Oral Argument Not Yet Scheduled

Nos. 19-1504, 19-1680

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

IMAGEFIRST UNIFORM RENTAL SERVICE, LLC

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE NATIONAL LABOR RELATIONS BOARD

INTRODUCTION

Days after learning that the Union had begun organizing ImageFirst's employees by making home visits, company managers swung into action. Supervisor David Rivera initiated a physical confrontation with a union representative that resulted in his pleading guilty to a criminal charge. Jeffrey Berstein, ImageFirst's owner, began visiting the facility and meeting with employees on a weekly, rather than monthly, basis. In those meetings, he solicited

employees' grievances and promised to remedy them. Not only did Berstein promise improvements, he made good on those promises. Within a week of learning about the Union's home visits, he ordered the discharges of an unpopular supervisor and lead person about whom employees had been complaining for months. General Manager Jim Kennedy also solicited grievances from employees and explicitly promised to remedy them. In addition, ImageFirst managers began giving employees more and better food to undermine the campaign. The company also maintained an unlawful handbook rule that prohibited employees from discussing their payroll information. The Board found that by taking these actions, ImageFirst unlawfully interfered with employees' statutory rights.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This unfair-labor-practice case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petition of ImageFirst Uniform Rental Service, LLC to review, a Board Order issued against ImageFirst. The Board's Decision and Order issued on August 27, 2018, and is reported at 366 NLRB No. 182. (JA 27-37.)[1] The Board had subject-matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act ("the Act"), as

[1] "JA" references are to the joint appendix. "AR" references are to the agency record filed electronically with the Court, and "Br." refers to ImageFirst's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

amended, 29 U.S.C. §§ 151, 160(a), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties.

The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act, 29 U.S.C. § 160(e) and (f), because the unfair labor practices occurred in New Jersey. The Board's application for enforcement and ImageFirst's cross-petition for review were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUES

1. Is the Board entitled to summary enforcement of those portions of its Order remedying uncontested findings that ImageFirst violated Section 8(a)(1) of the Act by initiating a physical confrontation with a union representative and maintaining an unlawful rule in its employee handbook that prohibited employees from discussing payroll information?

2. Does substantial evidence on the record as a whole support the Board's findings that ImageFirst violated Section 8(a)(1) of the Act by:

- Soliciting and impliedly promising to remedy employee grievances, including grievances about an unpopular supervisor and lead person, in a different manner than before the union campaign; and

- Granting benefits to employees by discharging the unpopular supervisor and lead person, and increasing the frequency and quality of food provided to employees in order to discourage union support.

STATEMENT OF THE CASE

I. Proceedings Before the Board

After Laundry Distribution and Food Service Joint Board, Workers United, a/w Service Employees International Union ("the Union") filed an unfair-labor-practice charge and the Board's General Counsel issued a complaint, an administrative law judge conducted a hearing and issued a recommended decision, finding that ImageFirst's conduct violated Section 8(a)(1) of the Act. 29 U.S.C. §158(a)(1). (JA 36.) ImageFirst and the General Counsel filed exceptions to most of the judge's findings. (AR 1267-86.) On review, the Board found no merit to ImageFirst's exceptions, granted the General Counsel's exception to require ImageFirst to post a remedial notice at its facilities nationwide, and adopted the judge's findings and recommended order as modified. (JA 27 & nn.2-4.) The following subsections summarize the Board's findings of fact and its Conclusions and Order.

II. The Board's Findings of Fact

A. ImageFirst Prohibits Employees from Discussing Their Wages

ImageFirst operates commercial laundries that clean linen for health care facilities. It employs approximately 700 workers nationwide. (JA 32; AR 480, 668, 789.) Jeffrey Berstein owns ImageFirst, and James Kennedy is the company's top official at the Clifton, New Jersey facility at issue in this case. (JA 32; AR 522-23, 667.)

ImageFirst maintains a rule in its employee handbook that threatens employees with "immediate suspension or termination" should they discuss "payroll information." (JA 32; AR 478, 833.) Wages, hours, and benefits are the only payroll information to which a production employee would have access. (JA 32.)

B. ImageFirst Learns that Supervisor Ventura and Lead Person Farez Are Mistreating Employees

In the spring and summer of 2015, Human Resources Associate Caitlyn Payne made three site visits to the Clifton facility and met with production employees. After those visits, Payne prepared site visit reports that were reviewed by managers, including Berstein and Kennedy. (JA 33; AR 489-90, 540, 623-25, 676-77, 885-94.) In a report on her May visit, Payne noted that employees complained that Lead Person Miriam Farez was rude, difficult to work with, and made them not want to come to work. (JA 33; AR 886.) Payne noted that the

issues with Farez had "been going on for a while," and employees had previously reported Farez's behavior to Supervisor Luis Betancourt with no result. (AR 886-87.)

During her site visits, employees also told Payne that Production Supervisor Joe Ventura was "aggressive" and yelled at them. (AR 886.) Payne's reports relayed the employees' complaints; her reports also noted that Kennedy and Betancourt were aware of Ventura's problems and had previously counseled him "to follow our company values and treat the associates with respect." (AR 887.) Following her July 9 visit, Payne reported that although employees did not raise any issues about Farez, they complained that Ventura was "aggressive," "snappy," and "reactive." Her report added that Ventura's behavior was a "big focus" of her meetings with employees. (JA 33; AR 890-91.)

Berstein and Kennedy knew employees were unhappy with Ventura and Farez. Berstein personally reviewed Payne's site visit reports. Kennedy learned about the complaints from the employees and from Payne's reports. In April or May, Kennedy asked Betancourt to speak with Farez about her behavior, and both Kennedy and Betancourt spoke with Ventura. (JA 33; AR 540-42, 676-77, 704-05.)

C. The Union Starts an Organizing Campaign; Berstein and Kennedy Respond by Soliciting Employee Grievances and Promising To Remedy Them; Making Good on a Promise To Rectify Complaints about Ventura and Farez, ImageFirst Discharges Them

In mid-July 2015, the Union began an organizing drive among employees at the Clifton facility. (JA 32; AR 18.) In addition to leafletting outside the facility, union representatives visited employees at home. Berstein and Kennedy first learned of the union campaign on July 12 when a supervisor notified Kennedy that organizers had come to his house. (JA 32; AR 445, 450, 610, 1185-86.)

Prior to the union campaign, Berstein had visited the Clifton facility once a month. Beginning on July 14, two days after learning about the campaign, Berstein started making weekly visits. (AR 721-22.) That day, he held small group meetings and asked employees whether they were being treated with respect. (JA 35; AR 680-81.) Employees responded by complaining—not for the first time—about Supervisor Ventura and Lead Person Farez. After the meeting, Berstein instructed Kennedy to discharge them both. Kennedy fired Farez on July 15 and Ventura on July 20. (JA 33; AR 477, 499, 896, 904.)

Kennedy also began a series of mandatory employee meetings. At the July 20 meeting, he read verbatim from prepared talking points and began by telling employees that ImageFirst had discharged Ventura and Farez based on the recent employee feedback. (JA 34; AR 554-55, 1203.) After remarking that ImageFirst

"appreciate[s] everyone who was honest with us in these recent meetings," Kennedy pivoted to the "recent union activity" and explained that ImageFirst "feel[s] that unions are not beneficial to our associates, our company and our culture." (AR 1203.)

Kennedy closed the meeting by returning to the subject of employee feedback, reminding them that it had been used to make "significant changes." (JA 34; AR 1203.) Kennedy then told employees that he took "full responsibility" and "should have made those changes sooner." (JA 34; AR 1203.) He concluded by encouraging employees to "continue to voluntarily share any questions that you may have and as promised we will continue to provide answers." (JA 34; AR 1203.)

D. Supervisor David Rivera Assaults Union Organizer Marcia Almanzar and Pleads Guilty to a Criminal Charge

On August 6, union organizers, including Marcia Almanzar, leafletted outside the ImageFirst facility. Supervisor David Rivera initiated a confrontation with Almanzar by calling her a whore and a "boot licker," and blew debris on her with a leaf blower. (JA 35.) When Almanzar began recording with her cell phone, Rivera tried to pry it from her. Almanzar filed a criminal complaint against Rivera, who pleaded guilty. (JA 35; AR 858.) Before the Board, ImageFirst

stipulated that the confrontation occurred and that it violated Section 8(a)(1) of the Act. (JA 27 n.2, JA 35; AR 7.)

E. Responding to the Union Campaign, ImageFirst Improves the Quantity and Quality of Food Provided to Employees

Before the union campaign, ImageFirst sometimes gave employees doughnuts, coffee, chips, and pizza. (AR 655-56.) It also nominally had a "Lunch with the Boss" program, but the program was moribund and "not happening" for production employees, as Payne reported in her site visit notes. (JA 27; AR 886, 891.)

Soon after learning about the union campaign, ImageFirst began providing more and better-quality food to employees. At his meetings with employees on July 20, Kennedy announced that ImageFirst would provide Creole and Hispanic food, which he acknowledged was "a little bit different than what [ImageFirst] ha[d] done in the past." (JA 27; AR 656, 905.) Employees, many of whom were Haitian Creole and Hispanic immigrants, reported to Payne that they were "very excited" about the upgraded food. (AR 905.) After July 20, ImageFirst served Creole and Hispanic food at least twice. (JA 27; AR 657.) Prior to the Union's arrival, Kennedy believed ImageFirst might have provided the employees' "preferred foods" on holidays, but he could not remember specifics. (AR 657.)

In addition, ImageFirst restarted its Lunch with the Boss program. (AR 179.) Kennedy instructed ImageFirst's new assistant general manager, Cesar

Sanchez, to have lunch with small groups of employees. (AR 511-12, 528-29.) Sanchez, who began his job on September 1, took three groups of employees to off-site restaurants for lunch. For the remaining groups, he ordered food to be delivered because leaving the facility was time-consuming. In each case, both off-site and on-site, employees were given menus and allowed to order what they wanted for lunch. (AR 116-17, 165, 243, 507, 509.) Before the Union began organizing, if an ImageFirst manager ordered lunch for employees, the manager chose the meal, and according to Kennedy, usually selected "pizzas or something small like that." (AR 606-07.) In contrast, Sanchez estimated that his lunches cost $10 to $20 per employee. (JA 28; AR 508.)

III. The Board's Conclusions and Order

On the foregoing facts, the Board (Members Pearce and Kaplan, and Member Emanuel, dissenting in part) found, in agreement with the administrative law judge, that ImageFirst violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by initiating a physical confrontation with a union representative; maintaining an illegal rule in its employee handbook that prohibited employees from discussing payroll information; soliciting employee grievances and impliedly promising to remedy them in a manner different than before the union campaign; and granting benefits to employees to discourage union support by discharging an

unpopular supervisor and lead person and increasing the frequency and quality of food provided to employees. (JA 27 & nn.2-3, JA 36.)

To remedy that unlawful conduct, the Board's Order requires ImageFirst to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order directs ImageFirst to rescind the unlawful rule and post the Board's remedial notice at its facilities nationwide. (JA 28, 31, 36-37.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings.

SUMMARY OF THE ARGUMENT

ImageFirst's actions in this case clearly violate Section 8(a)(1) of the Act, which prohibits employer conduct that would reasonably tend to coerce employees in the exercise of their Section 7 right to form, join, or assist labor organizations and engage in other concerted activities. Indeed, ImageFirst does not challenge two such violations found by the Board. First, it does not contest the Board's adoption of the administrative law judge's finding, in the absence of exceptions, that ImageFirst violated Section 8(a)(1) when Supervisor Rivera physically confronted a union representative—an assault to which he pleaded guilty. Given the bar imposed by Section 10(e) of the Act against challenging on review findings

not excepted to below, ImageFirst could not (and does not) contest the finding. Nor does ImageFirst challenge the Board's finding that it also violated Section 8(a)(1) by maintaining a handbook rule prohibiting employees from discussing payroll information. ImageFirst waived any challenge to that finding by failing to contest it in its opening brief. Accordingly, the Court should summarily enforce the portions of the Board's Order that correspond to both uncontested findings.

ImageFirst's remaining actions just as plainly violate Section 8(a)(1) of the Act. As the Board found, it immediately responded to the union campaign by soliciting employee grievances—including grievances about an unpopular supervisor and lead person—and by promising to fix them. ImageFirst then made good on its promise to resolve complaints about the pair by discharging them. In addition, the company provided employees with gustatory benefits by taking them to restaurants and serving more and better-quality food in order to discourage them from supporting the Union.

ImageFirst takes issue with the Board's factual findings and its credibility determinations, but the Court will not displace the Board's choice between two fairly conflicting views of the facts or overturn its credibility resolutions unless they are inherently incredible. On this record, ImageFirst has made no such showing.

STANDARD OF REVIEW

The Court will not disturb the Board's factual findings, or the reasonable inferences drawn from those findings, even if the Court would have made a contrary determination had the matter been before it *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Further, the Board's credibility determinations are entitled to deference and must be affirmed unless they are shown to be "inherently incredible or patently unreasonable." *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 609 (3d Cir. 2016). Finally, the Board's legal conclusions must be upheld if based on a "reasonably defensible" construction of the Act. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001) (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)).

ARGUMENT

I. The Board Is Entitled to Summary Enforcement of the Portions of Its Order Remedying Uncontested Findings that ImageFirst Unlawfully Initiated a Confrontation with a Union Representative and Maintained a Handbook Rule Prohibiting Employees from Discussing Their Wages

The Court should summarily enforce the portions of the Board's order addressing two Board findings that ImageFirst failed to contest. First, at the hearing, ImageFirst amended its answer to the unfair-labor-practice complaint to admit that it, by the actions of Supervisor David Rivera, "had a physical confrontation with a union representative and by its conduct coerced or restrained employees in the exercise of their Section 7 rights." (AR 7.) Following the hearing, the administrative law judge issued a decision finding that Rivera initiated the confrontation by calling Union Representative Marcia Almanzar a whore, blowing debris on her with a leaf blower, and, when Almanzar tried to record the episode with her cellphone, attempting "to pry" the phone from her. (JA 35.) Indeed, as the judge also found, Almanzar filed a criminal complaint against Rivera, who pleaded guilty to assault. (JA 35; AR 858.)

The administrative law judge found that by this assault, ImageFirst violated Section 8(a)(1) of the Act. ImageFirst filed no exceptions to this finding with the Board, which accordingly affirmed it. (JA 27 n.2.) Under Section 10(e) of the Act, therefore, the Court lacks jurisdiction to consider any challenge to that

finding. 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. FES, Div. of Thermo Power*, 301 F.3d 83, 95 n.6 (3d Cir. 2002). But even if ImageFirst had filed exceptions, it still would have waived any challenge by failing to contest the finding in its opening brief. *See, e.g.*, *NLRB v. Konig*, 79 F.3d 354, 356 n.1 (3d Cir. 1996).

Second, ImageFirst failed to contest in its opening brief the Board's finding that it violated the Act by maintaining a handbook rule prohibiting employees from discussing payroll information. ImageFirst's failure to challenge this finding constitutes a waiver of any direct defense on the merits, and ImageFirst may not raise it later in the reply brief. *Konig*, 79 F.3d at 356 n.1; *Kost v. Kozakiewicz*, 1 F.3d 176, 182 n.3 (3d Cir. 1993).

Because the Court lacks jurisdiction to consider any challenge to the physical confrontation finding and ImageFirst has waived any challenge to the handbook-rule finding, the Court should "accept them as true" and grant summary enforcement of those portions of the Board's Order corresponding to those findings. *Konig*, 79 F.3d at 356 n.1.

II. ImageFirst Violated Section 8(a)(1) of the Act by Soliciting Employee Grievances and Promising To Remedy Them, Discharging an Unpopular Supervisor and Lead Person, and Providing Better Quality Food in Order To Discourage Employee Support for the Union

A. The Act Prohibits Employers from Interfering with, Restraining, or Coercing Employees Engaged in Protected Activity

Section 7 of the Act protects employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Those rights are enforced through Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1).

By "expressly or impliedly promising to remedy employee grievances if they reject the Union," an employer violates Section 8(a)(1) of the Act. *1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 146 (3d Cir. 2016). *Accord Hedstrom Co. v. NLRB*, 629 F.2d 305, 314 (3d Cir. 1980). 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) (internal quotation marks and citation omitted), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011).

Just as soliciting and promising to remedy grievances can violate Section 8(a)(1) of the Act, so too can remedying those grievances and granting other benefits to interfere with employees' organizational rights. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). As the Supreme Court explained, "[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *Id*. at 409.

The Board's analysis for determining whether a grant of benefits violates Section 8(a)(1) under *Exchange Parts* is motive-based. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007). To find a violation, the Board determines whether the evidence on the entire record, including any "legitimate reason" proffered by the employer for its promise or grant of benefits, supports an inference that the promise or grant "was motivated by an unlawful purpose to coerce or interfere with [employees'] protected union activity." *Id.* Because direct evidence of unlawful motive is often impossible to obtain, the Board may rely on circumstantial evidence, including timing. *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164-65 (3d Cir. 1977); *Care One at Madison Ave., LLC v. NLRB*, 832 F.3d 351, 358 (D.C. Cir. 2016). Accordingly, the Act "requires . . . that the employer make its benefits decisions 'precisely as it would if the union were not

on the scene.'" *Care One*, 832 F.3d at 357 (quoting *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 927 (D.C. Cir. 2005)).

B. ImageFirst Unlawfully Solicited Grievances and Promised To Remedy Them

Substantial evidence supports the Board's findings that ImageFirst not only "repeatedly and materially altered its practice of soliciting grievances," it expressly promised to remedy those grievances, and then did, in fact, remedy some of the employees' complaints. (JA 35.) Moreover, the Board found "no credible evidence that . . . employees were solicited by Kennedy and/or Berstein prior to the union campaign in the manner that they were afterwards." (JA 36.)

Thus, Berstein "materially altered" his practice of soliciting grievances by visiting the Clifton facility more regularly after learning of the union campaign, and by immediately remedying longstanding employee complaints. Prior to the campaign, he had visited the facility only once a month. In contrast, on July 14, just two days after learning about the campaign, Berstein began showing up every week. (AR 721-22.) That day, he held small group meetings and asked employees whether they were being treated with respect. (JA 35; AR 680-81.) Employees responded by complaining—not for the first time—about Supervisor Ventura and Lead Person Farez. Berstein resolved their grievances by immediately ordering Kennedy to fire the pair. In short, although ImageFirst knew about the employees' complaints well before the union campaign, not until the organizing began did

management decide to do something about it. ImageFirst's abrupt about-face highlights the material change in its practice of handling such grievances.

Moreover, to ensure employees would know their complaints to Berstein had resulted in action, Kennedy announced on July 20 that ImageFirst had discharged Ventura and Farez because of information learned "[t]hrough associate[] meetings in the last couple of weeks." (JA 35; AR 1203.) He then thanked employees for their feedback and told them that "[a]fter further review . . . some significant changes have been made." He also took "full responsibility" and apologized for not making the changes sooner. (JA 35; AR 1203.) He concluded the meeting by again soliciting employees to "share any questions that you may have and as promised we will continue to provide answers." (AR 1203.) In addition, Kennedy informed managers about Supervisor Luis Betancourt's solicitation of grievances from employee DeJesus. Betancourt had told DeJesus "that he is more interested in any concerns our associates are having so that we can continue to fix them." (JA 36; AR 1205.)

Employee testimony also supports the Board's finding that ImageFirst "significantly alter[ed] its past manner and methods of solicitation." (JA 35.) While ImageFirst had regularly conducted morning "huddles" with employees, the huddles—to talk about the day's production—were unlike the meetings Berstein and Kennedy held after the Union began organizing. For example, employee

Estellus described the huddles as "quick meetings" to talk about "the machines." (AR 314, 326.) But once the Union came on the scene, managers began asking employees to "give suggestions . . . [a]bout the job." (AR 327.) Estellus's testimony was corroborated by employee Ulloa, who testified that the meetings held after the Union appeared were "not like" the ones held before. (JA 36; AR 250-51.)

Thus, the record amply demonstrates that as in *1621 Route 22 W.*, Berstein and Kennedy "solicited employees' grievances, promised to fix them, and, in some cases, did fix them during the election campaign, all in violation of § 8(a)(1) of the NLRA." 825 F.3d at 147. ImageFirst attempts to defend its managers' actions by characterizing their solicitation of grievances as a continuation of past practice and taking the Board to task for "blithely discredit[ing] Kennedy and Berstein." (Br. 19.) Both arguments fail.

As the Board has explained, past practice "can protect an employer from an inference that its solicitations include an *implicit* promise to remedy the grievances." *Manor Care*, 356 NLRB at 221 (emphasis added). But during a union campaign, there is no such protection for "*express* promises to remedy newly solicited grievances in a direct effort to discourage employees from choosing representation." *Id*. (emphasis added). Moreover, deviating from the usual policy of soliciting and remedying grievances during a union campaign violates the Act.

Ctr. Const. Co. v. NLRB, 482 F.3d 425, 435 (6th Cir. 2007); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263, 270 (2d Cir. 1981).

In rejecting ImageFirst's argument that its solicitation of grievances was merely a continuation of past practice, the Board relied on both employee testimony and documentary evidence. (JA 35.) As detailed above, employees testified that ImageFirst held more meetings—and asked different questions—after the union campaign began. Berstein and Kennedy's own testimony also provided strong evidence that they deviated from their past practice of soliciting grievances. Indeed, Berstein's admission (JA 721-22) that he increased his site visits from monthly to weekly directly undermines ImageFirst's claim that he "did not change his conduct in response to the Union" (Br. 18). He also changed his previously hands-off response to employees' persistent complaints about Ventura and Farez and ordered them to be discharged immediately. (JA 35; AR 681-82.) For his part, Kennedy's own talking points for his July 20 meeting with employees establish that he "solicited grievances and expressly promised to remedy them" at that meeting. (JA 35; AR 1203.)

Further, while Kennedy testified that the 10 "Be Remarkable" meetings he held with employees in September and October 2015 were merely a continuation of his past practice, the Board, affirming the administrative law judge, found "no evidence to support this contention other than the self-serving testimony of

Kennedy and Berstein." (JA 36.) Given the complete absence of employee testimony and documentary evidence corroborating this claim, the Board reasonably upheld the judge's determination to discredit their testimony. (JA 36.)

Where the judge and the Board, as they did here, "examine[d] in detail the conflicting versions of the particular incident charged and made reasoned credibility determinations," the Court defers to those findings. *Vitek Elecs., Inc. v. NLRB*, 763 F.2d 561, 571 (3d Cir. 1985). Given the overwhelming weight of the documentary and testimonial evidence, including Berstein and Kennedy's own admissions, ImageFirst can hardly show—as it must—that the judge's credibility determinations, which the Board accepted, are "inherently incredible or patently unreasonable." *Advanced Disposal*, 820 F.3d at 609.

ImageFirst focuses its attack on employee Ulloa's testimony, asserting that it is "incredible" and inconsistent. (Br. 20 & n.18.) But as Judge Learned Hand explained, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony. *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951). *Accord Sunbelt Mfg., Inc. v. NLRB*, 996 F.2d 305 (5th Cir. 1993). Moreover, where, as here, Ulloa's testimony was corroborated by other employees, the Court "will not substitute [its] own credibility finding for the [administrative law judge]'s." *St. George Warehouse, Inc. v. NLRB*, 420 F.3d 294, 298 (3d Cir.

2005). In these circumstances, substantial evidence supports the Board's finding that ImageFirst solicited employee grievances and impliedly promised to remedy them in violation of the Act.

C. ImageFirst Unlawfully Granted Benefits To Discourage Union Support

As part of its campaign to thwart the Union's nascent organizing effort, ImageFirst unlawfully discharged an unpopular supervisor and lead person and upgraded the quality and quantity of food provided to employees. In *Exchange Parts*, the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union" violates Section 8(a)(1) of the Act. 375 U.S. at 409. If an employer fails to show a legitimate business reason for conferring the benefits, the Board may infer that they "were granted with the purpose of interfering with the employee's choice to unionize." *NLRB v. Am. Spring Bed Mfg. Co.*, 670 F.2d 1236, 1243 (1st Cir. 1982) (internal quotation marks and citation omitted). *Accord Yale New Haven Hosp.*, 309 NLRB 363, 366 (1992). As shown below, substantial evidence supports the Board's findings that ImageFirst conferred new benefits on employees and failed to establish a legitimate business reason for doing so. Accordingly, ImageFirst's actions were unlawful.

1. ImageFirst unlawfully discharged an unpopular supervisor and lead person

The Board, affirmed by this Court and its sister circuits, has long held that where an employer discharges an unpopular supervisor in order to discourage unionization, that discharge is an unlawful conferral of benefits under *Exchange Parts*. *See, e.g.*, *NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164-65 (3d Cir. 1977); *Manor Care of Easton, PA*, 356 NLRB 202, 223 (2010), *enforced*, 661 F.3d 1139 (D.C. Cir. 2011).

Substantial evidence supports the Board's finding that ImageFirst fired Ventura and Farez to discourage unionization. (JA 34.) As an initial matter, Berstein and Kennedy were both aware of problems with Ventura and Farez for months before firing them, as they admitted at the hearing. (AR 540-42, 623, 628-29, 677, 704-05.) Indeed, Kennedy had learned of Farez's "disrespectful" behavior at the "beginning" of 2015, and of Ventura's behavior soon after he was hired in February 2015. (AR 623, 629.) Yet, it was not until the Union came on the scene in July 2015 that managers took immediate steps to deal with the problem.

Abundant testimony supports the Board's finding. Most tellingly, Farez herself testified that ImageFirst did not counsel or warn her about her behavior before discharging her. (AR 76-77.) In addition, employee DeJesus testified that she complained about Farez to Betancourt every day, and while her complaints started "much before" the Union arrived, they resulted in "no changes." (AR 97-

99.) Similarly, prior to the Union's arrival, employee Palacio complained to Betancourt about Ventura speaking rudely to her and embarrassing her in front of other employees, but nothing changed. (AR 113-14.) Employee Ulloa likewise testified that during meetings with Betancourt, multiple employees complained about Farez and Ventura before the union campaign started. (AR 247.) In addition, other employees overheard Ventura speak disrespectfully to Ulloa and reported the incident to Betancourt on her behalf. (AR 248-49.) Employee Alacote also repeatedly complained about Ventura and Farez, only to be told by Betancourt that "there are 100 people outside waiting"—a not-so-subtle hint that she could be easily replaced. (AR 158.) Moreover, nothing changed as a result of her complaints, except that the "[p]ressure was worse." (AR 160.)

Despite these repeated employee complaints, ImageFirst managers remained indifferent until two days after the Union began visiting employees at their homes. Only then did Berstein instruct Kennedy to fire Ventura and Farez "[b]ecause of feedback from [Berstein's] recent visit" with employees—feedback that was not news to either of them. (AR 622-23.) Given Kennedy and Berstein's admissions that they had long known of disrespectful behavior by Ventura and Farez, but only decided to get rid of them based on the "recent" (i.e., post-union campaign) employee feedback, the Board reasonably found that ImageFirst violated the Act by discharging them.

ImageFirst's attempts to assail the Board's decision fail. As an initial matter, its claim that the Board erred in finding a violation because the discharges did not occur during the "critical period" between the filing of a representation petition and an election is simply erroneous.[2] (Br. 13.) The Board applies the motive-based analysis of *Exchange Parts* to an employer's promise or conferral of benefits during an organizational campaign both before and after an election petition has been filed. *See, e.g.*, *Manor Care*, 356 NLRB at 222 (citing *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 17 (2006)); *Network Dynamics*, 351 NLRB at 1424; *Curwood, Inc.*, 339 NLRB 1137, 1147-48 (2003), *enf'd. in pertinent part*, 397 F.3d 548, 553-54 (7th Cir. 2005). Moreover, ImageFirst's bald statement that "there simply is no extant authority for the proposition that an employer's pre-petition discharge of a supervisor constitutes a violation of the Act" is plainly incorrect. (Br. 13.) The Board has squarely held that an employer's attempt to discourage unionization by removing a supervisor during an organizational campaign, but before an election petition has been filed, violates the Act. *Manor Care*, 356 NLRB at 223. *Cf. Aldworth Co., Inc.*, 338 NLRB 137, 180 (2002), *enf'd sub nom. Dunkin' Donuts Mid-Atl. Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437 (D.C.

[2] The "critical period" for purposes of Board law is the period between the filing of an election petition with the Board and the election. *Ideal Elec. & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). During that time, "any substantial interference" with employee rights "might constitute a basis for setting aside the election." *Id*. at 1277.

Cir. 2004) (employer's pre-petition promise to hire new manager as replacement for unpopular manager violated the Act).

ImageFirst's further argument—that the Board's finding "improperly intrude[s]" on its "management prerogatives" and prevents it from discharging a supervisor where it had "prior knowledge" of the misconduct—is a red herring. (Br. 15.) Because it is unlawful to confer benefits during a campaign to discourage unionization, an employer cannot, as ImageFirst did here, ignore employee complaints about supervisors for months and then fire them when the employees begin to organize, in order to thwart the campaign. *Manor Care*, 356 NLRB at 223; *Aldworth*, 338 NLRB at 180. Thus, the issue here is not that ImageFirst discharged a supervisor and lead person for misconduct during an organizational campaign. Rather, the violation occurred because "even if previous problems with these supervisors factored into the decision," ImageFirst failed to show it would have discharged them when it did "absent union activity." *Manor Care*, 356 NLRB at 223 n.43.

ImageFirst errs in arguing that employers "do not simply terminate employees . . . at the first sign of difficulty," and instead "counsel struggling employees . . . and attempt to correct the problems." (Br. 15.) After all, as Farez testified, ImageFirst never counseled her about her behavior before abruptly discharging her. (AR 76-77.) Moreover, ample testimony establishes that

ImageFirst ignored complaints by multiple employees about the pre-campaign behavior of Ventura and Farez. (AR 886-87.)

Nor does ImageFirst's claim that it was merely enforcing company values help its cause. (Br. 16.) Even if, as ImageFirst claims, it discharges supervisors who violate company values, in this case it failed to show that it would have discharged Ventura and Farez *when it did* in the absence of the union campaign. According to Berstein and Kennedy, violating the company's values warrants immediate dismissal, rather than application of the progressive discipline policy. (AR 625-26, 709-10.) But Berstein and Kennedy ignored repeated employee complaints until after the Union began organizing. The timing of the discharges supports the Board's finding that ImageFirst discharged Ventura and Farez in order to discourage unionization. *Manor Care*, 356 NLRB at 222.

Finally, ImageFirst gains no ground by arguing that the General Counsel "presented no evidence to prove that Farez acted as [ImageFirst's] agent in connection with any allegedly unlawful conduct." (Br. 12.) As ImageFirst notes, it initially denied Farez's agency status in its written answer. (AR 745 ¶12.) But ImageFirst seems to have forgotten that on the first day of the hearing, it amended that answer "to admit Paragraph 12 in its entirety."[3] (AR 8.) Thus, there was

[3] Paragraph 12 of the amended complaint alleges that "[a]t all material times Miriam Farez held the position of Respondent's Lead Person and has been an agent of Respondent within the meaning of Section 2(13) of the Act." (AR 756.)

absolutely no need for the General Counsel to present evidence regarding Farez's agency status. Further, whether Farez is a legal agent is of no moment to the analysis under *Exchange Parts*, which asks whether ImageFirst conferred a benefit on employees to discourage unionization. If ImageFirst removed Farez during the union campaign to discourage unionization, then her discharge violated the Act, regardless of her agency status.

2. ImageFirst improved the quality and quantity of food provided to employees in order to discourage unionization

Providing benefits to employees during a union campaign, if the motive is to discourage unionization, is unlawful whether those benefits involve increased wages, better leave policies, or better food. *Exchange Parts*, 375 U.S. at 408 (overtime and vacation benefits, new birthday holiday); *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 66 (3d Cir. 1978) (wages); *Hedstrom Co. v. NLRB*, 558 F.2d 1137, 1143 (3d Cir. 1977) (preferential wage rate and changes to machinery); *NLRB v. D'Armigene, Inc*., 353 F.2d 406, 408 (2d Cir. 1965) (improvements in vacation policy and wages); *Dynacor Plastics & Textiles Div. of Medline Indus*., 218 NLRB 1404, 1411 (1975) (free lunch). Here, ImageFirst increased both the quantity and quality of food provided to employees as part of its response to the union campaign. (JA 27-28.) As we now show, ImageFirst not only provided more and better food to employees, it failed to provide "a legitimate business justification for

the employee meals." The Board therefore reasonably determined that by providing this benefit, ImageFirst violated the Act. (JA 28.)

The day Kennedy announced ImageFirst had fired Ventura and Farez, he also announced the company would be bringing in Hispanic and Creole food on July 24, an event about which the employees (many of them Hispanic or Haitian Creole immigrants) were "very excited." (AR 656-57, 905.) As Kennedy admitted, providing Creole and Hispanic food was "[p]robably a little bit different than what we have done in the past." (AR 656.) In the past, according to Kennedy, ImageFirst had provided pizza, chips, doughnuts, coffee, and snacks. (AR 655-56.) ImageFirst provided the Creole and Hispanic lunches at least twice. (JA 27; AR 657.)

In addition, ImageFirst transformed its moribund Lunch with the Boss program into one in which employees were allowed to choose their own meals from a menu and were taken off-site for lunch. (JA 28.) Even Kennedy's testimony showed that previously, Lunch with the Boss had consisted of "pizza or something small like that," and was limited to cases where there was a "special reason" for having lunch. (AR 595-97, 606-07.) But after the union campaign began, Sanchez took employees out to lunch and later allowed them to choose their preferred lunches from a menu. Sanchez's lunches, rather than being "something small" like pizza, cost $10 to $20 per employee. (JA 28; AR 508.)

As the Board explained, the meals started on July 24, less than two weeks after ImageFirst first learned of the union campaign. (JA 28.) In addition, Kennedy announced the very popular Creole and Hispanic food at a meeting called "for the purpose of expressing [ImageFirst's] opposition to the Union and during which he announced the unlawful discharges as an intended employee benefit and unlawfully solicited grievances with a promise to remedy them." (JA 28.) In the context of ImageFirst's response to the union campaign, ImageFirst's provision of more and better quality food constituted an unlawful conferral of benefits.

Contrary to ImageFirst's claim, its provision of meals during the union campaign was not merely a continuation of past practice. (Br. 21.) Rather, as the Board found, ImageFirst did not give employees a choice of meals before the union campaign—a finding ImageFirst did not dispute before the Board. (JA 28 & n.5.) And while ImageFirst claims that its "Lunch with the Boss" program was long-established, HR Associate Payne's site-visit notes from May and early July clearly show that prior to the union campaign, Lunch with the Boss was "not happening" for production employees. (JA 27; AR 600, 886, 891.) Moreover, ImageFirst failed to explain why Sanchez took employees out to restaurants and later allowed them to order from a menu, when that had never been the practice. (JA 28; AR 208, 244, 606-08.) Thus, the Board reasonably determined that ImageFirst "failed to establish that its granting of lunches and revitalization of the

'Lunch with the Boss' program was motivated by legitimate business reasons and not the union organizing campaign." (JA 28.)

The cases cited by ImageFirst do not require a different result. (Br. 22 n.19.) Certainly, the Board has long held that "campaign parties, absent special circumstances, are legitimate campaign devices and that it will not set aside an election simply because the union or employer provided free food and drink to the employees." *Chicagoland Television News, Inc*., 328 NLRB 367 (1999) (internal quotation marks and citation omitted). But this case does not involve a "campaign party" or conduct that allegedly influenced an election.[4] Instead, the issue here is whether the employer violated Section 8(a)(1) by granting employees a benefit, and for that issue the Board applies the motive-based analysis of *Exchange Parts*. *Manor Care*, 356 NLRB at 222. The Board's application of that longstanding, Supreme Court-approved legal standard is "reasonably defensible" and should be upheld. *Quick v. NLRB*, 245 F.3d 231, 240-41 (3d Cir. 2001).

[4] Where either a union or employer alleges interference with a Board-conducted election, the analysis is qualitatively different from the instant case. The party seeking to overturn the election must show, not only that improprieties occurred, but that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970).

CONCLUSION

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

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner/Cross-Respondent v. IMAGEFIRST UNIFORM RENTAL SERVICE, LLC Respondent/Cross-Petitioner	Nos. 19-1504 & 19-1680 Board Case Nos. 22-CA-161563 & 22-CA-181197

CERTIFICATE OF COMPLIANCE

In accordance with Third Circuit L.A.R. 28.3(d) and 46.1(e), Board counsel Kellie Isbell certifies that she is a member in good standing of the State Bar of Maryland. She is not required to be a member of this Court's bar, as she is representing the federal government in this case.

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 7,116 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2010. Board counsel further certifies that: the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court; and the PDF file submitted to the Court has been scanned for viruses using

Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/s/ David Habenstreit
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Dated at Washington, DC
this 16th day of August, 2019

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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	)	Nos. 19-1504 & 19-1680
Petitioner/Cross-Respondent	)	
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v.	)	22-CA-161563 &
	)	22-CA-181197
IMAGEFIRST UNIFORM RENTAL SERVICE, LLC	)	
	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all the parties or their counsel of record through the CM/ECF system.

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Dated at Washington, DC
this 16th day of August, 2019