

Nos. 18-2323, 18-2552

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

TIME WARNER CABLE OF NEW YORK CITY, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

On June 22, 2018, the National Labor Relations Board (“the Board”) issued a Decision and Order, reported at 366 NLRB No. 116, against Time Warner Cable of New

York City, LLC (“the Company”). (SA. 1-16.)¹ This case is before the Court on the petition of the Company to review, and the cross-application of the Board to enforce, that Order. The Board had subject-matter jurisdiction under Section 10(a) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 160(a), which empowers the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), and venue is proper because the Company transacts business in New York. The Board’s Order is final, and the Company’s petition and the Board’s cross-application were timely because the Act places no time limitation on the initiation of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities.

¹ “A.” references and “SA.” references are to the Joint Appendix Record and Special Appendix. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

In April 2014, during a time when contract negotiations were deteriorating, and the day after the Company suspended several Union-represented employees for a rule violation, the Union gathered employees outside the Company's Brooklyn facility for a protest that disrupted company operations. While investigating the demonstration, the Company asked employees a series of questions about their participation in, and knowledge of, the demonstration. It subsequently disciplined several employees for their participation and the Union filed unfair-labor-practice charges before the Board. Because the Board ultimately concluded that the demonstration was not protected by the Act, it found that the Company had lawfully disciplined the employees. However, the Board found that at least three questions the Company asked employees during post-demonstration investigatory interviews were unlawful because they tended to interfere with, restrain, or coerce employees' protected union activities, exceeding the scope of the Company's permissible investigation. The Board's findings of fact and the procedural history of the case are set forth below.

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Operations; the Bargaining History Between the Company and the Union

The Company provides television, internet, security, and telephone services to residential and commercial customers throughout the New York City area.

(SA. 8; A. 51, 56.) Its facility in Brooklyn services customers in southern Manhattan and houses a dispatch center, executive offices, technical operations, and construction, survey, and design personnel and equipment. (SA. 8; A. 286-87.) More than 600 employees work out of the Brooklyn facility. On a typical day, about 150 technicians drive their personal vehicles to work between 6:30 and 8:00 a.m., park at a nearby lot, enter to receive their daily assignments, and then drive company vehicles out of the facility to customer locations. (SA. 9; A. 309-10, 322-23.)

For more than ten years, the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 (“the Union”) has represented a multi-facility unit of technicians and foremen at six company facilities, including the Brooklyn facility. (SA. 8.) The parties’ most recent collective-bargaining agreement expired on March 31, 2013. That agreement contained an arbitration provision as well as a no-strike clause. The parties bargained but did not agree to a successor contract.²

² The parties reached a tentative agreement in March 2013, but the Union claimed that the Company’s proposed final, written contract failed to include all of the material terms of their agreement. The Company filed an unfair-labor-practice charge alleging that the Union had unlawfully refused to execute the collective-bargaining agreement agreed upon by the parties, but the Board found that the Union’s refusal to sign was lawful because the parties had not reached a “meeting of the minds” on all the substantive and material terms. 363 NLRB No. 30, 2015 WL 6576373 (Oct. 29, 2015).

B. Employees Demonstrate Outside the Company’s Brooklyn Facility, Engaging in a Work Stoppage and Disrupting Operations

On April 1, 2014, the Company suspended several bargaining-unit foremen for violating a company rule that required them to take tools home at the end of their shifts. (SA. 9.) In addition, the Company suspended a shop steward for his conduct while representing one of the disciplined foreman during the grievance process. Another of the suspended foremen complained to the Union that the Company had violated his right to have a shop steward at his disciplinary meeting.³ (SA. 9.)

The Union responded to the suspensions by asking bargaining-unit members to attend a “safety meeting” outside the Brooklyn facility the following morning, April 2. That morning, at about 6:23 a.m., a union representative arrived at the Brooklyn facility and parked his car perpendicular to the direction of traffic, in the middle of the street. (SA. 9-10; A. 147, 157, 298.) He then instructed several employees to move their cars to similarly block the street and the flow of traffic in and out of the facility. By 7:00 a.m., nearly 50 employees had gathered. At around 7:30 a.m., the union representative addressed the crowd,

³ The Union filed an unfair-labor-practice charge against the Company concerning its allegation the Company violated employees’ right to have a union representative, which the parties settled in March 2015. Board Case No. 02-CA-125694.

speaking about employee safety concerns, the suspended foremen, and the alleged violations of employees' right to representation during disciplinary meetings. (SA. 9; A. 155-56, 161.) Around 8:00 a.m., the crowd dispersed and the cars blocking traffic and access to the facility were removed. (SA. 9-10; A. 160.) The demonstration prevented many technicians from accessing the facility and service trucks from departing, which caused delays in scheduled appointments throughout the day. (SA. 9-10; A. 159.)

C. The Company Investigates the Demonstration and Disciplines Employees for Their Participation

After the demonstration, the Company launched an investigation into employees' involvement in the demonstration. Employees identified in video-surveillance footage from that morning were summoned to interviews. (SA. 10-11; A. 120, 129.) Using a standardized questionnaire, groups of human-resources managers and supervisors, including the Company's vice president of human resources and the facility's director of human resources, asked each employee nearly two dozen questions. (SA. 10-11; A. 61, 129-33.) They began by asking employees about their tenure, schedules, and supervisors, then asked whether the employees were present for the demonstration. After confirming that an employee was present, the Company stated it "appears that [the Union representative] was present as well," and asked a series of follow-up questions, including: "Who told

you about this gathering?"; "When did you receive notification of the gathering?"; and "How was this event communicated to you?"

If an employee denied involvement in, or claimed ignorance about the purpose of, the demonstration, the Company asked follow-up questions about why the employee stayed after seeing the protest and whether the employee tried to enter the facility or contact a manager. If an employee denied being present at the Brooklyn facility that morning at all, the Company showed the employee photographic evidence to the contrary. (SA. 10-11.)

Towards the conclusion of each interview, the Company asked about the collective-bargaining agreement and whether the employee was "familiar with the section that prohibits cessation or stoppage of work." (SA. 10-11.) The Company ended each interview by reading that "no-strike" provision aloud and informing the employee that participation in the demonstration could result in disciplinary action, including discharge. (SA. 10-11.) On May 22, the Company issued 2-week suspensions to seven employees either because they had no reason to be at the Company's facility on the morning of April 2 other than to demonstrate, or because they engaged in particularly egregious conduct, such as using a personal vehicle to block the road. (SA. 11; A. 120-21.) Approximately 34 more employees, who had been scheduled to work the morning of the demonstration, received final written warnings for their participation. (SA 11; A. 120-21.)

D. An Arbitrator Rules that the Demonstration Violated the Parties' No-Strike Clause

In response to the demonstration, the Company initiated an arbitration demand. It asserted that the demonstration violated the no-strike clause of the parties collective-bargaining agreement, which prohibited any “stop of work [or] service.” (SA. 2.) The arbitrator rejected the Union’s claim that the no-strike clause was not in effect at the time of the demonstration because the parties had jointly submitted to the arbitrator the specific issue of whether the demonstration had violated the terms of the no-strike clause. (SA. 2 & n.7.) After concluding that the Union’s “safety meeting” was a pretext and that the demonstration had impeded access to the Brooklyn facility and interrupted normal business operations, the arbitrator found that the demonstration had violated the no-strike clause. (SA. 2; 102.) *See Time Warner Cable of New York City, LLC v. Local Union No. 3, Int’l Bhd. Elec. Workers, AFL-CIO*, 684 F. App’x 68 (2d Cir. 2017), *affirming Time Warner Cable of New York City, LLC v. Local Union No. 3, Int’l Bhd. Elec. Workers, AFL-CIO*, 170 F. Supp. 3d 392 (E.D.N.Y. 2016)

II. PROCEDURAL HISTORY

Acting on a charge filed by the Union, the Board’s General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act when it suspended four employees for their participation in the April 2 demonstration. The complaint also alleged the Company unlawfully interrogated

employees during post-demonstration investigatory interviews, in violation of Section 8(a)(1) of the Act. (A. 23, 29.) Following a hearing, an administrative law judge found that the Company violated the Act as alleged.

III. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Members McFerran, and Kaplan; Member Pearce, dissenting in part), reversing the administrative law judge, dismissed the allegation that the suspensions violated Section 8(a)(3) and (1) of the Act. The Board accepted the arbitrator's decision that the demonstration violated the parties' no-strike clause. Accordingly, the Board found that the demonstration did not constitute protected concerted activity and thus that the Company could lawfully discipline employees for their participation. By contrast, the Board found, in agreement with the judge, that the Company unlawfully interrogated employees about protected union activities while investigating the unprotected demonstration, in violation of Section 8(a)(1) of the Act. Specifically, the Board found unlawful the questions: "Who told you about this gathering?"; "When did you receive notification of the gathering?"; and "How was this event communicated to you?"

The Board's Order requires the Company to cease and desist from coercively interrogating any employee about union support or union activities and from, in any like of related manner, interfering with, restraining, or coercing

employees in the exercise of their Section 7 rights. (SA. 5.) Affirmatively, the Order requires the Company to post a remedial notice.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act when it coercively interrogated employees during an investigation of an unprotected, union-led demonstration. Even where an employer investigates alleged unprotected misconduct, the employer must seek to minimize intrusion into employee activities that are protected by the Act. Here, the Board reasonably found that at least three of the Company's questions were coercive based on the totality of the circumstances surrounding those interrogations and, moreover, did not further the employer's legitimate investigatory interests.

Specifically, the Board found that several factors contributed to the coerciveness of the interrogation. The Company summoned employees individually to meet with high-ranking human-resources managers and supervisors; during those meetings, those officials pressed employees for information by asking dozens of questions not only about the demonstration, but about employees' activities leading up to the demonstration. And not only did the Company fail to offer any assurances against reprisal, but its officials emphasized that employees' activities had already been captured on video and warned

employees that its investigation carried with it the possibility of discipline based on the employees' answers to the questions. Significantly, the Company already knew what had happened at the demonstration through its review of surveillance video. Thus, there was no reason for the Company to probe into potentially protected communications between employees or between the union and employees that occurred prior to the demonstration, except to identify participants not visible on the video. At least three of the Company's questions intruded into those protected activities, however, and none of them asked employees served to identify participants. The Board reasonably found those three questions—"Who told you about this gathering?"; "When did you receive notification of the gathering?"; and "How was this event communicated to you?"—unlawfully coercive.

The Company's challenges to the Board's rationale misapprehend the well-established standard for evaluating whether questioning is coercive, and the leeway an employer enjoys when investigating unprotected conduct. Contrary to the Company's assertions, questioning that would reasonably be viewed as coercive based on the totality of the circumstances violates the Act even if conducted in response to unprotected activity, unless the employer's legitimate investigatory interests outweigh the infringement upon employee rights. With regard to the Board's application of the law, the Company has not demonstrated that the Board's

finding is either unsupported or unreasonable, as it must to overcome this Court's deference to the Board's fact finding and reasonable inferences when interpreting workplace communications.

STANDARD OF REVIEW

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990); *see also Office & Prof'l Emps. Int'l Union v. NLRB*, 981 F.2d 76, 81 (2d Cir. 1992) (“Congress charged the Board with the duty of interpreting the Act and delineating its scope.”). Accordingly, where the plain terms of the Act do not specifically address a precise issue, courts must defer to the Board's reasonable statutory interpretation. *Local 812, Int'l Bhd. of Teamsters v. NLRB*, 947 F.2d 1034, 1039-40 (2d Cir. 1991) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)); *see also NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (court “reviews the Board's legal conclusions to ensure that they have a reasonable basis in law [, and] . . . afford[s] the Board a degree of legal leeway”).

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 121 (2d Cir. 2017). Evidence is substantial when “a reasonable mind might accept [it] as

adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477. *Accord Pier Sixty*, 855 F.3d at 121-22. Thus, as the Court has explained, “[w]here competing inferences exist, we defer to the conclusions of the Board.” *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988). In other words, this Court will reverse the Board based on a factual determination only if it is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *NLRB v. G & T Terminal Packaging*, 246 F.3d 103, 114 (2d Cir. 2001) (citation omitted); *accord Local 917, Int’l Bhd. of Teamsters v. NLRB*, 577 F.3d 70, 76 (2d Cir. 2009).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEES ABOUT THEIR UNION ACTIVITIES

Because the April 2 demonstration was unprotected, the Company was within its right to investigate employees’ participation in the demonstration, including by interviewing employees on that subject. As demonstrated below, however, substantial evidence supports the Board’s finding that at least three of the Company’s interview questions went beyond permissible investigation of unprotected activity and had the tendency to infringe upon employees’ protected activities. And, contrary to the Company’s assertion, those three coercive

questions were not lawful per se simply because the Company asked them during an otherwise lawful investigation or in reaction to unprotected conduct.

A. An Employer Violates Section 8(a)(1) If Its Conduct Reasonably Tends To Coerce Employees in the Exercise of Their Section 7 Rights, Even When Investigating Unprotected Misconduct

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. §157. Section 8(a)(1) of the Act implements that guarantee by making it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights.” 29 U.S.C. 158(a)(1). An employer’s conduct violates Section 8(a)(1) of the Act if it has a reasonable tendency to coerce employees, regardless of whether they are coerced. *New York Univ. Med. Ctr. v. NLRB*, 156 F3d 405, 410 (2d Cir. 1998). In addition, an employer’s statements “must be judged by their likely import to [the] employees.” *C&W Super Markets, Inc. v. NLRB*, 581 F.2d 618, 623 n.5 (7th Cir. 1978); *see also Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006) (assessing the legality of employer statements based on whether employees would “reasonably perceive” them as threats). Accordingly, any assessment of statements by an employer to its employees “must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because

of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); accord *NLRB v. Homer D. Bronson, Co.*, 273 F. App’x 32, 36 (2d Cir. 2008).

In light of those principles, an employer violates Section 8(a)(1) of the Act by interrogating employees if “under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176, 1177 (1984), enforced sub nom. *Hotel Employees & Rest. Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Factors tending to show such coercion include: a history of employer hostility towards, or discrimination against, union supporters; the nature of the information sought; the position of the questioner in the employer’s hierarchy; the place and method of the exchange; and evasive or untruthful replies by the questioned employee. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1122 (2002), enforced, 71 F. App’x 441 (5th Cir. 2003). This Court has recognized that those factors are not exhaustive or definitive, and the absence of any one does not exonerate the employer. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 492 (2d Cir. 1975); *NLRB v. Rubin*, 424 F.2d 748, 751 (2d Cir. 1970).

Of particular relevance here, while an employer may lawfully investigate employees' unprotected activities, it cannot use such an inquiry as a door to obtain information about their protected activities in a manner that interferes with their exercise of Section 7 rights. Instead, as the Board explained in *Alton Box Board Co.*, 155 NLRB 1025 (1965), an employer's inquiry must "occur in a context free from employer hostility to union or concerted activity," which includes limiting the inquiry to the unprotected activities and offering employees assurances that they will not suffer reprisals as a result of their responses. 155 NLRB 1025, 1040-41; *see also St. Francis Reg'l Med. Ctr.*, 363 NLRB No. 69 (2015), 2015 WL 9256969 at *1 n.2 (while employer "may lawfully question employees" as part of an investigation into facially valid claims of misconduct, it "must avoid impinging on Section 7 rights" by "tailoring those questions to address only the narrow facts surrounding the alleged misconduct" and offering assurances against reprisals for protected activity); *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151, 158-59 (2014) (employer questioning was lawful when "narrowly tailored" to misconduct investigation and assurances were given to questioned employee). In other words, the unprotected nature of employee activity triggering an investigation does not eliminate the employees' right to be free from coercive interrogation into their protected activities. As a result, assessing whether an employer's questions have exceeded permissive bounds under such circumstances

“calls for a delicate balance between the legitimate interest of the employer . . . and the interest of the employee” to be free from “unwarranted interrogation.” *Alton Box Board*, 155 NLRB at 1041 (quotation and citation omitted).

B. At Least Three of the Company’s Questions Were Unlawfully Coercive Because They Exceeded the Scope of the Company’s Investigation and Interfered with Employees’ Protected Activities

1. The questions were coercive when assessed under the totality of the circumstances and did not further legitimate investigatory purposes

Substantial evidence supports the Board’s finding that the Company unlawfully interrogated employees during post-demonstration investigatory interviews. Several factors contributed to the tendency of the questioning to interfere with employees’ exercise of their statutory rights, and at least three specific questions intruded into protected union activities without substantially furthering the Company’s legitimate investigation into unprotected conduct.

As the Board found (SA. 4-5, 14), after identifying some employees who had participated in the demonstration through its video-surveillance system, the Company summoned them one-by-one into a conference room for investigatory interviews. Such isolation of employees in a private room, away from their regular work routine, increased the coerciveness of the encounters. *See, e.g., Kellwood Co.*, 299 NLRB 1026, 1026-27 (1990) (summoning employees individually to office supports finding of coercion), *enforced*, 948 F.2d 1297 (11th Cir. 1991);

CFS N. Am., 341 NLRB 345, 349 (2004) (summoning employees to conference room evidence of coerciveness), *enforced*, *CFS N. Am. v. NLRB*, 129 F. App'x 57 (5th Cir. 2005); *Bulk Haulers, Inc.*, 219 NLRB 244, 245 (1975) (questioning in conference room, which was not part of the employees' work area, evidence of coerciveness).

Once they arrived, the employees were each interviewed by several company managers, supervisors, and human-resources staff. The company representatives asked the employees a series of questions from a prepared script that covered not only the demonstration, but also events and communications leading up to the demonstration. That the questioners were high level managers and supervisors—including the Company's vice-president of human resources and the facility's director of human resources—and that some employees were questioned in the presence of managers in their own chain of command increased the coerciveness of the interviews. *See Midwest Reg. Joint Bd. v. NLRB*, 564 F.2d 434, 443 (D.C. Cir. 1977) (questioning by member of management hierarchy evidence of coerciveness); *K-Mart Corp.*, 336 NLRB 455, 469 (2001) (questioning by general manager, a high-ranking onsite official, evidence of coerciveness); *Ingram Book Co., Div. of Ingram Indus., Inc.*, 315 NLRB 515, 516 (1994) (questioning by vice president of human resources evidence of coerciveness).

Logically, moreover, the presence of multiple representatives would intimidate a reasonable employee.

Further contributing to the coercive atmosphere was the plain risk of discipline based on the employees' answers during the interviews. *See ATC of Nevada*, 348 NLRB 796, 797 (2006) (conducting questioning under express threat of suspension evidence of coerciveness), *enforced*, 309 F. App'x 98 (9th Cir. 2009). That disciplinary risk was not only implied by the circumstances but expressly stated. Specifically, after the Company reminded employees that their activities had been captured on video surveillance, the Company's interviewers "tested employees on their knowledge of the [collective-bargaining agreement], asking whether they had reviewed it" and making clear that it believed the demonstration to be in violation of the agreement. (SA. 14). The interviewers then emphasized that employees were subject to discipline, not only based on their known participation in the demonstration, but also based on their answers from the investigation and potential future conduct. Needless to say, they did not provide any reassurances that the employees would not be subject to reprisals.

In addition to the surrounding circumstances, the nature of the information sought by some questions during the interviews contributed to the questions' reasonable tendency to coerce employees' exercise of their statutory rights. As the Board acknowledged, the Company had an interest in investigating the unprotected

April 2 demonstration, including by questioning participating employees “about the employees’ and the Union’s participation in that event to a greater extent than if no unprotected conduct had occurred.” (SA. 4.)⁴ But given the circumstances of the post-demonstration interviews just discussed—including that the Company, “through its video, had already established specifically what had happened, and . . . had identified by the same means many of the employees who participated” (SA. 14)—the Board reasonably found that at least three of the Company’s questions unlawfully probed “beyond employee misconduct or involvement in [the demonstration] by seeking to elicit employee knowledge about union activities.” (SA. 14.)

Specifically, the Board found unlawful the questions: “Who told you about this gathering?”; “When did you receive notification of the gathering?”; and “How was this event communicated to you?” As the Board found (SA. 5, 14), those three questions tended to interfere with employees’ union activities in two different ways, without significantly furthering the Company’s investigation into the unprotected demonstration.

⁴ As the Board noted (SA. 4-5, 14), there were no exceptions to the judge’s finding that many of the Company’s questions legitimately furthered, and were narrowly tailored to, the purpose of the investigation into the unprotected demonstration, including those regarding which employees blocked the road into the facility, and when and how employees got to the demonstration. (SA. 14.)

First, the questions probed for details of pre-demonstration communications, seeking information about discussions between employees, or between employees and the Union, leading up to the demonstration. Those discussions involved, at a minimum, protected communications about a concerted response to grievances about the Company's treatment of fellow employees.⁵ *See NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001) (protected concerted activity includes activities of employees who have joined together to achieve common goals) (citation omitted). The fact that the resulting demonstration was unprotected does not remove protection from that earlier union and protected Section 7 activity. *Tony Silva Painting Co.*, 322 NLRB 989, 990 n.1 (1997) (unlawful to coercively question employees about the coordination of an unlawful strike); *see also Can-Tex Indus.*, 256 NLRB 863, 872 (1981) (employee's "mere talk" in support of a shutdown is protected activity, even if shutdown itself was not protected), *enforced*

⁵ At the time of the demonstration, the Company had just disciplined several bargaining-unit employees for violating a newly enforced safety rule, and a union steward for conduct that occurred while representing one of them at a disciplinary meeting, and another employee had informed the Union that a shop steward was not present when he received his suspension. (SA. 8-9.) The demonstration's link to those concerns was highlighted by union pamphlets distributed during the demonstration and in the union representative's speech. (SA. 9.) The demonstration also occurred just two days after the Company filed unfair-labor-practice charges against the Union accusing the Union of failing to execute a written agreement, a clear indication that contract negotiations between the Union and Company had deteriorated.

in relevant part, 683 F.2d 1183 (8th Cir. 1982); *KQED, Inc.*, 238 NLRB 1, 2 (1978) (employee is engaged in protected activity when talking in support of a work stoppage, even though the work stoppage itself is forbidden), *enforced mem.*, 605 F.2d 562 (9th Cir. 1979); *cf. Sunrise Senior Living*, 344 NLRB 1246, 1255 (2005), *enforced*, 183 F. App'x 326 (4th Cir. 2006) (questioning that sought to get interviewees to “unmask the person or persons” discussing a potentially unprotected work stoppage was coercive). Indeed, protecting the earlier union activity furthers the purposes and policies of the Act because allowing employers to intimidate or discipline employees for discussing concerted protests that might be unprotected would reasonably tend to chill employees from discussing other, protected forms of concerted activity. *See KQED, Inc.*, 238 NLRB 1, 2 (1978) (interpreting no-strike clauses as forbidding discussion about stoppages “ignore[s] the principle that the waiver of statutory rights is not lightly to be inferred”).

Second, the Company’s open-ended questions could lead employees to reveal not only the Union’s involvement in the demonstration (which was known) or other protected employee communications, but also the identity of employees who may have participated in those discussions but who did not attend the demonstration. In other words, the questions risked exposing the union sympathies and activity of employees who preferred to remain anonymous, which tends to restrain employees from exercising their Section 7 rights. *See NLRB v. Rubin*, 424

F.2d 748, 750-51 (2d Cir. 1970) (questioning employees about their own and coworkers' union activities is coercive); *St. Francis Reg'l Med. Ctr.*, 2015 WL 9256969 at *1 n.2 (questioning designed to determine with whom employee had engaged in protected activity was unlawful); *Tony Silva Painting Co.*, 322 NLRB at 990 n.1 (placing employee in role of union informant renders inquiry coercive).

On the other side of the equation, the intrusive questions failed, as the Board found (SA. 4-5, 14), to further the Company's legitimate investigatory purposes. The Company asserts that it "could lawfully question suspected wrongdoers to confirm the details of their activity, to hear whether they had any excuse for their actions, and to learn who else was involved." (Br. 13.) Even accepting that premise, none of the questions the Board found unlawful sought information relevant to those issues. At most, they served to identify participants in protected discussions that occurred prior to the demonstration, not who else was present at the unlawful demonstration.

Moreover, the demonstration itself was captured on video, many employee-participants had thus been identified and called to interviews, and the Board did not find unlawful any of the Company's questions seeking further details of what transpired *during* the event. As the Board explained, "[t]here was therefore no need for the [Company] to inquire into the activity of any employees prior to the event, except . . . specifically to identify the additional individuals who were actual

participants in the demonstration.” (SA. 4.) As noted, however, none of the unlawful questions sought to identify further employee present at the unlawful demonstration itself. Nor, contrary to the Company’s suggestion (Br. 23), would the inability to ask the three questions prevent the Company from asking known employee participants if they had an excuse for their participation.

2. The Board’s coercive interrogation finding is consistent with longstanding caselaw

For the reasons detailed above, the Board’s finding that the three questions probing protected, pre-demonstration communications were unlawfully coercive is supported by substantial evidence. It is also, contrary to the Company’s assertions (Br. 16-21), fully consistent with longstanding Board precedent addressing employer inquiries, both in the course of investigating alleged misconduct and otherwise.

It is undisputed that, as many of the Company’s cases confirm, employers may question employees about unprotected activities. It is further undisputed that employers may question employees about protected activities. Neither type of inquiry, however, is limitless. As noted above (pp. 15-16), the Board requires that any questioning avoid coercing employees’ exercise of their statutory rights. To that end, employers must tailor their inquiries into unprotected conduct to focus on that conduct to the extent possible. And where employers’ legitimate investigatory interests necessitate questions that intrude on protected activities, the Board must

balance those employer interests with protection of employees' statutory rights. To do so, it considers whether the circumstances contribute to or detract from coerciveness. Notably, the Board has found that employers may temper the coerciveness of their questioning with assurances that they will not discipline or otherwise retaliate against employees.

For example, in *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 158-59 (2014), the Board found that an employer, faced with complaints that an employee had harassed coworkers when seeking witness statements to support her sexual-misconduct allegation, lawfully sought a "full picture of the event," including the employee's motivation. In doing so, the Board noted that the employer did not "delve into [the employee's] motives or sentiments beyond the narrow facts surrounding the complaints at issue." *Id.* at 159. And the Board highlighted that, when questioning the employee, the employer assured her that it was not seeking to impede upon her potential protected activities in reporting alleged sexual misconduct and seeking witnesses, and was committed to protecting her against retaliation of any kind. *Id.* See also *Alton Box*, 155 NLRB at 1041 (employer assurance that employees' responses to questioning would not result in discipline supports a finding that questioning was not coercive). Here, by contrast, the Company not only delved into protected activities preceding the unprotected demonstration but did so in a manner not calculated to further the legitimate

objectives of its investigation (*see above*, pp. 19-20). Moreover, it failed to offer interviewed employees any assurances that their answers would not be used against them; instead, company representatives explicitly stated that the employees were at risk of discipline based on their answers (*see above*, pp. 17-18).

In several cases cited by the Company (Br. 16), the Board found employer questioning lawful because the nature of the information sought, unlike here, related only to unprotected activities. Thus, in *HCA/Portsmouth Regional Hospital*, the Board found an employer's questions to an employee who allegedly spread false rumors about her supervisor to be lawful because the employer limited its inquiry to the employee's rumor mongering, which the Board found to be unprotected. 316 NLRB 919, 929-31 (1995). *See also Ogiwara Am. Corp.*, 347 NLRB 110 (2006) (inquiry into identity of employee who sent package under false pretenses not coercive since it was limited to investigation of unprotected conduct).

St. Louis Comprehensive Neighborhood Health Center, 248 NLRB 1078 (1980), is particularly instructive. In that case, the Board concluded that an employer's investigation of unprotected misconduct during protected picketing was not coercive where the questions were limited to specific misconduct allegations and contained no explicit or implicit "coercive overtones." *Id.* at 1078. That the interrogation was "peripherally related to Union activities" in that it probed alleged misconduct that occurred during a protected strike, did not alone

suffice to render the questioning unlawful. *Id.* at 1087. By contrast, the Board found unlawfully coercive the employer’s similar questioning of an employee who participated in the same picketing but was not accused of any significant misconduct. *Id.*⁶

The Company’s sole remaining argument (Br. 17-18) is that any action taken “in reaction to” unprotected activity, including an interrogation during an investigation into unprotected misconduct, is per se lawful. In support of this contention, the Company wrongly relies on *Preferred Building Services*, 366 NLRB No. 159, 2018 WL 4106356 (Aug. 28, 2018), *Martel Construction*, 302 NLRB 522 (1991), and *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986). In *Preferred Building Services* and *Rapid Armored Truck*, the Board dismissed unfair-labor-practice allegations after finding allegedly protected employee activities to be unprotected, like the demonstration in this case. Unlike the interrogation violation before the Court, however, each of the violations at issue in those three cases was contingent on the employees having engaged in protected

⁶ The Company’s citation (Br. 16) to *K.O. Steel Foundry & Machine*, 340 NLRB 1295 (2003), is inapposite because the judge’s finding regarding the lawfulness of a particular question, whether an employee had taken photos for a union, was *dicta*. *Id.* at 1298 (finding as a factual matter that the employer never asked the question). In any event, the analysis in *dicta* considered the unprotected nature of the underlying activity and the employer’s significant interests in the information sought, an analysis consistent with the Board’s rationale in this case.

activity. See *Preferred Bldg. Servs.*, 2018 WL 4106356 at *4, *8 (employer took series of retaliatory steps against employees and threatened employees because of picketing at issue, and surveilled the picketing); *Rapid Armored*, 281 NLRB at 382 (employer threatened to discharge and discharged employees because of picketing at issue). Similarly, in *Martel Construction*, the Board found that an administrative law judge should have accepted and considered evidence regarding the employer's defense that, because the employee picketing was unprotected, it was permitted to threaten employees with discharge and discharge employees based on the unprotected picketing. *Martel*, 302 NLRB at 528-30. In all three cases, a determination that the activity was unprotected meant an essential element of each alleged violation was, or would have been, missing and dismissal was appropriate. For that same reason, the Board here dismissed allegations that the Company unlawfully disciplined employees because of their participation in the unprotected demonstration.

As the Company notes (Br. 17), *Preferred Building Services* also involved one allegation of unlawful interrogation.⁷ Under the particular facts of that case, however, the interrogation violation depended on the judge's finding (overturned

⁷ While the Company states that there were multiple interrogation violations at issue in *Preferred Building Services*, all but one were dismissed by the judge (who found the picketing in the case protected) because they were not alleged in the complaint or fully litigated at the hearing. See 2018 WL 4106356 at *8.

by the Board) that the employees' picketing was protected. There, during its investigation of employees' unprotected picketing, a supervisor asked an employee why they were picketing and issued threats to the employee because of his participation in the picketing. 2018 WL 4106356 at *8. The judge found that the picketing was protected activity and, as a result, found the employer's threats unlawful. *Id.* In addition, the judge found the question regarding the motive for picketing unlawfully coercive specifically because of the unlawful threats in the same conversation. *Id.* In other words, the judge's interrogation finding was dependent on the protected nature of the picketing because the unlawful threats were what made the questioning coercive. Contrary to the judge, the Board found the picketing unprotected, and as a result, found the employer's threats did not violate the Act. Once the basis for the judge's unlawful interrogation finding (i.e. the threats) was eliminated, the judge's interrogation finding was similarly reserved. *Id.* at *5-6. Here, by contrast, the Company's questions were unlawful because they reasonably tended to interfere with protected union activities outside of the unprotected demonstration the Company was investigating, and the factors evidencing coercion did not depend on the demonstration being protected.⁸

⁸ There is no merit to the Company's argument (Br. 17 n.6) that the Board erred, in light of *Preferred Building Services*, in denying its motion for reconsideration. The Board properly found the Company's motion was untimely under 29 C.F.R. § 102.48(c). In any event, contrary to the Company's misreading of the case, and as shown above, *Preferred Building Services* is inapposite. Moreover, it did not

CONCLUSION

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

Respectfully submitted,

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May 2019

change Board law, but merely applied the principles of *Martel* and *Rapid Armored*, which predated the Board's decision.

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FOR THE SECOND CIRCUIT**

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LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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* Nos. 18-2323

* 18-2552

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* Board Case No.

* 2-CA-126860

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,569 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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	*
Respondent/Cross-Petitioner	*
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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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