

**Nos. 18-1219, 18-1246**

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

**ADVANCEPIERRE FOODS, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**UNITED FOOD AND COMMERCIAL WORKERS**

**UNION, LOCAL 75**

**Intervenor**

---

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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

ADVANCEPIERRE FOODS, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1219, 18-1246
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	9-CA-153966
	)	
and	)	
	)	
UNITED FOOD AND COMMERCIAL	)	
WORKERS UNION, LOCAL 75	)	
	)	
Intervenor	)	

**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

**A. Parties, Intervenors, Amici**

AdvancePierre Foods, Inc. (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. United Food and Commercial Workers Union, Local 75 (“the Union”) was the charging party before the Board and is the intervenor before the Court. The Company, the Board’s General Counsel, and the Union appeared before the Board in case numbers 09–CA–153966, 09–CA–153973, 09–CA–153986, 09–CA–154624, 09–CA–156715, 09–

CA-156746, 09-CA-159692, 09-CA-160773, 09-CA-160779, and 09-CA-162392. There were no amici before the Board, and there are none in this Court.

### **B. Rulings Under Review**

This case involves the Company's petition to review and the Board's cross-application to enforce an Order the Board issued on July 19, 2018, reported at 366 NLRB No. 133.

### **C. Related Cases**

The ruling under review has not previously been before this Court or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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Dated at Washington, DC  
this 20th day of March 2020

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UNION, LOCAL 75**

**Intervenor**

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

---

**STATEMENT OF JURISDICTION**

AdvancePierre Foods, Inc. (“the Company”) petitions for review of, and the National Labor Relations Board (“the Board”) cross-applies to enforce, a Board

Order (366 NLRB No. 133) issued on July 19, 2018. (A. 1-42.)<sup>1</sup> United Food and Commercial Workers Union, Local 75 (“the Union”) has intervened on the Board’s behalf.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). The Company’s petition and the Board’s cross-application were timely; the Act imposes no time limits for such filings. The Court has jurisdiction over the Board’s final Order pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

### **RELEVANT STATUTORY PROVISIONS**

Relevant statutory provisions are reproduced in the Addendum to this brief.

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order.
2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by soliciting employees to revoke their union authorization cards.
3. Whether the Board acted within its broad discretion in ordering a notice-reading remedy.

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<sup>1</sup> “A.” references are to the joint appendix. “Br.” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

This case involves the Company's wide-ranging campaign of unlawful conduct launched in response to its employees' union-organizing activities. Upon learning of the budding unionization effort, the Company swiftly embarked on a sustained course of unfair labor practices, prompting the Union to file charges. The Board's General Counsel issued a complaint alleging that the Company committed nearly 20 violations of the Act. (A. 8-10; A. 300-01, 328-30, 593-603, 614-20, 653-61.) Following a hearing, the administrative law judge found that the Company largely violated the Act as alleged, except as to its alleged unlawful solicitation of employees to revoke their union authorization cards and a few other alleged violations. (A. 8-38.) The judge acknowledged the numerous and serious nature of the Company's unfair labor practices but declined the General Counsel's request to recommend a notice-reading remedy. (A. 38-40.) The Company filed exceptions to the judge's decision; the General Counsel filed cross-exceptions. (A. 1.)

On review, the Board found no merit to the Company's exceptions and adopted all of the judge's violation findings. (A. 1 & n.4.) The Board found merit to the General Counsel's exceptions that the Company unlawfully solicited employees to revoke their authorization cards and also committed 2 additional

unfair labor practices involving an interrogation and the confiscation of authorization cards—bringing the Company’s violation tally to 17. (A. 1-4.) The Board also agreed with the General Counsel that the Company’s violations were sufficiently serious and widespread to merit a notice-reading remedy. (A. 1 n.2, 2, 4-7 & n.10.) The Board amended the remedy accordingly and adopted the judge’s recommended order as modified. (A. 1-8.) Before the Court, the Company challenges only one unfair-labor-practice finding and the Board’s imposition of the notice-reading requirement.

## II. THE BOARD'S FINDINGS OF FACT

### **A. The Company's Operations; Employees Begin a Union-Organizing Effort and the Company Learns of It**

The Company operates a food processing and packaging plant in Cincinnati, Ohio. Petra Sterwerf is the plant manager; Mandy Ramirez is the employee relations manager.<sup>2</sup> Renee Chernock, the director of human resources, works out of a different, nearby facility. (A. 1, 10; A. 305, 319-20, 331, 345-46, 591-606.)

In March 2015, a few employees contacted the Union about organizing the plant's 600 hourly workers. By early May, employees and union representatives began openly distributing union literature and authorization cards at or near the plant. (A. 1, 3, 10; A. 119-20, 122-23, 210, 332-34.) By May 11, the Company became aware of these activities, and of the unionization effort in general. (A. 1, 3, 10; A. 306-07, 318, 331-34, 512.)

### **B. The Company Posts and Maintains an Overbroad No-Solicitation/No-Distribution Policy and Door Sign**

The Company moved quickly to oppose unionization. On May 13, in response to employees' distribution of union authorization cards and other organizing activities, Ramirez posted a notice on a plant bulletin board "set[ting] forth a 'no solicitation and no distribution' policy." (A. 1 n.4, 3-4, 10, 12, 15; A.

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<sup>2</sup> Ramirez was promoted to human resources manager in about August 2015. (A. 12 n.7; A. 318, 351, 522, 591-92, 595, 606.)

318-19, 324-25, 350-51, 370-71, 420-22, 650-51.) This policy, which governed “[a]ll employees of the Company,” prohibited workers from “solicit[ing] memberships” or “conduct[ing] similar personal business” at “any time” in “immediate work areas,” and further prohibited them from “distribut[ing] literature” at “any time” in “employee work areas or work corridors.” The policy stated that it “replace[d] and supersede[d] any prior policies or interpretations on the subject of solicitations and distributions.” (A. 12-13; A. 650-51.)

At about the same time, also in response to employees’ union activities, the Company additionally posted a sign on the door of the plant’s main employee entrance that announced: “AdvancePierre Foods has a non-solicitation and non-distribution policy.” (A. 1 n.4, 3, 13 & n.8, 15; A. 145-46, 228-31, 373, 626.) The Company maintained the posted no-solicitation/no-distribution policy and door sign for almost a month before removing them. (A. 1 n.4, 13 & n.8, 15; A. 146, 228-31, 370-71.)

### **C. The Company Repeatedly Advises Employees Regarding Revocation of Signed Union Authorization Cards**

On about five or six occasions from mid-May to mid-June, the Company’s supervisors led anti-union meetings on the production floor. During those mandatory meetings, which every plant employee attended, supervisors handed out anti-union campaign literature and discussed issues surrounding the organizing effort. (A. 3, 5, 10; A. 140-42, 212-13, 241-42, 259-60, 307-11, 337, 365-70, 629-

44, 662-79.) In particular, the supervisors discussed how to revoke signed union authorization cards. To that end, they distributed flyers to the employees entitled “How to Withdraw Your signed Union Authorization Card.” (A. 3, 11; A. 142-44, 216-17, 242, 365-66, 624-25, 635, 641, 643-44.) The Company also placed the flyer in the main employee corridor, along with other anti-union campaign literature. (A. 3, 10-11; A. 142-44, 218-23, 624-25, 629-44, 662-79.)

The Company’s card-revocation flyer detailed three steps for an employee to withdraw his or her signed authorization card: (1) “[u]se the attached form to request in writing that you want your card back and are withdrawing your membership in the union;” (2) “[m]ake a copy of the form and mail the original to the union address on the form;” and (3) “[g]o to the union representative you gave the union authorization card to, and tell them that you want your card back.” The flyer also stated: “[p]lease understand that other than giving you this information, AdvancePierre Foods is not permitted by law to assist you in any other way in getting your card returned.” (A. 3, 11; A. 624-25.) As indicated, the flyer included an attached form letter—pre-addressed to the Union with a blank employee-signature space—expressing the sender’s desire to “revoke and rescind any union ‘authorization’ card, or any other indication of support for your union, that I may have signed in the past.” (A. 3, 11; A. 624-25.)

**D. The Company Searches Employees' Clipboards for Union Authorization Cards, Confiscates Employee Fox's Union Cards, and Disciplines Him**

While on duty, many company employees carry a clipboard with a closed storage box affixed to it. (A. 3 n.7, 18; A. 147-48, 166-67, 185-86, 224, 261-62.) Employees typically carry both work and personal items inside the storage box. (A. 3 n.7, 18; A. 147-50, 168-70, 261-62, 388, 391-92.) Before the union campaign, the Company had never searched its employees' clipboards. (A. 3, 18-20; A. 182-83, 226-27, 234, 263-64, 302-03.)

On June 8, responding to reports concerning employees' distribution of union authorization cards, the Company systematically searched employees' clipboards for the specific purpose of finding such cards. During that audit, the Company's supervisors walked the production floor mid-shift and instructed every employee with a clipboard to open it or hand it over. The supervisors looked through each clipboard, including the storage box. In some instances, supervisors searched an employee's clipboard while that employee was not present. (A. 3, 18-20; A. 150-53, 156-58, 169, 172-75, 224-25, 262-64, 303-04, 321-23, 372, 382-84, 389-90.)

On June 8, employee Ronnie Fox was carrying union authorization cards inside of his clipboard's storage box. He did not distribute or remove the cards from his clipboard while on the production floor. (A. 3, 18-20; A. 148, 152-54,

166-67, 171-72.) Supervisors searched Fox's clipboard twice during the June 8 audit. During the second search, Supervisor Daran Bishop discovered authorization cards and confiscated them. Bishop immediately advised Ramirez that he had found union cards in Fox's clipboard and gave her the cards. (A. 3, 19; A. 150-53, 156-58, 169, 172-75, 385-87, 591-92, 593-96, 606.)

Minutes later, Fox was summoned to the plant's human resources office for the first time in his 9 years at the Company. (A. 19; A. 139, 153-54, 326.) There, Ramirez and Chernock referenced Fox's union authorization cards and stated that the Company had "a nonsoliciting nondistributing policy." Fox responded that he understood, but that he had not been soliciting or distributing the cards. Ramirez challenged him, asking, "[s]o the cards would just sit in your box?" (A. 1 n.4, 19; A. 154, 176-77, 184, 326.) Although Fox answered in the affirmative, Ramirez gave him a "verbal warning," supposedly for violating the no-solicitation/no-distribution policy, and told him that "if it was to happen again . . . [he] could possibly be suspended or terminated." (A. 1 n.4, 3, 19-20; A. 154, 176-77, 591-92.) The Company never returned Fox's cards. (A. 3, 19; A. 154-55.)

**E. The Company Reviews Breakroom Video Footage Searching for Employee Union Activity, Interrogates Employees Cotto and Guzman About Their Participation in Such Activity, and Disciplines Them**

On June 8, prompted by employee complaints that coworkers were distributing union materials in the breakroom, Ramirez reviewed archived footage

from the breakroom's video cameras. (A. 2, 13, 16; A. 311-12, 352-53, 423-24.) Ramirez found footage showing employee Carmen Cotto handing out papers to coworkers in the breakroom, including handing "a stack" of papers to employee Sonja Guzman. The video did not show Guzman distribute the papers. (A. 2-3, 13-14; A. 193-94, 243, 358, 361, 363-64, 423-26.) Cotto and Guzman were both known union supporters, and Ramirez understood, correctly, that the papers they were handling were union materials. (A. 2, 13, 14 n.14, 16, 29; A. 124-27, 137-38, 193-94, 237-40, 242-43, 311-12, 335, 352-53.)

The next day, Cotto was called to human resources for the first time in her nearly 27-year career with the Company. Ramirez and Chernock confronted Cotto in Ramirez's office. (A. 2, 13; A. 192, 194-95, 311-12, 335-36, 423-24.) Ramirez told Cotto that, after receiving complaints, she had reviewed video footage of Cotto distributing papers to coworkers in the breakroom. The managers told Cotto that the Company's no-solicitation/no-distribution policy prohibited such conduct. Cotto replied that the Union had said that she could pass out materials on her own time. The managers insisted that her conduct was not allowed, and that she "[could] be fired or suspended." (A. 2, 13-14; A. 195-98, 200-01, 312-13, 335-36, 352-59, 423-24, 471-72.) They issued Cotto a verbal warning, purportedly for violating the no-solicitation/no-distribution policy. (A. 1 n.4, 2, 4, 13 & n.11, 14-15; A. 195-98, 200-01, 312-17, 359, 423-24, 591-92.)

At some point during that conversation, Ramirez told Cotto that the video had shown her handing “a stack” of her papers to Guzman. The managers asked Cotto whether “Guzman . . . gave [Cotto’s] paper[s] to . . . other people.” Cotto denied that Guzman had done so. (A. 2-3, 14, 17-18; A. 198-99.)

Immediately after their meeting with Cotto, Ramirez and Chernock summoned Guzman to Ramirez’s office. Like Cotto and Fox, Guzman had never before been summoned to human resources during her almost 9 years with the Company. (A. 2-3, 14; A. 235-36, 243, 248, 360-61, 425.) The managers told Guzman that they had received complaints of employees distributing papers in the breakroom, that such conduct was not allowed, and that they had seen camera footage showing Cotto and Guzman engaged in such conduct. Guzman admitted that she had received materials from Cotto, but denied distributing them. (A. 2-3, 14; A. 242-45, 248-52, 361-62, 425-26.) Nonetheless, Ramirez and Chernock issued Guzman a verbal warning, supposedly for handing out papers to coworkers in violation of the no-solicitation/no-distribution policy. (A. 1 n.4, 3-4, 14-15; A. 242-45, 248-52, 427.)

**F. The Company Searches Online for Information About the Union Activity of Employee Concepcion and Others, Retaliates Against Concepcion by Demanding that She Produce Documents, Then Indefinitely Suspends Her**

Diana Concepcion, a plant employee since 2008, was an active and open supporter of the union campaign. The Company’s supervisors and managers,

including Ramirez, were aware of Concepcion's union support prior to June 14. (A. 20 & n.35, 21-22, 22 n.38, 26; A. 124-27, 187-91, 210-12, 254-57, 492-93, 713-14.)

On June 14, Concepcion and Guzman spoke about the union campaign on a local Spanish-language radio station. (A. 20-21; A. 131-34, 240-41, 253, 258.) On June 16, Ramirez received an email from Supervisor Don Lewis reporting that he had heard that the radio station "broadcasted a question and answer session about the union activity at our plant," including an interview with "Guzman and another lady named Diana." (A. 21; A. 428-29, 473, 695.) Upon reading Lewis' email, Ramirez believed that the "lady named Diana" was Concepcion. (A. 20 n.35, 22 n.38; A. 434, 477-78.)

Ramirez immediately began investigating the union radio show online. (A. 21, 24; A. 430-32, 473-74, 696-711, 713-14.) After checking the radio station's website, she visited its Facebook page, where she found a post that referenced (in Spanish) the union show featuring "workers talking about the campaign at Pierre Foods with Local 75." (A. 21, 24; A. 430-32, 473-75, 697, 713-14.) That post had one "like," associated with a Facebook account for a "Yazzmin Trujillo." Ramirez clicked on that "like" and reviewed a portion of Trujillo's main Facebook page. (A. 21, 24; A. 433-37, 475-76, 697-99, 713-14.) Ramirez then opened the page's "photos" section and searched through it. Among various other photographs,

Ramirez found one photo that she believed to be Concepcion. (A. 21, 24; A. 438-40, 476, 481-82.) Ramirez proceeded to scour the remainder of Trujillo's Facebook page, including reading the comments and searching through Trujillo's profile and list of Facebook "friends." (A. 21, 24; A. 441-42, 445-47, 476, 479-80, 484, 487-88, 701-11.) She also opened and searched through some of those friends' Facebook pages. (A. 21, 24; A. 442-48, 476-77, 483, 487-88, 703-11.)

The next day, June 17, Ramirez confronted Concepcion and asked her if she had participated in the union radio show. Concepcion answered that she had. (A. 22; A. 265-66, 286, 289.) Ramirez then explained her search for that show on the internet, and how she had found Yazzmin Trujillo's "like" and Facebook page, and the photograph that Ramirez believed was of Concepcion. Ramirez claimed that, based on her online search, the Company had concerns about Concepcion's identity. (A. 22, 25; A. 265-67, 284-86, 452-53.) Concepcion told Ramirez that she did not know what she was talking about, and that she did not have a Facebook page. (A. 22; A. 266, 285, 452-53.) At a second meeting a few minutes later, Ramirez demanded that Concepcion submit documents—other than the types of documents that she had submitted when she was hired 7 years earlier—to prove her identity and work authorization. Ramirez provided a memo expressing the same demand, which circumscribed the types of acceptable documents and imposed a June 29 deadline. The memo also stated that the Company "has a policy under

which it may terminate” employees who are discovered to have provided false information. (A. 22; A. 267-73, 287-88, 449-55, 485-86, 646-47.)

On June 29, in response to the Company’s demand, Concepcion submitted a Puerto Rican birth certificate for Diana Concepcion. She also submitted a letter stating that she was doing so under protest, as she believed that the Company’s request was in retaliation for her union activity. (A. 23; A. 273-74, 281-82, 290, 691.) The Company rejected the birth certificate, advising that all Puerto Rican birth certificates issued prior to July 2010 had been declared invalid by operation of law. Ramirez renewed the Company’s demand for documentation and set a new deadline of July 17. She also offered the Company’s assistance in obtaining a new Puerto Rican birth certificate. (A. 23; A. 274-77, 282-83, 291-92, 456-59, 648-49.) Concepcion indicated that she would rely on the Union, not the Company, for any assistance in obtaining a new birth certificate. (A. 23; A. 277, 460.)

On July 16, Concepcion and other employees participated in a union-organized rally in the plant’s parking lot, during which Concepcion delivered a letter to Ramirez. The letter reiterated Concepcion’s belief that the Company’s document demand constituted anti-union retaliation while further stating that Concepcion was attempting to comply with the demand and requesting a 90-day extension. (A. 24; A. 128-30, 258-59, 278-79, 282, 461-62, 621-22, 716-17.)

The Company refused Concepcion's plea for additional time. On July 17, Ramirez indefinitely suspended her without pay. Concepcion remained on indefinite suspension as of the time of the hearing in this matter, some 5 months later. (A. 24; A. 279-80, 463-66, 608, 719-22.)

**G. The Company Assesses an Attendance Point Against Employee Maldonado for an Absence Due to Her Participation in a 1-Day Strike**

Under Company policy, employees are to report an impending absence from a scheduled shift by calling a designated telephone number and leaving a voice message. The Company assesses attendance points against employees for such absences, and it issues further progressive discipline, up to and including termination, to employees who accumulate specified quantities of points within a rolling, 12-month period. (A. 28-29; A. 513, 523-30, 730-33.)

On July 17, employee Jessenia Maldonado and other employees participated in a 1-day strike organized by the Union. Per company policy, Maldonado called in prior to the start of her shift and left a message in which she read from a union-prepared script stating, in Spanish: "I am not reporting to work today to protest the Company's unfair labor practices. I will unconditionally return to work on my next scheduled shift." (A. 29-30; A. 514-21, 538, 652.) The Company assessed an attendance point against Maldonado for this strike-related absence; Ramirez advised Maldonado that she had been issued this point. (A. 29-30; A. 520-21, 538-40.)

## **H. The Company Implements an Unprecedented Grievance-Solicitation Program in Response to the Ongoing Union Campaign**

When the union-organizing drive commenced, the Company had no established practice or procedure for soliciting or answering employees' work-related grievances. (A. 35, 37; A. 159, 246, 398-99.) Management had not checked the plant's suggestion box in at least 8 years. (A. 35, 37; A. 399, 416.)

In late May, after the Company learned of the union campaign, Plant Manager Sterwerf announced to employees at a plant-wide meeting that the Company would be implementing a new program called "CATS." Sterwerf described the program as a tool to "solve" employees' "problem[s]," or to "close the loop on their concerns." She advised the workforce to "stay tuned" for more information. (A. 36; A. 340, 395-97, 401-06, 414-15.)

On July 15, the Company implemented the CATS program. (A. 35-37; A. 121, 128-30, 134-36, 159-61, 341-42, 400-02, 407, 469-70, 489, 627, 681-84, 686.) It posted a memo to employees announcing the implementation and summarizing CATS as "a way for you to express questions, concerns, thoughts, and ideas and to ensure that your requests are addressed in a timely manner." As the memo further explained, employees could deposit a CATS form in a locked box that a human resources official would check on a "daily" basis, and the Company would then "answer [the employee's] question/ concern/ idea" within "a designated amount of time." (A. 35; A. 685.) The Company's supervisors also met with employees to

“push” the new CATS program and “walk them through” how it would function. (A. 35; A. 246-47, 341, 393, 681-84, 686.) Management gave itself a 48-hour deadline for answering a CATS form—a time target it communicated to some employees. (A. 35-36; A. 178, 246-47, 343-44, 394, 407, 416, 419, 467-70, 687-90.)

Ramirez checked the CATS box daily. (A. 35; A. 469-70, 686.) On July 20, employee Fox submitted the first form, proposing to change or eliminate the accumulation of attendance points. (A. 35; A. 161-63, 178-79, 343-44, 407, 416, 628, 687.) On July 21 or 22, Ramirez met with Fox and told him that “they’re working on it,” and that management was “trying to get in contact” with other Company plants about establishing a unified attendance-point system. (A. 35; A. 163-65, 179.) Some employees used the forms to complain about an attendance point that they had been assessed, and, as a result, management permitted the employees to avoid the point by retroactively applying a vacation day. (A. 35-36; A. 411-13, 489-91, 727-28.)

In early August, pro-union employees gave Ramirez a packet of 20-30 CATS forms with a union logo added across the top. Most of those forms asked the Company to establish a starting wage of \$15 per hour; some referenced concerns about other working conditions and/or expressed pro-union messages, such as requesting “a union for a real voice on the job.” (A. 35, 37 n.56; A. 408-

10, 623, 724-25.) The Company refused to consider or answer those pro-union CATS forms. (A. 35, 37 n.56; A. 410, 417-18.)

**I. The Company Instructs Employees Not to Discuss Wages with Coworkers**

On August 27, the Company sent a letter to all plant employees announcing the implementation of a new pay structure. (A. 31-34; A. 180-81, 232-33, 338-39, 505-07, 591-92, 607.) The letter instructed employees: “[a]s a reminder, information about your pay is considered personal and confidential and should not be shared with other associates.” (A. 32-34; A. 591-92, 597, 607, 645, 680.)

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

On July 19, 2018, the Board (Members Pearce and McFerran, Member Emanuel dissenting in part) issued its Decision and Order finding that the Company committed 17 violations of the Act. (A. 1-42.) Specifically, the Board found (A. 1-4 & n.4, 8-38) the following unfair labor practices:

#### **Section 8(a)(1) violations:**

- Mid-May – mid-June 2015
  - maintaining an overbroad no-solicitation/no-distribution policy, which was promulgated in response to employees' union activity
  - maintaining a door sign banning employee solicitation and distribution, also promulgated in response to employees' union activity
  - repeatedly soliciting employees to revoke their signed union authorization cards
- June 8 – 9
  - surveilling union activity by searching employees' clipboards for union authorization cards
  - confiscating Fox's union authorization cards
  - surveilling union activity by reviewing archived video footage of Cotto and Guzman distributing or receiving union materials in the breakroom
  - interrogating Cotto about Guzman's union activity
  - interrogating Guzman about her own union activity
- June 16
  - surveilling union activity online

- June 17 – July 17
  - demanding that Concepcion provide identity and work-authorization documents in retaliation for her union activity
- July 15 – thereafter
  - soliciting employees’ grievances and impliedly promising to remedy them through the implementation of the CATS program
- July 17
  - assessing an attendance point against Maldonado for an absence caused by her participation in a protected strike
- August 27
  - instructing employees not to discuss wages with coworkers

**Section 8(a)(3) violations:**

- June 8 – 9
  - disciplining Fox for possessing union authorization cards
  - disciplining Cotto for handling union materials
  - disciplining Guzman for handling union materials
- July 17
  - indefinitely suspending Concepcion for her failure to provide the documents that the Company had unlawfully demanded in retaliation for her union activity

Alternatively, the Board found that the Company's discipline of Fox, Cotto, and Guzman violated Section 8(a)(1) because it constituted enforcement of the unlawfully overbroad no-solicitation/no-distribution policy.<sup>3</sup> (A. 1 n.4, 15-16, 20.)

The Board's Order directs the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with employees' exercise of their rights under the Act. (A. 6.) Affirmatively, the Order requires the Company, among other things, to rescind the disciplines issued to Fox, Guzman, and Maldonado, to rescind the CATS grievance program, and to post a remedial notice.<sup>4</sup> (A. 6-7.) It also requires that the remedial notice be read aloud to employees by Ramirez in the presence of a Board agent, or, at the Company's option, by a Board agent in the presence of Ramirez—allowing the Company, under either option, to substitute another high-ranking responsible management official for Ramirez, if Ramirez is no longer employed by the Company. (A. 5-7.)

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<sup>3</sup> Member Emanuel found it unnecessary to pass on this additional basis for finding the disciplines of Fox, Cotto, and Guzman unlawful. (A. 2 n.4.) Similarly, although Member Emanuel agreed that the Company's no-solicitation/no distribution policy and door sign were both unlawfully overbroad, he found it unnecessary to pass on the majority's further finding that they also were unlawful because they were promulgated in response to union activity. (A. 2 n.4.) Additionally, Member Emanuel disagreed with the majority's finding that the Company unlawfully solicited employees to revoke their authorization cards. (A. 4 n.9.) With respect to the remedy, discussed below, Member Emanuel dissented as to the notice-reading requirement. (A. 1 n.2, 5 n.12.)

<sup>4</sup> The Board did not order the Company to rescind the unlawful discipline issued to Cotto because the Company had already done so. (A. 15, 17, 38 & n.57.)

The Board found (A. 1 n.2, 2, 4-7 & n.10) that this case warranted such a reading requirement in light of the Company's serious and widespread violations, several of which affected every plant employee, and most of which involved the direct participation of Ramirez, a high-level manager.

While the case was pending before the Court on the Company's petition for review and the Board's cross-application for enforcement, the parties participated in mediation pursuant to this Court's Appellate Mediation Program. Mediation concluded with the Company, the Board, and the Union entering into a partial settlement agreement (the Agreement). The Agreement addressed three violations: the Company's online surveillance of the union activity of Concepcion and others; its demand that Concepcion provide documents; and its indefinite suspension of Concepcion. Specifically, the Agreement settled certain portions of the Board's Order that provided some—but not all—of the remedial relief for those violations, namely, Board Order paragraphs 1(i), 1(j), 2(c), 2(d), 2(e), 2(f), and 2(i) (“the Settled Order Provisions”). (See A. 6.)

### **SUMMARY OF ARGUMENT**

1. The Board found that the Company responded to a union-organizing drive with a campaign of coercive conduct establishing 17 violations of the Act; and the Board issued an Order setting forth a number of provisions to remedy those violations. Before the Court, however, the Company contests only one of those

numerous violations and one of the Board's chosen remedies. Thus, under settled law, the Board is entitled to summary enforcement of the uncontested portions of its Order.

2. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by soliciting employees to revoke their signed union authorization cards. Indeed, the Company does not dispute the essential facts demonstrating its unfair labor practice. Thus, it is undisputed that the Company repeatedly advised employees how they could revoke their authorizations cards, including during anti-union meetings led by the Company's supervisors and through the dissemination of instructional flyers accompanied by pre-printed, form revocation letters pre-addressed to the Union. And it is further undisputed that the Company made those revocation communications in the context of committing numerous, serious, and contemporaneous violations of its employees' rights under the Act. The Board reasonably found that those contemporaneous unfair labor practices created a perilous atmosphere in which the Company's repeated revocation statements amounted to unlawful solicitations, as they reasonably would tend to coerce employees in deciding whether to rescind their union support. The Company fails to provide a basis to overturn that reasonable Board finding. Its primary contention—that free-speech concerns compelled the Board to blind

itself to the context of coercive violations in which the statements were made—is not properly before the Court and, in any event, is refuted by controlling precedent.

3. The Board acted within its broad discretion in requiring that the remedial notice be read aloud to the employees by Employee Relations Manager Ramirez or by a Board agent in Ramirez’s presence. As noted, the Company—in its zeal to put down the union effort—subjected its employees to an impressive array of unfair labor practices, which ranged from announcing a total prohibition on employee solicitation and distribution to rifling through employees’ clipboards in search of their union cards and confiscating them to indefinitely suspending a high-profile union supporter, as well as disciplining four others and implementing an unprecedented grievance-solicitation program, among numerous additional coercive actions and statements. Moreover, Ramirez, a high-level manager, directly participated in the bulk of the Company’s violations, and several of the violations were plant-wide in scope, affecting every employee. Thus, the Board properly determined that the Company’s serious and widespread unfair labor practices merited a notice reading to ameliorate their coercive effects and to assure the employees of their rights and the Company’s obligations under the Act. The Company’s contentions before the Court, some of which are jurisdictionally barred, fail to undermine the Board’s exercise of its wide discretion.

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

Section 7 of the Act guarantees to employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) of the Act protects those rights by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). Section 8(a)(3) of the Act, moreover, makes it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3).<sup>5</sup>

As explained, here the Board found that the Company—in a course of unlawful conduct that began within days of learning that its employees were engaged in Section 7 union-organizing activities—committed 17 violations of either Section 8(a)(1) or Section 8(a)(3) of the Act. (See pp. 3-5, 19-21.)

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<sup>5</sup> A violation of Section 8(a)(3) also produces a derivative violation of Section 8(a)(1). See *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

Before the Court, however, the Company challenges only one of the Board’s findings of violations and one of its ordered remedies, specifically: the unlawful solicitation of employees to revoke their authorizations cards and the notice-reading remedy. (Br. 19-20, 26, 28-29.) By failing to contest any of the Board’s numerous other findings of violations, the Company has waived any possible objection to those findings. *CC1 Ltd. Partnership v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018) (arguments not made in opening brief are waived); *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (same). Under this Court’s “longstanding rule,” the Company’s failure entitles the Board to summary affirmance of its 16 uncontested findings of violations, and to summary enforcement of the uncontested portions of its Order relating to those findings.<sup>6</sup> *CC1 Ltd. Partnership*, 898 F.3d at 35 (quotation marks omitted); *accord Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012); *Fortuna Enterprises, LP v. NLRB*, 665 F.3d 1295, 1304 (D.C. Cir. 2011).

Furthermore, the Company’s many undisputed violations of the Act are highly relevant to, and strongly support, the Board’s findings with respect to the sole disputed violation and the notice-reading remedy. *Cf. U.S. Marine Corp. v.*

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<sup>6</sup> Consistent with the parties’ partial settlement, the Company does not contest the propriety of the Settled Order Provisions, and the Board does not presently seek enforcement of those provisions. (See p. 22.) The Board does, however, seek summary affirmance of the three unfair-labor-practice findings that relate to those remedial provisions.

*NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (unchallenged findings of violations “lend[] their aroma to the context in which the [challenged] issues are considered”) (quotation marks omitted); *see also United Food & Commercial Workers Int’l Union v. NLRB*, 852 F.2d 1344, 1346-49 (D.C. Cir. 1988) (upholding notice-reading remedy in reliance on uncontested unfair-labor-practice findings).

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY SOLICITING EMPLOYEES TO REVOKE THEIR SIGNED UNION AUTHORIZATION CARDS**

### **A. Applicable Principles and Standard of Review**

The Court’s review of the Board’s contested unfair-labor-practice findings is “quite narrow.” *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). It “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *accord Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-85, 488 (1951). Where, as here, the Board has disagreed with the administrative law judge, “the standard of review with respect to the substantiality of the evidence does not change.” *Bally’s Park Place, Inc. v. NLRB*, 646 F.3d 929,

935 n.4 (D.C. Cir. 2011); accord *Universal Camera*, 340 U.S. at 496 (substantial-evidence standard “is not modified in any way” when Board disagrees with judge). Additionally, the Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

The test for whether an employer’s statement violates Section 8(a)(1) of the Act is whether, “considering the totality of the circumstances,” the statement had a “reasonable tendency” to coerce or interfere with employees’ Section 7 rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). “The inquiry is objective. Neither the employer’s intent to interfere nor actual coercion of the employee[s] needs to be proven.” *Advanced Life Sys. Inc. v. NLRB*, 898 F.3d 38, 44 (D.C. Cir. 2018) (citation omitted). Moreover, the 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)), who, because of their “economic dependence” on the employer, may perceive in such statements coercive messages that might be dismissed by “a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). This Court “recognize[s] the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 544 (D.C. Cir. 2006) (quoting *Gissel Packing*, 395 U.S. at 620); accord *Timsco*

*Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987) (line between lawful and unlawful speech may be thin and “is to be determined by context and the expertise of the Board”).

The critical inquiry, then, is how the employees “could reasonably perceive” the employer’s statements—and the effect on Section 7 rights that could reasonably result—given the “context” in which the statements are made.

*Progressive*, 453 F.3d at 543-45; *accord Fort Dearborn Co. v. NLRB*, 827 F.3d 1067, 1072-74 (D.C. Cir. 2016); *Tasty Baking*, 254 F.3d at 124-25. Accordingly, an employer’s contemporaneous unfair labor practices may be an important contextual factor in assessing a statement’s coercive tendency. *See, e.g., Southwire Co. v. NLRB*, 820 F.2d 453, 457-59 (D.C. Cir. 1987); *Int’l Union of Elec., Radio & Mach. Workers v. NLRB*, 418 F.2d 1191, 1193-94 (D.C. Cir. 1969).

### **B. The Company Unlawfully Solicited Employees To Revoke Their Union Authorization Cards**

“[A]s a general rule,” Section 8(a)(1) forbids an employer from “solicit[ing] employees to revoke their [union] authorization cards.” *Mohawk Indus., Inc.*, 334 NLRB 1170, 1170-71 (2001) (quotation marks omitted); *accord Adair Standish Corp.*, 290 NLRB 317, 317-318 (1988), *enforced*, 912 F.2d 854 (6th Cir. 1990). Indeed, this Court has held that an employer violated that section when it “solicited and urged” employees to “execute and mail to the [union] a letter withdrawing [their signed union] authorization and membership card[s]” and distributed form

letters to the employees for that purpose. *Amalgamated Clothing Workers of Am. v. NLRB*, 424 F.2d 818, 824 (D.C. Cir. 1970). Although an employer may lawfully advise its employees of their right to revoke an authorization card in “an atmosphere free of coercion, intimidation, or union animus” (*Escada, Inc.*, 304 NLRB 845, 849 (1991) (quotation marks omitted), *enforced mem.*, 970 F.2d 898 (3d Cir. 1992)), an employer violates Section 8(a)(1) by issuing such advice in a context of contemporaneous unfair labor practices giving rise to “an atmosphere wherein employees would tend to feel peril in refraining from revoking.” *Mohawk*, 334 NLRB at 1171 & n.3; *accord Marquez Bros. Enterprises, Inc.*, 358 NLRB 509, 510 n.13 (2012), *incorporated by reference in* 361 NLRB 1375 (2014), *enforced*, 650 F. App’x 25 (D.C. Cir. 2016).

Here, substantial evidence supports the Board’s finding (A. 3-4) that the Company communicated its “explanation[s] of how employees could revoke” their signed union authorization cards “in the context of [its] contemporaneous serious unfair labor practices.” (A. 4.) And the record likewise well supports the Board’s further finding that those contemporaneous violations created “an atmosphere where employees would tend to feel peril if they refrained from revoking their support for the Union,” thus rendering the Company’s revocation communications coercive solicitations in violation of Section 8(a)(1). (A. 4.)

To begin, from mid-May to mid-June, the Company repeatedly advised employees how to revoke their authorization cards, including by disseminating flyers containing step-by-step revocation instructions and pre-addressed form revocation letters. (A. 3-4, 10-11.) And the Company does not dispute that, during the same timeframe (specifically, from May 13 to June 17), it committed no less than a dozen violations of the Act—including both a restriction and an outright prohibition on protected employee solicitation and distribution, three different methods of anti-union surveillance (clipboard searches, camera-footage review, and online investigation), the confiscation of union materials, three discriminatory disciplines, two coercive interrogations, and a retaliatory demand for documents imposed under the specter of potential suspension or discharge. (See pp. 5-14, 19-21 above.)

Moreover, the Board reasonably found (A. 3-4) that those contemporaneous violations created a perilous atmosphere in which the Company's revocation communications ran afoul of Section 8(a)(1). *See, e.g., The Register Guard*, 344 NLRB 1142, 1142-44, 1155 (2005) (employer unlawfully advised employees of card-revocation rights and distributed form revocation letters contemporaneous with unlawful wage increase and unlawful solicitation of grievances); *Escada*, 304 NLRB at 849, 851 (employer unlawfully explained card-revocation process and distributed form revocation letters in atmosphere of unlawfully soliciting

grievances, creating impression of surveillance, announcing potential raise, threatening permanent replacement of strikers, reassigning a supervisor, and discharging a union supporter). As the Board first emphasized, the Company's numerous, serious, and contemporaneous unfair labor practices "all stem[med] from the [Company's] efforts to . . . squelch" the union-organizing drive "as soon as it began." (A. 4 (quotation marks omitted).) Thus, the Company "swiftly" commenced its campaign of violations "immediately after [it] learned" of the employees' nascent union activities, and those violations variously aimed to "ban," "limit[]," "seek[] out," "uncover," "crack[] down on," "punish," and "stamp out" such protected activities in their infancy—before the employees had an opportunity effectively to exercise their right to select the Union as their representative. (A. 1 n.4, 3-4, 15 n.17, 16-18, 20, 24-26.)

Additionally, as the Board further reasoned, many of the Company's contemporaneous violations were themselves closely "related to the card-signing process." (A. 4.) In particular, the Company unlawfully maintained the policy and door sign banning its employees from distributing authorization cards, both of which the Company also posted in direct response to such card activity. It then enforced that unlawfully overbroad policy against Fox, disciplining him for possessing cards, and against Cotto and Guzman, disciplining them for

distributing/receiving them.<sup>7</sup> It also engaged in an “unprecedented” search of its employees’ clipboards for authorization cards and confiscated them. (A. 3-4.)

Thus, the Company’s numerous severe violations during the mid-May to mid-June period—most of which “went to the heart of the card-signing process,” and all of which comprised an unlawful and aggressive effort to nip the union campaign in the bud—established a coercive anti-union climate. And the Board reasonably concluded that, in that climate, the Company’s repeated card-revocation communications amounted to solicitations and reasonably tended to coerce employees’ exercise of their rights to refrain from withdrawing their union support. (A. 3-4.) *See Mueller Energy Servs., Inc.*, 333 NLRB 262, 262 n.1, 263-64 (2001) (employer “could not lawfully inform its employees of their right to revoke their authorization cards” in light of its contemporaneous unlawful threat of job loss for employees who signed cards); *cf. Southwire*, 820 F.2d at 457-59 (employer unlawfully posted notice concerning authorization cards given context of numerous and serious violations, which included “at least one [threat] explicitly linked to signature of a union card”).

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<sup>7</sup> In addition to enforcing the unlawful policy against Fox, Cotto, and Guzman, the Board also found, in the alternative, that the Company relied on that policy as a pretext meant to mask its effort to “squell, punish, and discriminate against union activity.” (A. 16, 20.)

### **C. The Company’s “Free Speech” and Other Contentions Are Meritless and, in Substantial Part, Jurisdictionally Barred**

The Company’s challenges (Br. 48-59) to the Board’s finding of a violation are unavailing. Those challenges rest, in large measure, on the Company’s erroneous invocation of its free-speech rights under the First Amendment and Section 8(c) of the Act. *See* 29 U.S.C. § 158(c) (“The expressing of any views, argument, or opinion . . . shall not constitute . . . evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.”). Section 8(c) “merely implements the First Amendment,” and must be understood and applied in conjunction with Section 8(a)(1)’s “prohibit[ion] [on] interference, restraint or coercion of employees in the exercise of their right to self-organization.” *Gissel Packing*, 395 U.S. at 617. An employer’s free-speech rights thus “cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [Section] 7 and protected by [Section] 8(a)(1).” *Gissel Packing*, 395 U.S. at 617. Accordingly, as the Company appears to recognize (Br. 50, 55-56, 58), Section 8(c) and the First Amendment offer no protection for coercive employer speech. *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 66-67 (2008); *Gissel Packing*, 395 U.S. at 617-20.

Since, as shown, substantial evidence supports the Board’s finding that the Company’s contemporaneous violations rendered its card-revocation statements coercive, the Company cannot rely on the First Amendment or Section 8(c) to

defends its revocation efforts as protected “free speech.” In its meritless attempt to escape that conclusion, the Company claims that the Board failed to evaluate the coerciveness of the revocation communications, and instead simply “bootstrap[ped]” the Company’s contemporaneous violations of the Act “into an additional violation” as a “method to impose a second punishment” on that “separate” unlawful conduct. (Br. 48-49, 53-56.) To the contrary, and as demonstrated, the Board—in accord with applicable precedent—assessed the coercive tendency of the revocation communications themselves in light of the “context” and “atmosphere” of contemporaneous violations in which those communications were made. (A. 4.)

The Company wrongly insists (Br. 53-56) that, in determining whether its card-revocation statements were coercive and therefore not protected speech, the Board was required to consider those statements in isolation, without reference to the Company’s contemporaneous unfair labor practices. The Board’s “perilous atmosphere” analysis, the Company claims, is “inconsistent” with Section 8(c) and the First Amendment. (Br. 54, 56.) The Court does not have jurisdiction to consider this claim.

Section 10(e) of the Act provides in relevant part: “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.” 29 U.S.C. § 160(e). Courts thus “lack[] jurisdiction to review objections that were not urged before the Board.” *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *accord Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008); *W & M Properties of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1345 (D.C. Cir. 2008).

Here, the Company never challenged before the Board the validity or applicability of the “perilous atmosphere” principle, even though the administrative law judge expressly recognized and applied it. (*See* A. 11-12.) When the General Counsel excepted to the judge’s failure to find a violation under that principle, the Company, in its answering brief, contended that there was no violation but did not question the principle. (*See* A. 542-47, 570-75.) To the contrary, the Company specifically conceded that the judge properly considered, in assessing the lawfulness of its revocation statements, whether its other unfair labor practices “created ‘an atmosphere wherein employees would tend to feel peril in refraining from revoking.’” (A. 573 (quoting *Space Needle, LLC*, 362 NLRB 35, 36-37 (2015)).) Moreover, although the Board subsequently found those statements unlawful based on *its* application of the “perilous atmosphere” principle (A. 3-4), the Company did not thereafter file a motion for reconsideration. Thus, the Court has no jurisdiction to consider the Company’s belated challenge (Br. 53-

56) to the validity of that principle.<sup>8</sup> 29 U.S.C. § 160(e); *see, e.g., Novato Healthcare Ctr. v. NLRB*, 916 F.3d 1095, 1107 (D.C. Cir. 2019) (employer failed to urge free-speech arguments before Board).

In any event, there is utterly no merit to the Company’s unsupported claim (Br. 53-56) that Section 8(c) or the First Amendment demand that the Board determine the lawfulness of an employer’s statements in isolation. Such a claim is refuted by the basic tenet that Section 8(a)(1) mandates a *contextual* analysis of a statement’s coercive tendency—one that considers “the totality of the circumstances,” and does so from the employees’ perspective. (See pp. 28-29.) Indeed, the Supreme Court has specifically declared that “[a]ny assessment of the precise scope of [allowable] employer expression . . . must be made in the context of its labor relations setting,” *Gissel Packing*, 395 U.S. at 617, and that employers may not lawfully engage in speech that “in connection with other circumstances [amounts] to coercion within the meaning of the Act.” *Brown*, 554 U.S. at 66–67 (quoting *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477 (1941)). And, of course, such other circumstances may include, as here, an employer’s contemporaneous unfair labor practices—as this Court has consistently recognized.

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<sup>8</sup> In its answering brief to the General Counsel’s exceptions, the Company vaguely asserted that its revocation statements were protected by Section 8(c), but it did not tie that assertion to any suggestion that the Board must assess the lawfulness of those statements in isolation from their surrounding context. (See A. 571-75.)

*See, e.g.*, cases cited at p. 29. *See also Virginia Elec.*, 314 U.S. at 471-79 (if Board’s “findings . . . as to the coercive effect” of employer’s speech were “based on the totality of the [employer’s] activities,” which included other violations, then court “[could] not consider [those] findings . . . in isolation from . . . [such] other [activities]”).

The Company misses the point in emphasizing (Br. 50-51, 57) that its employees have a Section 7 right to abandon their union support by revoking their authorization cards. They also have a Section 7 right not to do so and, as discussed, the question is whether their employer has unlawfully tended to coerce them in deciding how to exercise or choose between those rights. Moreover, because the Board reasonably found that the Company’s communications constituted coercive solicitations, those communications did not merely “inform” the employees of their rights and were not “neutral,” as the Company erroneously contends. (Br. 48, 50-51, 57.) *Cf. Southwire*, 820 F.2d at 458 (“surrounding circumstances could transform otherwise sound advice” into an unfair labor practice) (quotation marks omitted); *Amalgamated*, 424 F.2d at 824-25 (employer’s “strong suggestion” that employees revoke authorization cards constituted unlawful solicitation and “went beyond any . . . proper expression of views permitted an employer by the constitutional guarantee of free speech or by Section 8(c) of the Act”).

The Company also alternatively claims that its contemporaneous violations were not as “egregious” (Br. 58-59) as in *Mohawk* or *Escada*—two cases noted above where the Board concluded that a context of unfair labor practices created a coercive atmosphere. *See* 334 NLRB 1170; 304 NLRB 845. But, as the Board here explained, those cases do not “establish[] a floor as to the types of violations needed to create a perilous atmosphere,” and, in any event, the Company’s violations were, indeed, just as “egregious” as the violations in those two cases. (A. 4 & n.8.) (See also pp. 19-21, 31-33.) Moreover, in other cases, such as *The Register Guard* and *Mueller Energy*, the Board has found a perilous atmosphere based on only one or two contemporaneous violations, rendering quite reasonable the Board’s finding here that the Company’s dozen contemporaneous violations similarly created a perilous atmosphere. *See* 344 NLRB 1142; 333 NLRB 262. (See also pp. 31-33.)

Finally, the Company’s apparent suggestion that the Board’s finding of a violation here is subject to “de novo” review (Br. 49)—perhaps based on the Company’s invocation of its free-speech rights as a defense—is contrary to settled precedent. The question for the Court is whether, giving due deference to the Board’s expertise, the Board’s finding that the statements were objectively coercive was reasonable and supported by substantial evidence. *See, e.g., Gissel*

*Packing*, 395 U.S. at 617-20; *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 924-25 (D.C. Cir. 2005); *Amalgamated*, 424 F.2d at 824-25.

### **III. THE BOARD ACTED WITHIN ITS BROAD DISCRETION IN ORDERING A NOTICE-READING REMEDY**

#### **A. Applicable Principles and Standard of Review**

In Section 10(c) of the Act, Congress empowered the Board to remedy unfair labor practices by ordering a violator to “take such affirmative action . . . as will effectuate the policies of [the Act].” 29 U.S.C. § 160(c). The Board’s remedial power under Section 10(c) is “a broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). “In fashioning its remedies . . . the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.” *Gissel Packing*, 395 U.S. at 612 n.32; *see also ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 323-25 (1994) (“relation of remedy to policy is peculiarly a matter for administrative competence,” and Board’s remedial decisions thus “merit the greatest deference”) (quotation marks omitted). Accordingly, courts must enforce the Board’s chosen remedies unless shown to be “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard*, 379 U.S. at 216 (quotation marks omitted); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 735, 738 (D.C. Cir. 2015) (Board acts with “extremely broad” authority and at “zenith” of

its discretion in choosing remedies, and its choice must be upheld unless “so gross an abuse of power as to be arbitrary”) (quotation marks omitted).

### **B. The Board Properly Ordered the Company to Read the Notice Aloud**

In addition to its standard remedies, the Board orders special remedies where it determines that they are needed to “dissipate fully the coercive effects of the unfair labor practices found.” *Federated Logistics & Operations*, 340 NLRB 255, 256-58 & n.8 (2003) (quotation marks omitted), *enforced*, 400 F.3d 920 (D.C. Cir. 2005); *accord Ingredion, Inc.*, 366 NLRB No. 74, slip op. at 1 n.2, 36 (May 1, 2018), *enforced*, 930 F.3d 509 (D.C. Cir. 2019). One such remedy is to require a responsible management official or Board agent to read aloud the Board’s remedial notice to employees. *Id.* As the Court has recognized in upholding such measures, a reading requirement may “dispel [an] atmosphere of intimidation created . . . by [the employer’s] statements and actions” (*United Food & Commercial Workers Int’l Union v. NLRB*, 852 F.2d 1344, 1348-49 (D.C. Cir. 1988) (quotation marks omitted); *accord Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018)), and allow employees to “fully perceive that [their employer] and its managers are bound by the requirements of the [Act].” *Federated Logistics*, 400 F.3d at 929-30 (emphasis and quotation marks omitted). *See also Ingredion*, 366 NLRB No. 74, slip op. at 36 (notice reading is “an effective but moderate way to

let in a warming wind of information, and more important, reassurance”) (quotation marks omitted).

The appropriateness of a notice-reading remedy depends on the specific facts of each case. *United Food & Commercial Workers*, 852 F.2d at 1349. The number, scope, and character of the particular unfair labor practices are relevant considerations. *See Veritas*, 895 F.3d at 86; *Federated Logistics*, 340 NLRB at 256-58 & n.8, n.11. So too is the involvement of a high-level manager or official in the commission of the unlawful conduct. *E.g.*, *NLRB v. Ingredion Inc.*, 930 F.3d 509, 519 (D.C. Cir. 2019). Indeed, this Court has repeatedly and recently affirmed that a notice-reading order is appropriate “where ‘upper management has been directly involved in multiple violations of the Act.’” *Id.* (quoting *Veritas*, 895 F.3d at 86); *accord Federated Logistics*, 400 F.3d at 929-30; *United Food & Commercial Workers*, 852 F.2d at 1348-49; *Shamrock Foods Co. v. NLRB*, 779 F. App’x 752, 756 (D.C. Cir. 2019). As with all remedial choices, the decision to issue such an order is a matter ultimately committed to “[t]he Board’s broad discretion to fashion remedies for violations of the Act.” *Ingredion*, 930 F.3d at 519; *accord United Food & Commercial Workers*, 852 F.2d at 1347-49.

Here, the Board acted within its wide discretion in requiring (A. 1 n.2, 5-7) that the remedial notice be read aloud to the employees either by Employee Relations Manager Ramirez or by a Board agent in Ramirez’s presence. The

Board properly found such a remedy appropriate under the facts of this case to “dissipate as much as possible any lingering effects of the [Company’s] unfair labor practices,” and to enable the employees to “fully perceive that the [Company] and its managers are bound by [the Act].” (A. 5-6 (quotation marks omitted).)

As the Board explained (A. 1 n.2, 4-6 & n.10), the Company’s violations were “sufficiently serious and widespread” to warrant a notice reading. (A. 1 n.2.) Indeed, as discussed (pp. 3-18, 19-21, 29-33), the Company here committed numerous (17) unfair labor practices. Those violations included the Company’s mid-May to mid-June blitz of coercive attempts to snuff out the union effort. (See pp. 29-33.) They also included indefinitely suspending, for months on end, a prominent union supporter (tantamount to a discharge in practical and coercive effect);<sup>9</sup> assessing an attendance point against another union supporter who participated in a protected strike; soliciting employees’ grievances and impliedly promising to remedy them through the implementation of its CATS program; and admonishing the workforce, in writing, not to discuss wages with one another. And as the Board additionally noted, several of the Company’s serious unfair labor practices were “plant-wide violations” that “affected every employee”—including

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<sup>9</sup> Cf. *Alpine Log Homes, Inc.*, 335 NLRB 885, 885 (2001) (indefinite suspension constituted constructive discharge); *Keeshin Charter Serv., Inc.*, 250 NLRB 780, 787-90 (1980) (employer discharged employee although “calling it an indefinite suspension”); *King Soopers, Inc.*, 222 NLRB 1011, 1014, 1018 (1976) (employee “was indefinitely suspended and, in effect, discharged”).

the coercive solicitations to revoke union authorization cards, no-solicitation/no-distribution policy and door sign, CATS program, and written instruction not to discuss wages. (A. 5.) *See, e.g., Federated Logistics*, 400 F.3d at 922-23, 929-30 (upholding reading requirement where employer unlawfully maintained no-solicitation rule, solicited grievances, created impression of surveillance, solicited employees to surveil coworkers, interrogated and threatened employees, promised unspecified benefits, withheld a wage increase, and disciplined two employees); *Auto Nation, Inc.*, 360 NLRB 1298, 1298-1300 & n.2, 1337 (2014) (ordering notice reading where employer made several unlawful statements during a group meeting and unlawfully discharged one employee), *enforced*, 801 F.3d 767 (7th Cir. 2015); *Marquez Bros.*, 358 NLRB at 509-510, 522-23 (same, where employer “promptly” responded to union activities “as it became aware of [them]” by unlawfully interrogating and threatening one employee, coercively encouraging employees to revoke their authorization cards, and discharging two employees), *incorporated by reference in* 361 NLRB 1375, *enforced*, 650 F. App’x 25.

Moreover, as the Board further reasoned, Ramirez—“a high-level manager”—was “personally involved” in carrying out most of the Company’s unfair-labor-practice campaign. (A. 5.) Thus, Ramirez herself: posted the unlawful no-solicitation/no-distribution policy; disciplined Fox for possessing union cards; surveilled, interrogated, and disciplined Cotto and Guzman for

handling union materials; surveilled union activity by searching for such activity online and by scrutinizing union sympathizers' Facebook pages; demanded documents from Concepcion in retaliation for her union activity and thereafter indefinitely suspended her; disciplined Maldonado for participating in a protected strike; and solicited grievances from employees under the unlawful CATS program. (A. 5.) Such “pervasive personal involvement” of a high-level manager in the Company’s course of violations strongly supports the Board’s notice-reading remedy. *United Food & Commercial Workers*, 852 F.2d at 1348-49 (quotation marks omitted); *see also Ingredion*, 930 F.3d at 519 (chief negotiator “played a central role in several violations”); *Veritas*, 895 F.3d at 86 (upper management “directly involved in multiple violations”); *Federated Logistics*, 400 F.3d at 929-30 (high-level officials committed “many” of the violations).

### **C. The Company’s Challenges are Unavailing**

The Company makes several claims (Br. 33-48) in its effort to avoid reading the remedial notice to its employees—attacking first the adequacy of the Board’s explanation for choosing a notice-reading remedy and then the sufficiency of the facts to warrant that discretionary choice. Some of the Company’s claims are jurisdictionally barred, and all are meritless, as shown below. And certainly the Company has not met its extraordinary burden of demonstrating that the Board’s decision to order a notice reading here constitutes “a patent attempt to achieve ends

other than those which can fairly be said to effectuate the policies of the Act,” *Fibreboard*, 379 U.S. at 216 (quotation marks omitted), or “so gross an abuse” of the Board’s “extremely broad” remedial discretion as to be “arbitrary.” *Fallbrook*, 785 F.3d at 735, 738 (quotation marks omitted).

**1. The Court cannot consider the Company’s meritless, first-time challenge to the adequacy of the Board’s explanation**

The Company claims (Br. 33-40) for the first time in its opening brief that the Board’s decision fails to adequately explain its basis for ordering a notice reading. It argues that the decision does not contain a specific finding that standard Board remedies alone would be insufficient to redress the effects of the Company’s violations and/or does not articulate a sufficient explanation for such a finding. Because the Company never presented this claim to the Board, Section 10(e) of the Act bars the Court from considering it. 29 U.S.C. § 160(e). (See pp. 35-36 above.)

It is well established that where, as here, a party could not have raised a contention prior to the issuance of the Board’s decision, it must present that contention to the Board in a motion for reconsideration in order to preserve it for judicial review. *Int’l Ladies’ Garment Workers’ Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015); *S. Power Co. v. NLRB*, 664 F.3d 946, 949 (D.C. Cir. 2012). To be sure, in its answering brief to the Board, the Company argued that the judge was correct to find that its violations did not warrant a notice reading and that standard remedies

were sufficient. (See A. 578-80.) But at that time, the Company did not and, indeed, could not have, contested the adequacy of the Board’s subsequent explanation for disagreeing with the judge and ordering a notice reading in its yet-to-be-issued decision. And, once the Board issued that decision and set forth the explanation that the Company now attacks as insufficient, the Company “did not file a motion for reconsideration with the Board, opting instead to go straight to court.” *W & M Properties*, 514 F.3d at 1345-46. Thus, the Company’s first-time claim “that the Board failed to sufficiently explain” its amended remedy is “beyond [the Court’s] jurisdiction” to consider. *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 n.12 (D.C. Cir. 2015), *enforcing* 360 NLRB 538, 538-39 (2014); *accord Fallbrook*, 785 F.3d at 738-39 (Section 10(e) “prevent[ed] [the Court] from considering” employer’s argument “that the Board failed to adequately explain” its amended remedy because employer failed to raise that argument in “a petition for reconsideration with the Board”) (quotation marks omitted), *enforcing* 360 NLRB 644, 644-47 (2014); *see also W & M Properties*, 514 F.3d at 1345-46 (employer “deprived [the Court] of jurisdiction to consider” challenge to the Board’s remedy by failing to file motion for reconsideration).

In any event, the claim is meritless. To begin, the Board did find (A. 1 & n.2, 4-7 & n.10, 9, 39-40) that absent a notice reading, standard remedies alone would be insufficient to redress the effects of the Company’s violations. The

Board specifically adopted (A. 1, 5 n.10) the judge’s finding that *other* special remedies sought by the General Counsel were “unwarranted.” (A. 9, 39.) At the same time, however, it rejected (A. 1 & n.2, 4-7 & n.10) the judge’s determination that the Company’s violations “could . . . be remedied through traditional remedies” alone (A. 39), and instead concluded that such remedies “*and* a notice reading[] will sufficiently ameliorate the effects of the [Company’s] unfair labor practices.” (A. 5 n.10 (emphasis added).) (See also A. 5-6 (finding addition of reading requirement “appropriate” to dissipate any lingering effects “[i]n light of” violations’ “serious and widespread” nature, and finding such addition will “allow” employees to fully perceive that Company and managers are bound by Act and “make the remedy fully effective”).) Furthermore, the Board adequately explained (A. 1 n.2, 4-6 & n.10) its reasons for finding that a notice reading was necessary under the circumstances of this case, as demonstrated above (pp. 41-45).

The Company heavily relies (Br. 33-40) on inapposite cases addressing the Board’s “special” duty, under this Court’s precedent, to justify an affirmative bargaining order, which is not at issue here. *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1156-58 (D.C. Cir. 2017). In circumstances where employees have not selected a union as their representative in a Board-certified election and where the employer has not voluntarily recognized the union based on a showing of employees’ majority support, the Court regards an affirmative bargaining order as

an “extreme” remedy that “demand[s] special justification” because it “interfere[s] with the employee free choice that is a core principle of the Act.” *Scomas*, 849 F.3d at 1156-58 (quotation marks omitted); *accord Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077-80 (D.C. Cir. 1996); *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934-39 (D.C. Cir. 1991). A notice-reading requirement does not implicate comparable concerns as an affirmative bargaining order, as, indeed, the Court in *Avecor* expressly recognized. 931 F.2d at 935 (contrasting bargaining order with requiring employer “to post a notice *or read one aloud*”) (emphasis added). Accordingly, the “heightened explanatory burden” that the Court imposes on the Board in bargaining-order cases simply does not apply where, as here, only a notice reading is at issue. *United Food & Commercial Workers Union Local 204 v. NLRB*, 447 F.3d 821, 827-28 (D.C. Cir. 2006) (holding that such heightened burden does not apply to Board’s imposition of broad cease-and-desist order). It is therefore no surprise that the Court has repeatedly enforced notice-reading requirements in cases where the Board’s explanation of the particularized need for the remedy was no more elaborate than here. *E.g., Ingredion*, 930 F.3d 509, *enforcing* 366 NLRB No. 74, slip op. at 1 n.2, 36; *Veritas*, 895 F.3d 69, *enforcing* 363 NLRB No. 108, slip op. at 1 n.5, 11 (Feb. 4, 2016); *United Food & Commercial Workers*, 852 F.2d 1344, *enforcing* 284 NLRB 1429, 1479 (1987);

*Shamrock*, 779 F. App'x 752, enforcing 366 NLRB No. 117, slip op. at 38 (June 22, 2018).

Similarly, *United Steelworkers of America v. NLRB*, 646 F.2d 616 (D.C. Cir. 1981), which the Company also cites (Br. 36, 40), does not support the Company's suggestion that the Board faced an especially elevated explanatory burden here. That case concerned a Board order—meant to remedy an unfair labor practice occurring at just one of the employer's plants—that granted the union broad, corporatewide, physical access to the employer's private property at all of its plants, most of which were unorganized, and some of which the union had never attempted to organize. 646 F.2d at 637-42. By contrast, the notice-reading order here applies only to the specific plant where the Company's numerous violations occurred and does not provide for any union access (not even at the time of the notice-reading). Further, the Board's explanation for its remedy here was not “conclusory,” as the Court deemed the explanation in *Steelworkers*. *Id.* at 639-41.

**2. The Company cannot undermine the Board's discretionary judgment that the circumstances merit a notice reading**

The Company also errs in attempting (Br. 40-48) to substitute its remedial judgment for the Board's by asserting that “the facts of this case” do not warrant a notice reading. (Br. 40.) The Company first claims (Br. 41-44) that, although its numerous violations of the Act (all undisputed with one exception) admittedly were “serious,” they were not “egregious” enough to merit a reading requirement.

(Br. 43-44). The Company cites no precedent that even arguably supports this claim. Instead it merely summarizes (Br. 41-44) some of the varied collections of serious violations that have been found to justify reading remedies in other cases. Those cases do not undercut the Board’s exercise of its broad discretion here in concluding that the Company’s violations, too, were “sufficiently serious and widespread” to justify the same remedy (A. 1 n.2)—even if the violations in some of those other cases were, as the Company claims (Br. 41-44), more egregious than here.<sup>10</sup> See *United Food & Commercial Workers*, 852 F.2d at 1349 (Board’s “broad remedial discretion” and wide variety of “unique” factual circumstances involved in labor disputes make it “difficult to provide bright-line limits” on when a notice-reading or other special remedy may be ordered).

Moreover, the Company, in an effort to downplay the seriousness of its unlawful conduct (Br. 43-44), mischaracterizes its violations, claiming most were “mistakes.” Specifically, it defends its no-solicitation/no-distribution policy as a “mistake.” (Br. 4, 9, 30, 43-44.) As the Board found, however, that characterization is “not entirely accurate” and “not at all relevant” to the policy’s

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<sup>10</sup> The Company suggests (Br. 41-44) that an employer must commit multiple “hallmark” violations to warrant a notice reading but notably cites no authority supporting that contention. Further, as the judge noted (A. 39) and the Company concedes (Br. 44), the indefinite suspension of Concepcion was a “hallmark” violation. And in any event, as demonstrated, the overall effect of the Company’s litany of unfair labor practices was sufficiently severe to warrant a notice reading.

illegality and coercive effect. (A. 15 & n.18, 17.) Thus, “even if [Ramirez and Chernock] did not necessarily know [that the policy] was illegal, or ‘the wrong’ policy,” they knew at least by June 9 exactly what it was that they had posted and maintained since May 13. (A. 15 & n.18.) And during the nearly month-long period that the policy was in effect, an untold number of the Company’s 600 employees walked past and “viewed” the overbroad policy and the door sign “on a daily basis,” knowing nothing of any claim that the policy was a “mistake.” (A. 17.) As the Board found (A. 17), once the Company purportedly discovered its unlawful “mistake,” it failed to take the actions required under established Board law to effectively repudiate the mistake and remediate its coercive effects upon the employees. Indeed, the Company made “[n]o effort . . . to communicate with the employees generally about the unlawfulness of the . . . policy, or even about the change in the policy.” (A. 17.) Instead, it merely substituted the “correct” policy for the unlawful one on the bulletin board and provided copies of the updated policy to about 5 of its 600 employees.<sup>11</sup> (A. 17.)

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<sup>11</sup> See *Gen. Indus. Employees Union, Local 42 v. NLRB*, 951 F.2d 1308, 1312 & n.1 (D.C. Cir. 1991) (noting that under Board’s “stringent criteria,” a repudiation is effective only if “timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, adequately published to the employees involved, accompanied by assurances that the employer will not interfere with the employees’ section 7 rights in the future, and not followed by any additional illegal conduct”) (citing *Passavant Mem’l Area Hosp.*, 237 NLRB 138, 138-39 (1978)).

There is also little merit to the Company's contention that the "six" or "seven" other violations that it claims flowed from the policy (those involving the clipboard search, discipline of Fox, camera-footage review, and interrogations/disciplines of Cotto and Guzman) are equally pardonable as "mistakes." (Br. 4, 9, 30, 43-44.) The Company sorely misses the mark by pointing the finger at the policy for those violations; the blame lies with the Company. As the Board specifically found (A. 2-4, 16-17, 19-20 & n.33, 26), those violations "all stem[med]" from the Company's "direct effort[s]" to "actively look[] for," "target[]," and "stamp out" or "squelch" employees' union activities. (A. 4, 16-17, 20.) Similarly, there is no record support for the claim (Br. 4, 18, 30, 44) that the written instruction not to discuss wages was a "mistake," other than a manager's testimony implying that she did not realize the instruction was unlawful when she intentionally issued it to the employees. (A. 501-04, 508-11.) The Company's "mistake" defense therefore fails because it ignores that "the crucial factor" in determining the scope of the Board's remedial authority in a given case is "the effect of [the employer's unlawful] conduct on the employees" *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981), not the extent to which that conduct might be characterized as mistaken versus intentional.<sup>12</sup>

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<sup>12</sup> Additionally, the Company errs to the extent it claims, as part of its "mistake" defense, that it remediated the unlawful disciplines issued to Cotto and Guzman by rescinding them. (See Br. 12, 19.) As the Board explained (A. 15, 17, 38 & n.57),

Continuing its attempt to rewrite history, the Company also asserts (Br. 43-44) that it merely “temporarily” suspended Concepcion. As discussed, her unlawful suspension was indefinite and had continued for nearly half a year at the time of the hearing, making it a *de facto* unlawful discharge. Additionally, the evidence belies the Company’s claim that its violations “did not target a large number” of employees and directly affected only “a handful” of them. (Br. 30, 43.) As the Board found, several violations were “plant-wide,” affecting “every” employee. (See pp. 43-44.) Moreover, some of the Company’s other violations—although less than plant-wide in scope—either directly affected many employees (as with the clipboard search) or became well known to many employees beyond those directly affected (as with the retaliatory document-demand and indefinite suspension of Concepcion). (See A. 18-19, 22-24.) Furthermore, as the Board additionally found, the Company—through the totality of its sustained campaign of numerous violations—succeeded in its “efforts to . . . create” an overall “perilous” or “discriminatory” anti-union “climate” in the facility. (A. 4, 20.)

The Company next challenges the Board’s remedial judgment by noting that it did not find that the Company had a “history of past violations.” (Br. 45.) That is true, but “[t]he mere fact that the [Company] [may have] no prior record of

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the Company failed to effectively repudiate or remediate either of those violations, and it did not, in fact, rescind Guzman’s discipline.

NLRB violations does not, in itself, dissipate the egregiousness of the conduct involved in this proceeding.” *NLRB v. Blake Const. Co.*, 663 F.2d 272, 286 (D.C. Cir. 1981) (upholding broad cease-and-desist order). And there is no requirement that a notice-reading order be founded on any such history. *Teamsters Local 115*, 640 F.2d at 399-404 & n.8 (upholding reading requirement, as modified, and several other special remedies absent history of prior violations, rejecting contention that “only a record of hardened recidivism could justify so much affirmative action”); *Federated Logistics*, 340 NLRB at 256-58 & n.9 (ordering notice reading and other special remedies although employer was “not . . . shown to have committed prior violations of the Act”), *enforced*, 400 F.3d 920; *see also*, *e.g.*, *Ingredion*, 930 F.3d at 519 (upholding reading requirement not based on any finding of prior violations).

Finally, the Company erroneously contends (Br. 46-47) that because Ramirez was “not [the Company’s] president or [a] similarly high ranking official,” the Board abused its discretion in finding that she qualified as a “high-level manager” for notice-reading purposes. (Br. 46.) To begin, this contention is jurisdictionally barred by Section 10(e) of the Act. 29 U.S.C. § 160(e). The administrative law judge did not address Ramirez’s high-level status in his discussion of the proposed notice-reading remedy. (A. 39-40.) And although the General Counsel’s exceptions to the judge’s recommended remedy broadly

asserted that “many of the [Company’s] unfair labor practices were committed by high ranking officials” (A. 553), the Company did not respond to that assertion or otherwise address Ramirez’s high-level status in arguing against the remedy in its answering brief. (See A. 578-80.) Furthermore, after the Board disagreed with the judge and granted the notice-reading remedy—specifically basing its decision, in part, on its finding that Ramirez was “a high-level manager” (A. 5)—the Company did not file a motion for reconsideration. Thus, having failed to contest Ramirez’s high-level status before the Board, the Company cannot do so before the Court. 29 U.S.C. § 160(e). (See pp. 35-36.)

In any event, the contention is meritless. Under relevant precedent, high-level managers or officials may include not only company presidents and chief executive officers, but also human resources managers and others. For example, in *Ingredion*, the Court held that the employer’s “chief negotiator” in collective bargaining qualified as “upper management,” 930 F.3d at 519—an individual who was one of the employer’s human resources directors. See 366 NLRB No. 74, slip op. at 6. See also, e.g., *DHSC, LLC*, 362 NLRB 654, 655-56 (2015) (notice to be read by vice president of human resources or by highest-ranking manager at plant), *enforced*, No. 15-1426, 2019 WL 6972854, \_\_\_ F.3d \_\_\_ (D.C. Cir. Dec. 20, 2019); *Auto Nation*, 360 NLRB at 1298 & n.2, 1305 (notice to be read by human resources director or by associate general counsel). Given Ramirez’s position as a

human resources manager—and her extensive involvement in effectuating the Company’s response to the union campaign—employees would reasonably perceive her unlawful conduct as representing official company policy, not the whim of a rogue supervisor or low-level official.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the petition for review and enforce the Board's Order, except for the Settled Order Provisions. (See pp. 22, 26 n.6.)

Respectfully submitted,

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National Labor Relations Board  
March 2020

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

ADVANCEPIERRE FOODS, INC.	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 18-1219, 18-1246
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	9-CA-153966
	)	
and	)	
	)	
UNITED FOOD AND COMMERCIAL	)	
WORKERS UNION, LOCAL 75	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,756 words of proportionally spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC  
this 20th day of March 2020

# **STATUTORY ADDENDUM**

**STATUTORY ADDENDUM**

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## THE NATIONAL LABOR RELATIONS ACT

### **Section 7 of the Act (29 U.S.C. § 157) provides:**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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

It shall be an unfair labor practice for an employer--

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

\* \* \*

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

### **Section 8(c) of the Act (29 U.S.C. § 158(c)) provides:**

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

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

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce. . . .

\* \* \*

(c) . . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . . .

\* \* \*

(e) The Board shall have power to petition any court of appeals of the United States . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order . . . and shall file in the court the record in the proceeding . . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power . . . to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the

Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction . . . in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

**UNITED STATES COURT OF APPEALS  
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and	)	
	)	
UNITED FOOD AND COMMERCIAL	)	
WORKERS UNION, LOCAL 75	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
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