Moreover, because Wallace’s discharge was itself unlawful, it could not “giv[e] rise,” *id.*, to a lawful waiver.

Shamrock does not challenge the Board’s finding that the separation agreement constituted a waiver of Wallace’s rights under the Act and does not attempt to justify the waiver. Its only argument is that the waiver theory was not litigated at the hearing (Br. 23-24), but Shamrock did not raise that issue to the Board and cannot do so for the first time on appeal. Under Section 10(e) of the Act, “[n]o objection that has not been urged before the Board ... shall be considered by the court” absent “extraordinary circumstances.” 29 U.S.C. § 160(e); *Alden Leeds, Inc. v. NLRB*, 812 F.3d 159, 166 (D.C. Cir. 2016). Where an issue arises for the first time in the Board’s decision, such as a claim that the Board relied on a new theory of liability, a party must file a motion for reconsideration in order to preserve the issue for appellate review. *See, e.g., International Ladies’ Garment Workers’ Union v. Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975) (declining to consider argument that Board “based its order upon a theory of liability ... allegedly not charged or litigated” because

employer “failed to file a petition for reconsideration”). Shamrock did not file such a motion and does not attempt to offer any extraordinary circumstances for its failure to do so.⁶

B. Shamrock Retaliated Against Mario Lerma, Steve Phipps, and Michael Meraz for Their Union Activity

Section 8(a)(3) of the Act prohibits “discrimination in regard to hire or tenure of employment or any term or condition of employment to ... discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). The question of whether union activity was the motivating factor in an employer’s action is analyzed under the *Wright Line* framework discussed above, pp. 53-54. *See, e.g., Ozburn-Hessey*, 833 F.3d at 217-18. A violation of Section 8(a)(3) also derivatively violates Section 8(a)(1). *Id.* Substantial evidence supports the Board’s findings that Shamrock violated Section 8(a)(3) by retaliating against warehouse employees Lerma, Phipps, and Meraz for their support of the organizing campaign.

⁶ Although similarly forfeited, Shamrock’s contention (Br. 24) that the separation agreement was lawful under *Boeing Co.* is a non-starter because *Boeing* sets out the framework for evaluating work rules, 365 NLRB No. 154, 2017 WL 6403495, at *4 (2017), and the Board (JA 1707 n.12) and Shamrock (Br. 24) agree that the separation agreement was not a work rule.

1. Shamrock disciplined Lerma for his union activity

Substantial evidence supports the Board's finding that Shamrock unlawfully disciplined forklift operator Lerma in the May 5 meeting with Engdahl and Vaivao (*supra* pp. 14-15). As an initial matter, that meeting was disciplinary in nature. Vaivao testified that the meeting was a "counseling" (JA 279), which is the first step in Shamrock's progressive-discipline policy (JA 1113). He also told Lerma at the time that Lerma would be in "deeper trouble" if Shamrock heard further complaints about him (JA 1350), which suggests, of course, that Lerma was in trouble already. Likewise, Engdahl foreshadowed possible discharge by telling Lerma that he did not want "to have to bring in new people" (JA 1352), indicating that Lerma was on a path that could lead to the ultimate disciplinary step. Under similar circumstances, the Board has explained that verbal counselings are disciplinary for Section 8(a)(3) purposes if they "are part of a disciplinary process" that "lay[s] a foundation for future disciplinary action," such as where, as here, a "handbook specifically includes [them] as part of the ... progressive discipline system." *Altercare of Wadsworth*, 355 NLRB 565, 565 (2010) (internal quotations omitted).

Similarly supported is the Board's finding that Lerma's union activity was a motivating factor in his discipline. Lerma was a member of the organizing committee who had distributed union-authorization cards to other employees, and

it is undisputed that Shamrock knew of his involvement in the campaign. The counseling occurred amidst months of unfair labor practices, including Garcia's unlawful surveillance of Lerma just four days earlier.

In addition, as the Board found (JA 1734), Shamrock's purported reasons for the discipline were pretextual. Shamrock contends that the meeting was in response to reports that Lerma was delaying forklift deliveries for employees who did not sign cards (Br. 42), but does not challenge the Board's factual finding (JA 1725, 1734) that neither Engdahl nor Vaivao investigated (let alone corroborated) those complaints. *Cf. Ozburn-Hessey Logistics*, 609 F. App'x at 658 ("failure to investigate" as evidence of improper motive). Engdahl and Vaivao also attributed the counseling to vague (and likewise not investigated) reports of "hecklings" and the possibility that other employees "could perceive it as intimidation" or "feel threatened" when Lerma expressed his pro-union views (JA 1348-49). But the Board has held it unlawful to discipline employees "on the basis of the subjective reactions of others to their protected activity." *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000) *enforced*, 263 F.3d 345 (4th Cir. 2001). Given the evidence of pretext, Shamrock has not met its burden of showing that it would have disciplined Lerma even absent his union activity.

2. Shamrock followed changes in break-policy enforcement with closer supervision and discipline of Phipps

Shamrock's pattern of retaliation continued with a series of actions related to employee break policy (*supra* pp. 18-20), ranging from stricter enforcement of the policy to prevent organizing activity to ramped-up supervision and discipline of campaign leader Phipps.

a. Shamrock enforced its break policy more strictly in response to union activity

An employer violates Section 8(a)(3) by enforcing a previously unenforced or underenforced policy in response to its employees' union activity. *See, e.g., St. John's Community Services*, 355 NLRB 414, 423-24 (2010). A stricter-enforcement violation is analyzed under the *Wright Line* standard. *Id.*

Here, Shamrock ran afoul of the Act by more strictly enforcing its policy that all employees on a particular crew take breaks at the same designated time. The credited testimony was that Shamrock previously had permitted employees to take their breaks outside of the designated times if doing so would not interfere with operations, but that in January 2016 it began telling employees that they were required to break at the designated times and printing them on employees' daily schedules. Phipps's testimony on both Shamrock's prior flexibility and newfound strictness was corroborated by fellow forklift operator Matt Sheffer, who the Board found credible (JA 2781 n.17) because he had "no obvious interest" in the unfair-labor-practice case and was a current employee testifying contrary to his employer

and thus risking his own economic interest. *See Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995) (noting that “the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable”), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996).

Shamrock launches various credibility challenges (Br. 46-48), but identifies nothing “patently unsupportable” about the Board’s findings. *Shamrock Foods*, 346 F.3d at 1134. Its allegations (Br. 47-48) that Phipps contradicted himself misconstrue his testimony, for example. Phipps’s response that he “wouldn’t go that far” as saying employees previously “could take breaks when they wanted” and his follow-up explanation that employees could shift breaks “as long as that didn’t affect business” (JA 2475-76) was consistent with his earlier, similarly qualified statement that they had been able to choose break times “as long as it didn’t interfere with what was going on on the floor” (JA 2425). Phipps also testified consistently that Shamrock has designated break times on a given day. (JA 2453, 2476.) Context makes clear that he first answered “no” to whether employees have “normal” break times because he understood the question as asking whether employees have the same specific break times every day (JA 2486-88)—an accurate response because, as even Shamrock’s witnesses acknowledged (JA 2033-35), the shipping crew’s breaks can change from day to day based on operational needs. Finally, as noted above, the basis for crediting Sheffer was his

status as a disinterested witness and current Shamrock employee; contrary to Shamrock's contention (Br. 46), no factual or credibility finding hinged on whether he left his former supervisory position voluntarily.⁷

Shamrock's other challenges to the Board's finding of stricter enforcement are no more availing. For example, Shamrock is not correct (Br. 48) that Phipps described shifting his breaks in the past only for operational reasons. He also testified to adjusting breaks in order to distribute union flyers in October and December 2015 (JA 2424-26), as well as about the general flexibility that existed prior to January 2016 (JA 2425). Finally, Phipps's statement that he was "directed ... as to when to take break" in that period was in the context of explaining how he would know when the designated break time would begin on a particular day or shift (JA 2495-97) rather than, as Shamrock presents it (Br. 47), an example of him being required to take breaks exclusively during the designated time.⁸

⁷ Shamrock's other observations regarding Sheffer are either irrelevant or incorrect. Because the violation is a change in enforcement in January 2016, the relevant evidence is that Sheffer adjusted his breaks prior to that date; it does not matter whether he also testified as to "when exactly he did this" (Br. 46). In any event, Sheffer testified that he "always" had flexibility during his four years as a forklift operator. (JA 2410.) Also, just because Sheffer works in a more remote area of the warehouse does not mean, as Shamrock contends (Br. 46), it would not be aware of when he took breaks. He is still part of the operational process and has supervisors with whom he communicates about breaks. (JA 2409, 2596-97.)

⁸ Shamrock wrongly asserts (Br. 43-44, 52 n.19) that the Board misunderstood that forklift operators had been split into inbound and outbound crews prior to 2015. The Board specifically noted that all forklift operators were on the same crew

In addition to supporting the Board’s finding that there was a change in enforcement, the record further shows that the change was made in response to the union campaign. It is undisputed that Shamrock knew about the campaign and Phipps’s prominent role. And it knew that employees including Phipps engaged in union activity during breaks, as managers were present when Phipps announced the campaign in a breakroom and said he would talk to co-workers about it on lunch and breaks. Further, the timing of the change reflects a retaliatory motive. *Inova Health*, 795 F.3d at 82. The campaign proceeded in the months and weeks prior to the change in enforcement, including new union flyers appearing in December.⁹ Board proceedings were also ongoing during that period, including an early January hearing on the Board’s motion for a preliminary injunction (which Phipps attended). (JA 2462-63.) In addition, the change occurred against the

“from February 8, 2015 through January 24.” (JA 2779 n.8.) The stricter enforcement of break times did not correspond to the re-splitting of the crews (Br. 43-45), moreover, because Phipps testified that he was able to adjust his breaks both before and during the 2015 consolidation (JA 2452-54).

⁹ Because the change applied to all employees, it does not matter for the issue of knowledge or timing whether Shamrock was aware of the particular details of Phipps’s union activity (Br. 49-50). In any event, it is a fair inference that Shamrock officials knew Phipps was involved with the December flyers, as they knew he led the campaign and knew he distributed flyers; indeed, Vaivao testified that he knew of only two employees that handed out union flyers and that Phipps was one of them (JA 1924-25).

backdrop of Shamrock's numerous unfair labor practices, which the Board identified as "substantial background evidence of animus." (JA 2776 n.1.)

Finally, Shamrock failed to prove its affirmative defense that it would have changed enforcement policy absent the union campaign. Although legitimate reasons may exist to require all inbound employees to break together, the record supports the Board's finding that those reasons were not the basis for Shamrock's actions here. That is, even though Shamrock argues (Br. 51-52) that it could have made the changes for neutral operational reasons, it has not shown that it actually did. Moreover, it previously had tolerated the flexibility that it now purports to find unacceptable. As the Board found (JA 2786), Shamrock's proffered business rationales were pretext, and thus not grounds for a defense.¹⁰

b. Shamrock singled out Phipps for closer supervision

Substantial evidence supports the Board's finding that Shamrock also used the stricter enforcement of its break policy to supervise Phipps more closely due to his union activity. Subjecting employees to closer supervision because of their

¹⁰ Contrary to Shamrock's contention that stricter enforcement would be a violation only as to Phipps (Br. 52-53), the change is unlawful as to all employees, because it applied to everyone. Moreover, because it was tainted by unlawful motivation, it was unlawful even as to employees who were not involved with the campaign, just as an "otherwise lawful ... policy violate[s the Act]" when "instituted ... in response to employees' organizing activities." *Hawaii Tribune-Herald*, 356 NLRB at 661 n.4.

union activity violates the Act. *See, e.g., Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1085-86 (2007), *enforced*, 577 F.3d 467 (2d Cir. 2009).

After previously allowing Phipps and other employees flexibility in adjusting their break times, Shamrock officials confronted Phipps twice in two weeks (on January 26 and February 11) about taking his breaks during the designated time. The record contains no evidence that Shamrock had spoken with or otherwise called attention to employees for adjusting their break times before it began singling out Phipps for such treatment. Following the January 26 encounter, moreover, supervisor Gomez took the unusual step of including all inbound supervisors and two additional layers of management (including from the separate outbound crew) all the way up to warehouse manager Vaivao on an email reporting that Phipps had not taken a designated break. Vaivao could not recall another instance of such a widely disseminated report regarding an employee working through a break. (JA 2078-79, 2083-84.) By contrast, other emails during the same period regarding breaks outside of designated times did not go to other crews or to Vaivao. (JA 2664-66.) Coming on the heels of that episode, the February 11 encounter with Gomez and manager Nicklin, which also escalated up to Vaivao, shows a continuation of the heightened targeting. Because Shamrock's response was unusual, moreover, its observation (Br. 54) that supervisors often are on the

floor during break times is beside the point; what matters is not just that they saw Phipps on break, but their unprecedented reaction to it.

The closer supervision was the result of Phipps's union activity. As detailed above, Shamrock was well aware of Phipps's union activity and its ramped-up supervision followed months of repeated unfair labor practices. Like with the stricter enforcement of break policy, the timing of Shamrock's actions is suspicious. In addition to the other recent union activity discussed above, the February 11 encounter took place two days after Phipps began distributing a new flyer celebrating a "win" over Shamrock in the injunction litigation, *see* p. 23 n.2, and discussing the court order with other employees. The break from past practice evidenced by Gomez's email further supports the finding of an unlawful motive. *Property Resources*, 863 F.2d at 967. Although Shamrock offers the post hoc rationale that Gomez copied everyone to "insure that the entire management team was in agreement on when and how they should share forklift resources" (Br. 55-56), that purported reasoning does not appear in the email itself.¹¹

¹¹ The Board did not, as Shamrock contends (Br. 53), fail to prove closer supervision just because it stated (JA 2787) that it did "not need to provide evidence [of] the typical level of supervision" in addition to showing a discriminatory motive under *Wright Line*. Indeed, the Board expressly found in its *Wright Line* analysis that Shamrock subjected Phipps to the "unusual practice" of Gomez's reporting (JA 2787)—the kind of out-of-the-ordinary action that Shamrock insists is needed (Br. 53) to prove a closer-supervision violation. For the same reason, the Board did not give Shamrock "the burden to disprove" (Br.

c. Shamrock disciplined Phipps for his union activity

As with the other violations related to Phipps's breaks, the Board's finding that Shamrock's unlawful enforcement and supervision culminated in unlawful discipline finds support in the record.

As an initial matter, Phipps's February 11 meeting with Vaivao and operations manager O'Meara regarding his break times was disciplinary in nature. O'Meara expressly and repeatedly told him that the meeting was a "counseling" (JA 2705-09), which is the first step in Shamrock's progressive-discipline policy. *See* p. 61. And even if O'Meara told him the counseling was not disciplinary (Br. 58), the plain text of the policy nonetheless would permit Shamrock to use it as the basis for heightened punishment in the future. Moreover, O'Meara and Vaivao are both high-ranking officials and had taken the unprecedented step of meeting directly with an employee in O'Meara's office. As O'Meara himself acknowledged, calling an employee to his office for non-disciplinary reasons would be "kind of weird." (JA 2548.) Given those circumstances, the Board aptly noted that Phipps at the least "could reasonably assume that [he was] being disciplined." (JA 2788.) Likewise, that understanding would not be undermined

53-54) the violation by noting as additional evidence that Shamrock had not shown prior instances of overseeing Phipps's breaks.

by Shamrock's claim (Br. 59) that it ignores its own disciplinary policy by not issuing counselings.

A wide range of evidence supports the Board's finding that the discipline was in response to Phipps's union activity. Timing again provides evidence of unlawful motive. The evidence here is even stronger, moreover, because the discipline for shifting his break times occurred immediately after Phipps told Gomez and Nicklin (who reported it to Vaivao) that he staggered his breaks so that he could discuss the organizing campaign with other employees. Further support for the Board's finding is shown by the fact that Shamrock previously condoned the very conduct for which it now disciplined Phipps. The circumstances of the discipline were also unusual, because O'Meara and Vaivao had never before met with an employee in O'Meara's office and because Phipps's direct supervisor was not involved. *Cf. Williams Services*, 302 NLRB at 500. In addition, the discipline issued on the same day that O'Meara sent his otherwise unrelated letter with its gratuitous reference to Local 232's level of support—a statement that, as the Board found, “hints at animus” (JA 2788). Finally, the discipline was the latest in a long series of unfair labor practices, including some directed specifically at Phipps.

Shamrock's only argument that Phipps would have received the same discipline even absent his union activity is that it also told other employees to take breaks during designated times (Br. 61-62). But none of those employees were

disciplined for not doing so, rendering the comparison inapt. The weakness of that argument, coupled with the Board's finding of pretext (JA 2788), make clear that Shamrock failed to make out its affirmative defense.

3. Shamrock disciplined Meraz for his union activity

Substantial evidence supports the Board's finding that Shamrock continued its pattern of retaliation by disciplining Meraz (*supra* pp. 21-23) because of his union activity rather than, as Shamrock claimed, for misplacing a pallet. Meraz's participation in the organizing campaign was open and public. He distributed union flyers on multiple occasions and kept them on his forklift, attended the unfair-labor-practice hearing, and submitted a statement as part of the injunction litigation. Further, Vaivao acknowledged that he knew of Meraz's involvement with the Board case.

Evidence of an unlawful motive is shown in Shamrock's failure to investigate several issues related to the misplaced pallet that could have exculpated Meraz. *Ozburn-Hessey Logistics*, 609 F. App'x at 658. Meraz and other employees told human-resources official Santamaria that the scanners recording pallet moves frequently malfunctioned (an issue known to Shamrock), yet Santamaria admittedly never considered whether scanner error may have played a part or whether other employees could have moved the pallet after Meraz. Shamrock claims that Vaivao looked into the matter (Br. 68), but his testimony that

he discounted the possibility because Meraz's scans were recorded (JA 1881) makes clear that he did not fully understand the issue; the question Meraz raised was not just whether his own scanner malfunctioned, but whether subsequent moves by other employees did not register in the system because of problems with *their* scanners. (JA 2288, 2676-79, 2684.) Given the longstanding and Shamrock-acknowledged issue with scanners in this area of the warehouse, that was not simply a "theoretical" possibility (Br. 69). In addition, despite promising to do so, Santamaria did not question the inventory clerk who had been tasked with finding the pallet. *Cf. NLRB v. Allied Medical Transport, Inc.*, 805 F.3d 1000, 1008 (11th Cir. 2015) (employer's "fail[ure] to conduct the promised investigation undermines its purported legitimate reason" for discipline). Even after Meraz informed Vaivao and Santamaria that the clerk told him that the pallet, on the night it was reported missing, had not been in the spot where Shamrock ultimately found it, neither man looked into that discrepancy. Further, the record contradicts Shamrock's suggestion (Br. 70) that Meraz's guilt was conclusively documented. Meraz's task history shows only that he moved the pallet, not whether anyone else did afterwards. Shamrock's own witnesses acknowledged that the video footage is only a "real short snippet" (JA 2244) and does not show where Meraz placed the pallet. And again, the scan records would be incomplete if there had been a subsequent malfunction.

Shamrock's unsupported reasons and disparate treatment further support the Board's finding of unlawful motive. When asked for the reasons for his decision to discipline Meraz, Vaivao stated that the pallet went missing on the same day it was received (JA 1879), even though the record shows (and Shamrock now acknowledges (Br. 70)) that it actually arrived two days earlier. In addition, the record contains no other examples of Shamrock disciplining a forklift operator for misplacing a pallet. Shamrock officials could not identify specific instances of similar discipline. (JA 2100, 2135-36, 2236.) The purported examples that Shamrock provides (Br. 65) involved either different job classifications with different responsibilities (receivers rather than forklift operators (JA 2622-24)) or different conduct (mislabeling or physically damaging inventory (JA 2566, 2615, 2626)). Finally, Shamrock's panoply of unfair labor practices place Meraz's discipline in a broader context of discrimination.¹²

Against the weight of that evidence, Shamrock falls back on the repeated refrains that it had an "honest belief" that Meraz misplaced the pallet (Br. 65, 69) and that such action would violate procedure (Br. 64, 71). Neither argument

¹² Given its reliance on the evidence detailed above, the Board did not "concede that no animus had been shown" (Br. 63) when it also stated that it "need not prove specific animus toward Meraz" (JA 2789); it is well-established that the Board can rely on circumstantial evidence to find that union activity was a motivating factor. *Property Resources*, 863 F.2d at 966-67.

satisfies Shamrock’s affirmative-defense burden. Whether Shamrock believed Meraz misplaced the pallet is not dispositive if it cannot also show that it would have disciplined him for doing so regardless of his support for the organizing campaign, *see* p. 54 n.5. And it is not enough that Shamrock “could have” disciplined Meraz for a missing pallet where the evidence of pretext undermines any claim that it would have done so even absent his union activity. *Manor Care*, 356 NLRB at 225.

C. The Board’s Notice-Reading Remedy Was an Appropriate Exercise of Its Discretion

Shamrock’s brief challenge to the notice-reading remedy in the Board’s order (Br. 71-73) does not show an abuse of the Board’s “broad discretionary power over remedies.” *Banner Health*, 851 F.3d at 43. The Board’s reasoning that a notice reading was warranted given the “severity and scope of [Shamrock’s] unfair labor practices” and “the fact that many of them were committed by high-level officials” (JA 1742) is consistent with this Court’s and the Board’s precedent finding such a remedy appropriate.

The Court has approved a notice-reading remedy where, as here, “many of the ... violations were committed by high-level management officials.” *Federated Logistics*, 400 F.3d at 930. There was also “pervasive personal involvement” by the Shamrock officials tasked with reading the notice. *UFCW v. NLRB*, 852 F.2d 1344, 1349 (D.C. Cir. 1988) (internal quotations omitted). Vice president Engdahl

“personally and repeatedly communicated to employees the threats that were found to be violations of the Act” in meetings on January 28 and April 29. *Id.* In addition, CEO McClelland sent the letter announcing the unlawfully promulgated rule and Engdahl “personally promised his employees ... improvements in working conditions” when he distributed the written no-layoff commitment. *Conair Corp. v. NLRB*, 721 F.2d 1355, 1386 (D.C. Cir. 1983). And as to Shamrock’s objection (Br. 72) to a personal reading by company officials, neither McClelland nor Engdahl is required to read the notice, but can choose instead to have a Board agent read it.

Under such circumstances, a public reading by or in the presence of Engdahl or McClelland will serve to “dispel the atmosphere of intimidation created in large part by [their] own statements and actions.” *Conair*, 721 F.3d at 1386-87.

Likewise, a dedicated meeting for that purpose acts as a counterpoint to the series of mandatory meetings that were the locus of many of the unfair labor practices. In addition, Shamrock committed a similarly lengthy litany of violations as the employers in *Federated Logistics* (12), 340 NLRB at 261-62, and *UFCW* (15), 284 NLRB 1429, 1430 (1987). Ordering a similar remedy here was thus a proper exercise of the Board’s discretion.

CONCLUSION

The Board respectfully requests that the Court deny Shamrock's petitions for review and enforce the Board's Orders in full.

s/ Elizabeth Heaney _____
ELIZABETH HEANEY
Supervisory Attorney

s/ Joel A. Heller _____
JOEL A. HELLER
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-1743
(202) 273-1042

PETER B. ROBB
General Counsel

JOHN W. KYLE
Deputy General Counsel

DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board
February 2019

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

SHAMROCK FOODS COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos.18-1170, 18-1178
)	18-1197, 18-1199
)	
v.)	Board Case No.
)	28-CA-169970
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
BAKERY, CONFECTIONARY, TOBACCO)	
WORKERS' AND GRAIN MILLERS)	
INTERNATIONAL UNION, LOCAL UNION)	
NO. 232, AFLO-CIO-CLC)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 17,658 words of proportionally spaced, 14-point type, and the word-processing system used was Microsoft Word 2016.

s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of February, 2019

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

SHAMROCK FOODS COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos.18-1170, 18-1178,
)	18-1197, 18-1199
)	
v.)	Board Case No.
)	28-CA-169970
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
BAKERY, CONFECTIONARY, TOBACCO)	
WORKERS' AND GRAIN MILLERS)	
INTERNATIONAL UNION, LOCAL UNION)	
NO. 232, AFLO-CIO-CLC)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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 document was served on all parties or their counsel of record through the CM/ECF system.

s/David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of February, 2019

STATUTORY ADDENDUM

29 U.S.C. § 152:

When used in this subchapter—

...

(11) The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

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 ...

29 U.S.C. § 158(a):

It shall be an unfair labor practice for an employer—

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

...

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

29 U.S.C. § 158(c):

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 160(e):

... 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

29 U.S.C. § 160(j):

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.