UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 06-4304-ag

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CNP MECHANICAL, INC.

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the application of the National Labor Relations Board ("the Board") for enforcement of its Order against CNP Mechanical, Inc. ("the Company"). The Board had jurisdiction below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. This Court has appellate jurisdiction under Section 10(e) of the Act (29 U.S.C.

§ 160(e)), as the unfair labor practices occurred in the state of New York. The Board's Decision and Order issued on May 31, 2006 and is reported at 347 NLRB No. 14. (A 15-28.)[1] The Board filed its application for enforcement on September 15, 2006. The enforcement application was timely; the Act places no time limits on such filings. The Board's Order is a final order with respect to all parties.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by telling an employee-applicant that the Company's restrictive policy regarding employment applications was in furtherance of the Company's commitment to remaining an "open shop;" by interrogating and threatening a recent hire about union matters and telling him employees were expected to refrain from all contact with union representatives even before he was given a starting date; by interrogating an employee-applicant about his union sympathies; by threatening employees with discharge and unspecified reprisals for union activities; and by instructing employees to report to management all union activities that occur on the job.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee

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

Trevor Claffey for antiunion reasons, and by refusing to consider 11 applicants for hire, and refusing to hire 3 of them for then-current vacancies, because of their declared union connections.

STATEMENT OF THE CASE

Based upon charges filed by U.A. Plumbers and Pipefitters Local Union #13 ("the Union"), the Board's General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(1) of the Act by committing various acts of interference, restraint, and coercion, and Section 8(a)(3) and (1) of the Act by refusing to hire, or consider for hire, 11 named union applicants, and by discharging employee Claffey, all for antiunion reasons. Following a hearing, based in the main on credibility determinations, a Board administrative law judge issued a decision and recommended order sustaining the complaint's allegations. (A 27.) The Company filed timely exceptions. The Board issued a Decision and Order affirming the judge's findings and adopting his recommended order, modifying it to make clear that, while the Company unlawfully refused to consider 11 union-affiliated applicants for hire, it refused to hire only 3 of them, as the company had only 3 unfilled positions at the time. (A 14-16.) The pertinent facts follow.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company, a Nonunion Contractor, Successfully Bids on Several Prevailing-Wage Jobs; Union Applicants Are Told that the Company Is Not Hiring; One Is Told that the Company's Announced Policy of Not Accepting Applications Except by "Appointment" Is Designed To Keep the Union Out

The Company, which is owned and run by Charles Natalello ("Natalello"), specializes in performing plumbing work on prevailing-wage, governmental projects in the Rochester, New York area. In early 2002, the Company successfully bid on several such projects. Much of the work on those projects could not begin until sometime in the spring, after the ground thawed and weather permitted. (A 18; 664-75, 697-704.) In the past, Natalello had rejected overtures by Union Business Agent James Caternolo to enter into a pre-hire collective-bargaining agreement, which, according to Caternolo, would have permitted the Company to use apprentices at a much lower rate than journeymen to perform some of the work on its jobs. (A 18; 204-06.)

Natalello was irate at Caternolo's earlier actions that included filing charges against the Company with the New York State Department of Labor ("DOL") for alleged prevailing-wage violations--that is, for paying laborer's rates to plumbers when they performed certain less-skilled work on his jobs. The DOL had issued a complaint on those charges, which Natalello disputed; as a consequence, the DOL

had been withholding what, at the time of the Board hearing herein, amounted to hundreds of thousands of dollars from the fees due the Company for work performed to cover backpay contingencies, and Natalello was incurring considerable, on-going legal fees. (A 196-208, 230-32, 675-90, 794-99.)[2]

In March 2002, Caternolo initiated an effort to organize the Company's workforce from the bottom up. To that end, on March 13, Caternolo and Gary Swanson, a business agent for a different union that also represented plumbers, went to the trailer that served as the Company's headquarters to apply for work. A sign prominently posted on the trailer read:

> ABSOLUTELY NO APPLICATIONS ACCEPTED AT CNP MECHANICAL, INC., WITHOUT AN APPOINTMENT. WE CONSIDER AN APPLICATION WITHOUT AN APPOINTMENT IN VIOLATION OF THE NEW YORK STATE TRESPASSING LAWS

As a consequence, they left. (A 18; 66-69, 818.)

On March 19, Swanson telephoned the Company and spoke to Lisa Legler, the lone secretary employed by Natalello. Swanson told Legler that he wanted to make an appointment to submit an employment application. Legler responded that they were not accepting applications, but asked Swanson about his work experience. Swanson told her he had considerable experience in the plumbing trade, among others, and then asked about the sign on the trailer, commenting that

---

[2] At the time of the hearing herein, the DOL's charge still had not been resolved. (A 203.)

he had never seen anything like it before. Legler replied, "We're not a union shop" and that the sign was "a requisite to remaining an open shop." (A 18; 851.) Swanson again asked if he could submit a resume, adding that he was a loyal and dependable employee and "not union." Legler replied that they were not accepting resumes. (A 18; 177-81, 850-52.)

Legler prepared a message log reporting Swanson's employment inquiry; the note emphasized, "loyal-dependable-not union!!" (A 18; 891) (exclamation points in original). Swanson mailed his resume to the Company on April 10. Two days later, he received a mailed response informing him that "at present CNP is not hiring, interviewing, or reviewing for employment," but that his application would be kept on file for 30 days. (A 18-19; 853.)

On March 28, Union Business Agent Caternolo telephoned the Company's office and spoke with Legler. Caternolo identified himself as a union representative and said that he would like to apply for work and had a lot of other men who wanted to apply. Legler replied, "We also have a lot of men," but agreed to tell Natalello that Caternolo had called. (A 19; 819.) Legler relayed the message to Natalello, who instructed her in the future to respond to all employment inquiries by stating that the Company was not hiring but would welcome all resumes. (A 19; 616.)

On April 1, Caternolo received a phone call from Natalello's brother, Ray, whom he knew. Ray asked Caternolo if he was serious about applying for work, teasingly pointing out that Caternolo had not worked with tools in quite some time. Caternolo assured Ray that he was, and Ray told Caternolo to send a resume and they would consider it and keep it on file for 30 days. Caternolo mailed the Company his resume on April 1. (A 19; 820-21.)

On March 28, another union official, William Yatteau, telephoned the office and spoke with Legler, identifying himself as a union official looking for work. Legler said that the Company was not currently hiring, but that she would take his name and number. Between April 1 and April 9, similar calls were placed by eight other union-member applicants, all of whom subsequently mailed resumes to the Company. (A 19; 252-55, 822-23.)[3]

B. Natalello Hires Nonunion Employees James Montinarelli, Steven Soper, and Trevor Claffey and Has Them Backdate Their Dates of Hire; Natalello's Secretary Interrogates Montinarelli about His Union Affiliation and Sympathies; Natalello Threatens Soper With Discharge if He Speaks to the Union

In February, after it was publicly announced that the Company was the low bidder on several prevailing-wage jobs, James Montinarelli, Steven Soper, and

---

[3] The remaining nine union-affiliated applicants, and the dates they contacted the Company to apply, were: Robert Mueller, April 1 (A 90-91, 895), Lonnie Keys, April 1 (A 895), John Perticone, April 2 (A 896), Jim Slattery, April 3 (A 897), Keith Warren, April 3 (A 897), Steve Catalina, April 3 (A 898), Richard Williams, April 8 (A 823), Steve Cirrincione, April 9 (A 823), Harry Moses, April 9 (A 823).

Trevor Claffey, all longtime employees of Mass-Am, a nonunion competitor of the Company's, contacted the Company for work. All three were former coworkers of then-current Company Job Superintendents Andy McDermott and Paul Battaglia, with whom they had worked at Mass-Am for considerable lengths of time. (A 21-22; 264-67.)

In early and mid-February, Montinarelli, a longtime acquaintance of Natalello's, left two messages on the Company's answering machine, explaining his interest in employment because of concerns that Mass-Am was in serious financial difficulty and his fear that it might go under any day. Montinarelli added that two current company job superintendents, McDermott and Battaglia, with whom he had worked at Mass-Am, could vouch for him. Montinarelli heard nothing from Natalello until early April, at which time Natalello asked if Montinarelli was still interested. When Montinarelli indicated that he was, Natalello replied: "Okay, I do not have anything right now but I will get back to you." (A 21; 266-68.) Later that month, when he had yet to hear from Natalello, Montinarelli went to the Company's office, where he asked Legler "if anything had come up." Legler asked why he was leaving his current job, and Montinarelli explained that he was worried about his job security. Legler then asked if Montinarelli was affiliated with the Union and how he felt about unions. Montinarelli responded that he had "no feelings [about] the Union," that he had

"never worked for them," and had "nothing to say, good or bad." Legler replied: "Well good, we have our hands full here with the Union." (A 21; 269-70.)

In mid-February, Soper left a message on the Company's answering machine stating his interest in employment. Soper had known Natalello for a number of years, and gave Superintendent McDermott as a reference. Soper left a second phone message in late March, stating that he "had called before and did not know if [Natalello] had received the message"; that he was interested in coming to work for Natalello; and that he had worked with two of Natalello's current employees, McDermott and Battaglia. Natalello contacted Soper the first week in April. Natalello said that he had received Soper's message, that McDermott and Battaglia had said "good things" about Soper, and that "he would be getting in touch with [him.]" (A 20; 333-38.) At Soper's request, the two met at the company trailer that Saturday, April 6. At that time, Natalello told Soper that he had a job "if he wanted it," but no time was set for when Soper would begin. (A 20; 338-39.)

On April 25, Natalello contacted Soper and Montinarelli and asked them to meet him at the trailer on April 26. At that time, Natalello explained how the Company operated on prevailing-wage jobs and said that he had jobs for them beginning that Monday. Natalello gave them paperwork to fill out, directing them to write "March 11" or simply any date in mid-March as the date of hire. Both

were still working for Mass-Am as of that meeting. They began work for the Company 3 days later. (A 20-21; 271-75, 342-44.)

In late March, Claffey telephoned Natalello about employment. At Natalello's suggestion, the two met at the Company's office shortly thereafter, on April 1. Natalello explained that he had work coming up, but the ground was too wet to do underground work, and it might take 2 or 3 weeks. Claffey said that he was "very interested" in the job. On Saturday, May 4, Claffey met with Natalello at the Company's office, where he was asked fill out necessary paperwork. At Natalello's direction, Claffey wrote "March 13" as the date of hire. Claffey began work that Monday, May 6. (A 20-21; 371-79, 403-05.)

On May 2, Soper's second day of employment, Natalello came to the jobsite where Soper was working and told Soper that he understood a union representative had been on the site talking to him. Soper acknowledged that that was correct. Natalello then said, "Well, the union is not our friend. CNP is one big happy family. I can obviously not tell you who you can talk to. But if you continue talking to a union representative then we will have to reevaluate your position in this company." (A 22; 347-49 .)

C. Natalello Tells Montinarelli To Expect Union Representatives To Be on the Jobsite and To Immediately Report All Union Contacts to Natalello; Union Representative Caternolo Recruits Montinarelli and Claffey To Help Organize the Company's Employees

On June 10, Natalello came to the jobsite where Montinarelli and Claffey were working and where Montinarelli was serving as job superintendent. Natalello spoke with Montinarelli in the job trailer. He said that he wanted Montinarelli to know that a union contractor would be starting at the site and therefore "union personnel" would be permitted on the site. He then pointedly told Montinarelli: "I want to know if yourself or any other employee talks to the union representative. I want to know when, where and how long. If you don't tell me, someone else will. Then I will know which side of the fence you are really on." (A 22; 279-82.)

The next evening, Union Business Agent Caternolo spoke to Montinarelli and Claffey on the phone. Caternolo had spoken to both about joining the Union while they were employed at Mass-Am and both had indicated interest, but did not join at that time. On this occasion, Caternolo asked if they would help organize their coworkers at the Company, and both agreed. The three then met an hour before work the next morning at Claffey's home. Caternolo gave Claffey union T-shirts, buttons, pamphlets, and stickers to distribute to his coworkers that day. He told Montinarelli to follow Natalello's instructions and report Claffey's actions to Natalello. (A 22; 165-68, 215-18, 282-84, 384-85.)

D. Claffey Distributes Union Leaflets and Stickers to Coworkers Before Work; Montinarelli Reports Him to Natalello; Natalello Instructs Montinarelli To Tell Claffey To Pack Up His Tools and Report to Company Headquarters; Natalello Fires Claffey

After meeting with Caternolo, Claffey and Montinarelli drove to work. They arrived 15 minutes before the 7 a.m. starting time. Claffey handed out union leaflets and stickers to his coworkers at the jobsite as they arrived. He then reported to his work area and began work at 7:00 a.m. (A 22; 285-86, 385.) A short while later, Montinarelli telephoned Natalello and reported that Claffey was wearing a union T-shirt and had distributed union literature to coworkers before work. Natalello replied that he could not believe it, and instructed Montinarelli to tell Claffey to clean up his work area, pack his tools, and report to the office. Claffey followed that direction and drove across town to the Company's office, after stopping briefly at his home to get money and then at a station to get gas. (A 23; 287, 387-88.)

When Claffey arrived at the office, Natalello was preparing to leave for an appointment. Natalello told Claffey that Claffey had broken company policy, that "I do not want to see you on any of my job sites. If you want to talk to me, you are going to have to call for an appointment." Claffey replied that he was "going on an unfair labor practice strike." Natalello then drove off. (SA 9; A 390.) A few hours later, Natalello telephoned and asked Montinarelli if Claffey had returned to the jobsite, and when assured that he had not, said that, if Claffey showed up,

Montinarelli was to tell him he could not enter and would be removed by the police if he did. (A 23; 290.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing, the Board (Members Schaumber, Kirsanow, and Walsh), in agreement with the administrative law judge, found that the Company violated Section 8(a) (1) of the Act (29 U.S.C. § 158(a) (1)) by telling an employee-applicant that the Company was committed to remaining an "open shop" and that its refusal to accept applications other than by appointment was in furtherance of that end; by interrogating a recent-hire about his union affiliation or sympathies and telling him that company employees were expected to refrain from speaking to union representatives; and by threatening two employees that their jobs with the Company depended both on refraining from union activities and reporting about all such activities immediately to the Company's owner. The Board also found that the Company violated Section 8(a) (3) and (1) of the Act (29 U.S.C. § 158(a) (3) and (1)) by discharging employee Claffey for antiunion reasons, and by refusing to consider hiring 11named applicants, and refusing to hire 3, because of their self-declared union affiliation. (A 14-16, 26.)

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their

statutory rights. (A 14-16, 27.) Affirmatively, the Order requires the Company to make a proper offer of reinstatement to discriminatee Claffey, to the extent that it has not done so previously; if the Company has not made such an offer to Claffey, offer jobs to two, otherwise three, of the named discriminatees who the Board determines in an ensuing compliance proceeding would have been hired by the Company for then-available positions for which they applied, or to substantially equivalent positions, if the previously-available positions are no longer available; to make those discriminatees and Claffey whole for any losses incurred due to the discrimination against them; to notify the Board's Regional Director, and all named discriminatees who have not been offered instatement, of employment openings as they arise; to consider those discriminatees for the openings on a nondiscriminatory basis until such time as the Regional Director determines that the case should be closed; to expunge from the files any reference to the discharge of Claffey; and to post copies of a remedial notice. (A 16, 27-28.)

SUMMARY OF ARGUMENT

The Board reasonably concluded that the coercive remarks and inquiries made by Company Secretary Lisa Legler to two employee-applicants were attributable to the Company and violated the Act. The Company's posted policy of refusing to accept applications for employment other than "by appointment" placed Legler at the vortex of the Company's system of hiring. Legler therefore spoke

with an authoritative voice when she explained to employee-applicant Swanson that the Company's unusual policy regarding employment applications was meant to keep the Union out, and questioned recent-hire Montinarelli about his union affiliation and sympathies before Montinarelli had even been given a starting date or job assignment.

The credited evidence establishes that Company Owner Natalello threatened employees Soper and Montinarelli that their jobs depended on their not only refraining from talking with any union representatives but also reporting on all union contacts that occurred on the jobsite immediately to him. Contrary to the Company, the Board's administrative law judge, affirmed by the Board, did nothing more than base her credibility determinations on the probability of events and her observation of the witnesses' demeanor on the stand. In that regard, there was nothing improper in the judge's finding that Natalello presented himself as a wholly incredible witness. In particular, the judge found that Natalello's version of his conversations with the 2 employees, in which Natalello vigorously maintained he made no mention of the Union, was fundamentally at odds with the judge's observation of Natalello at the hearing. At the hearing, Natalello revealed uncoaxed contempt for Union Business Agent Caternolo for having, among other things, caused the Company to incur considerable expense, and face liability in the

hundreds of thousands of dollars, by filing prevailing-wage charges against the Company with the state DOL.

In a similar vein, the Company's attack on the Board's findings of unlawful discrimination must also fail. Contrary to the Company, the Board did not rely upon Natalello's admitted antipathy toward Caternolo to find union animus; instead, the above-described unfair labor practices provided ample evidence of such animus and a most telling backdrop against which the Company's acts of unlawful discrimination must be assessed. Nor is there documentary evidence that conflicts in any way with the judge's determination, based upon the credited testimony of 3 employee witnesses, that there were 3 job openings that had not been filled when 11 union applicants presented themselves for hire. Therefore, and because the Company's other arguments rely on a distortion of the record evidence, there is no basis for the Company's attack at this late date on the credited evidence upon which the Board's discriminatory refusal-to-hire, and refusal-to-consider-for-hiring, unfair labor practice findings rest.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT IN NUMEROUS RESPECTS

A. Applicable Principles and Standard of Review

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in their union and other protected concerted activities.[4] It is settled, moreover, that proof of an unlawful effect is not required; all that is required is a finding that an employer's conduct was likely to have interfered with employee rights. *See NYU Medical Center v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998).

The Board's findings are entitled to affirmance if supported by substantial evidence. Section 10(e) of the Act (29 U.S.C. § 160(e)). That "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (attribution omitted). Stated otherwise, the Board's factual findings may only be reversed if a reviewing court is "'left with the impression that no rational trier of

[4] Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) affords protection to the "exercise" of rights guaranteed employees in Section 7 of the Act (29 U.S.C. § 157)—namely, "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," or to refrain from such activities.

fact could reach the conclusion drawn by the Board.'" *NLRB v. G & T Terminal*, 267 F.3d 103, 114 (2d Cir. 2001) (attribution omitted). On issues of credibility, moreover, court review "is even further constricted"—credibility determinations may not be disturbed "'unless incredible or flatly contradicted by undisputed documentary testimony.'" *Id*.

B. The Board Reasonably Concluded that Lisa Legler's Remarks to Job Applicants Swanson and Montinarelli Violated Section 8(a)(1) of the Act

As shown, in response to his inquiry, the Company's lone secretary, Lisa Legler, explained to Gary Swanson that the Company's posted policy of refusing to accept employment applications or employee resumes except by "by appointment" was integral to the Company's commitment to remaining an "open shop." While Legler attempted to distance Natalello from what she had said, the Board found (A 24) her to be a wholly "unbelievable" witness and reasonably concluded that the Company could not disown Legler's statement by arguing that Legler was not speaking as its agent.

"[T]he test for agency under the Act 'is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy.'" *Blaylock Electric v. NLRB*, 121 F.3d 1230, 1234 (9th Cir. 1997) (attribution omitted). Here, the Company placed Legler at the vortex of its application process, and applicants had

no reason to understand that she was not an authoritative source on that subject. Indeed, it does not appear that there was anyway to make the "appointment" that the posted policy required other than through Legler. Having made Legler the virtual gatekeeper in its hiring process, the Board reasonably concluded that the Company could not avoid the consequences of what Leger said and did relative to employees seeking employment by disclaiming her apparent authority to speak to them as its agent. *See Blaylock Electric v. NLRB*, 121 F.3d at 1234 (the employer had placed its receptionist in a position relative to the hiring process in which she had the apparent authority to provide information and answer questions regarding that process); *GM Electrics*, 323 NLRB 125, 126 (1997) (same).

The Company insists (Br 23-24) that Legler's statement constituted protected speech, but the Board reasonably concluded (A 24) that it was coercive—that is, that "any employee hearing [it] would reasonably conclude that working for the [Company] and joining a union were not compatible." As such, Legler's statement reflecting the Company's resolve to keep union members and sympathizers from even applying for employment clearly violated Section 8(a)(1) of the Act. *See NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 1460, 1466 (2d Cir. 1996) (unlawful to assert that the employer's hiring policy is intended to weed out "anybody from the union").

The credited evidence also establishes that Legler coercively interrogated Montinarelli about his union affiliation and sympathies and informed him that company employees were expected to refuse to talk to union representatives. While the Company would dispute it, the circumstances surrounding these statements were as coercive as could be imagined. Montinarelli had yet to hear anything definitive about starting with the Company when the conversation occurred, and so could reasonably have understood that Legler's pointed inquiries were more than just idle talk. To the contrary, if he had any doubts that how he answered might well impact on whether he had a job or not, Legler's ensuing remark—to the effect that company employees were constrained to shun any contact with union representatives—would have had to have erased them. The inference was thus clear, and the Board drew it (A 24), that in this instance too the Company's point person in the application process had imparted a coercive message to a potential employee. *See Matthews Readymix, Inc. v. NLRB*, 165 F.3d 74, 76, 78 (D.C. Cir. 1998). (inquiry into an applicant's union membership coercive "as a matter of law"). *See also Abbey's Transportation Services*, 837 F.2d 575, 580 (2d Cir. 1987) (unexplained inquiries about union affiliation that had no readily discernible lawful purpose are unlawfully coercive).

C. The Board Reasonably Concluded that Chuck Natalello's Remarks to Employees Montinarelli and Soper Violated Section 8(a)(1) of the Act

The credited evidence establishes that company owner Natalello pointedly told employees Montinarelli and Soper that speaking with union representatives was strictly forbidden, that employees were expected to report on all union contacts when they occurred, and that their jobs hung in the balance if they failed to adhere to this policy. The Board reasonably concluded (A 25) that such remarks by a hands-on owner struck at the core of the Act's protections: Natalello had made it plain that he was aware of everything that went on at his jobsites, that he would not tolerate any union contacts by any of his employees, and that Montinarelli and Soper had better heed his warning and also report all union contacts made on the job involving any company employee, or they would be summarily dismissed. *See Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 29-30 (2d Cir. 1996) (coercively threatened employees with discharge unless they not only forwent union activities but also actively assisted in the employer's antiunion effort).

The Company insists (Br 11-16) that, at their root, the Board's credibility resolutions here depended upon protected speech to employees at the jobsite by Natalello. However, as a cursory examination reveals, the Board's administrative law judge properly relied on her assessment of how the witnesses presented

themselves and whether their testimony fit together and fit with the probability of events. The judge found (A 24-25) that the employee witnesses were impressive on the stand and that their versions of what was said were internally consistent and fit with the probability of events. By contrast, the judge found that Natalello was an unimpressive witness, whose version of events made no sense in light of the probability of events. Indeed, as the judge observed, that testimony was all but impossible to reconcile with Natalello's own testimony elicited by his own attorney regarding how he felt about Union Business Agent Caternolo, whose efforts to see that the prevailing-wage law was enforced had lead to a state DOL complaint that had cost Natalello dearly, both in terms of out-of-pocket legal fees and considerable cash-flow problems, and that, if ultimately sustained, would cost him hundreds of thousands of dollars.

Soper testified that Natalello confronted him at the jobsite the day after he had spoken with Union Business Agent Caternolo at the site; that Natalello demanded to know if he had spoken to a union representative; and, that, when he confirmed that he had, Natalello warned him that "the Union was not their friend" and that he would have to "reevaluate" Soper's position with the Company if Soper spoke with a union representative again. (A 347-48.) For his part, Natalello's version of events had it that Soper reported his conversation to Natalello without

Natalello having made any inquiry, and that Natalello's only comment to Soper in response was that Soper should make certain that all visitors sign in. (A 734-35.)

While the Company would ignore it, the judge reasonably found (A 24) "it highly unlikely" that Soper, "who had been working for [the Company] only a few days" "would voluntarily tell Natalello about Caternolo's presence on the jobsite." Indeed, if Soper knew nothing about Natalello's antipathy towards Caternolo, then he had no reason to report on his brief conversation with Caternolo in the first place. On the other hand, as the judge reasoned (A 24), if Soper was aware of that hostility, it made no sense for Soper, having spoken to Caternolo, to then report on himself to Natalello, thus risking a job he had spent months pursuing. Not only did the judge find that Natalello's version of events made no sense, but also she found that Natalello's professed response—that he had said nothing whatever to indicate anger toward Caternolo or the Union—was completely at odds with Natalello's demonstrated anger on the stand at Caternolo for the legal troubles that Caternolo had fomented with the DOL. (A 24.)

The judge found (A 25) that precisely the same probabilities militated in favor of crediting Montinarelli's testimony that Natalello warned him on June 10 that he was to report all union conversations or other activities immediately to Natalello or "others will," in which case, Natalello threatened: "I will know which side of the fence you are really on." Montinarelli testified, credibly in the judge's

view, that Natalello explained that he was giving Montinarelli this stark warning because a union contractor was scheduled to begin work on the jobsite, which would expectedly cause union representatives to be present. (A 279-81.) By contrast, the judge found that Natalello's version of what transpired—that Montinarelli had volunteered that Caternolo had approached him on the jobsite and that Natalello's only response to Montinarelli's inquiry about whether it was okay to speak with Caternolo was that he did not care as long as it was not on company time—was difficult to square with the antipathy that Natalello had displayed on the stand toward Caternolo and the trouble he had caused the Company. (A 25.)

Contrary to the Company, the judge offended no policy arguably embodied in Section 8(c) of the Act (29 U.S.C. § 158(c)) when she made credibility determinations that relied, in part, on Natalello's open and "undisguised dislike" for the Union, in general, and for Caternolo, in particular, that Natalello had expressed and exhibited at the hearing. As this Court has recognized, Section 8(c) concerns itself with the different issue of whether the Board may rely on evidence of protected noncoercive communications to employees to prove an unfair labor practice, as, for example, evidence of union animus in a discrimination case. *See Holo-Krome Co. v. NLRB*, 907 F.3d 1343, 1347 (2d Cir.1990). It says nothing about making a determination regarding witness credibility based upon the probability of events and an assessment of how a witness presents on the stand,

which is all that the judge did here. (A 24.) The Board's determination here that Natalello's testimony as a whole was so conflicted, both in concept and presentation, as to defy belief, offends no policy that Section 8(c) can even arguably be said to embrace.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE CLAFFEY FOR ANTIUNION REASONS AND BY REFUSING TO CONSIDER 11 APPLICANTS FOR HIRE, AND REFUSING TO HIRE 3 OF THEM FOR THEN-CURRENT VACANCIES, BECAUSE OF THEIR DECLARED UNION CONNECTIONS

A. Applicable Principles and Standard or Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to "discriminate[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." In discrimination cases, the General Counsel has the burden of demonstrating that an employer took an adverse employment action against employees and that antiunion considerations were a "motivating factor." *Wright Line, a Division of Wright Line, Inc*, 251 NLRB 1083 (1980) (establishing the test in unlawful motive cases), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1991), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). *Accord NLRB v. G & T Terminal Packaging Co., Inc.*, 246 F.3d 103, 115-16 (2d Cir. 2001). If that burden

is met, "the employer may avoid liability only if it demonstrates by a preponderance of the evidence 'that it would have reached the same decision absent the protected conduct.'" *Id*. (attribution omitted). *Accord Holo-Krome Co. v. NLRB*, 954 F.2d 108, 111-12 (2d Cir. 1992) (denying rehearing) (explaining *Wright Line* test).

It is settled, moreover, that the Board may rely upon direct or circumstantial evidence, and that the General Counsel's case can appropriately rest on a variety of circumstantial factors alone. *See G & T Terminal*, 267 F.3d at 117; *Holo-Krome*, 954 F.2d at 113-14. As noted earlier, the Board's findings are entitled to affirmance if supported by substantial evidence, and its credibility determinations may not be disturbed "'unless incredible or flatly contradicted by undisputed documentary testimony.'" *G & T Terminal*, 267 F.3d at 117 (attribution omitted).

B. The Board Reasonably Found that Natalello Discharged Claffey for Antiunion Reasons

In the wake of the unfair labor practices summarized above, employees Claffey and Montinarelli were recruited to initiate an organizing effort and test Natalello's threat the previous day that Natalello would not stand for any union activities on his jobsites and would discharge employees who did not cooperate. As a consequence, Claffey wore a union T-shirt to work and, before work began, distributed union literature to coworkers before his and their starting time. When, as per Natalello's pointed directions, Montinarelli reported what Claffey had done,

Natalello demanded that Montinarelli direct Claffey to pack up his tools and report directly to the office. When Claffey reported, Natalello declared, "I don't want to see you on any of my jobsites," "if you want to talk to me, you are going to have to make an appointment." (A 354-55.) Natalello then instructed Montinarelli to call the police if Claffey ever returned to the jobsite.

Given the compelling backdrop of antiunion animus that Natalello's own prior threats evidenced, the Board reasonably concluded that Natalello discharged Claffey for antiunion reasons. Natalello claimed that he summoned Claffey to the office, not to discharge him, but to reassign him to a different worksite, and that his reason for doing so had nothing to do with Claffey's union activities—that it was because Montinarelli reported that Claffey was away from his work station during working time on non-work-related business that just happened to involve organizing his coworkers. (A 742-48.) The administrative law judge, affirmed by the Board, disbelieved him, and reasonably concluded that, not only was Natalello dissembling, but also, because he was, the truth was precisely the opposite of "what he [was attempting to den[y].'" *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962) (attribution omitted).

Indeed, Natalello said nothing to Claffey about reassigning him to another jobsite. Rather, Natalello flatly told Claffey that he did not want to see him at any of his jobsites, and then placed Claffey on the same status Natalello reserved for all

known union members—if Claffey wanted to talk to Natalello, he was to make an appointment. The inference was reasonable, as the Board found (A 25), that Claffey had been summarily discharged by Natalello for failing to heed Natalello's warnings about the consequences of choosing the wrong "side."

The Company insists (Br 27-29) that Claffey could not have been discharged because he responded to Natalello's tirade by declaring that he was going on an unfair labor practice strike. However, there is nothing inconsistent with a finding that Natalello had discharged Claffey, and with Claffey's responding as he did. When Caternolo recruited Montinarelli and Claffey to challenge Natalello, everyone involved expected trouble. Caternolo arranged for the two, and employee Soper, to have a safe haven with a union-organized contractor, while they confronted Natalello's earlier unlawful threats by declaring that they were on an unfair labor practice strike. They therefore could pressure Natalello to disclaim his prior threats and open the workplace to a free exercise of employee rights, without forfeiting their jobs. The fact that Natalello acted to terminate Claffey because of Claffey's organizing efforts only added to the list of unfair labor practices that the employees had to protest. And, while Soper chose to simply quit his job with Natalello in favor of the union job Caternolo had arranged, Claffey and Montinarelli did not. Their ensuing declaration of being on an unfair labor practice strike therefore cannot erase Natalello's precipitous action in discharging

Claffey for antiunion reasons as soon as he learned of the organizing effort that Claffey had begun.

C. The Board Reasonably Found that the Company Unlawfully Refused to Consider 11 Union-Affiliated Applicants for Hire, and Unlawfully Refused To Hire 3 of Them, Because of their Declared Union Affiliation

The credited evidence establishes that, at the time that Caternolo informed Lisa Legler on the morning of March 28 that he and a number of other union members wanted to make appointments to apply for work, Natalello had yet to even speak to Montinarelli or Soper and had not yet met with Claffey. Natalello then rushed to offer the three of them jobs, even though he could not say when work would begin and even though he was aware that Claffey had experienced a problem on his then current job with persistent absences. (A 712.)

Natalello had sat on his hands for a month or more without even contacting Montinarelli or Soper until the onslaught of employment inquiries from union-affiliated applicants began, only to falsely inform those applicants, many of whom had already contacted the Company before the precipitant offers were made, that the Company was not hiring. Natalello then attempted to cover his tracks by instructing Montinarelli, Soper, and Claffey to backdate their dates of hire on employment forms to mid-March, and took steps to foreclose the union-affiliated applicants from being considered for future employment by adopting a rule that resumes would be kept on file for only 30 days. (A 729-31.)

The Board reasonably concluded that this array of facts constituted a compelling case that the Company had unlawfully refused to consider for hire all 11 union-affiliated applicants, and refused to hire 3 of them, for antiunion reasons.[5] To begin with, it is evident that Natalello had no intention of considering any union-member applicants for hire, regardless of need. Natalello's animus to unionization was well documented by his unlawful threats and his summary discharge of Claffey, when Claffey later crossed him on the issue of unionization. And, his new rule to hold resumes for only 30 days stands in marked contrast to his treatment of Montinarelli and Soper, whose employment inquiries he kept on mental file for a much longer period before choosing to act upon them when the

[5] The Board has refined its *Wright Line* approach for analyzing discrimination cases in general to meet the nuances that discrimination in the hiring context can present. In refusal-to-consider cases, the Board has held that the General Counsel must establish only that an employer excluded applicants from the hiring process and that antiunion considerations contributed to that decision; in refusal-to-hire cases, there are the added requirements that the General Counsel prove that the employer was actually hiring when union-affiliated applicants presented themselves for jobs for which they were qualified. In either type case, once the General Counsel's burden has been met, it then falls upon the employer to prove that the applicants would not have been considered or hired, as the case may be, even in the absence of their union affiliation. *See FES (a Division of Thermo Power)*, 331 NLRB 9, 15-16 (2000) (remanding for further findings), 333 NLRB 66 (2001), *enforced*, 301 F.3d 83, 87 (3d Cir. 2002); *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1035-36 (10th Cir. 2003); *Int'l. Union of Operating Enginesrs Local 147 v. NLRB*, 294 F.3d 186, 189 (D.C. Cir. 2002) The Company did not challenge those refinements of the Board's burden-of-proof rule when the case was before the Board or in its brief here, and therefore no question regarding them is before the Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 65-66 (1982).

onslaught of union-affiliated applications began. *See NLRB v. Interstate Builders, Inc.*, 351 F.3d at 1037-38.[6]

Furthermore, given the reality that the Company hired Claffey, Montinarelli, and Soper after receiving job inquiries from at least 3 of the 11 union-affiliated applicants, there can be little doubt that the credited evidence establishes that antiunion considerations so infused Natalello's hiring decisions that a refusal-to-hire violation with regard to the 3 vacancies had also been established. (*Id*.) Indeed, the Company makes no serious argument to the contrary. Instead, apart from repeating its erroneous argument that the Board relied on Natalello's antipathy towards Caternolo to prove animus, the Company (Br 17-23) again launches a wholesale attack on the Board's credibility determinations and insists that hiring was completed before the job inquiries from union-affiliated applications began. However, we now show that the Company's credibility arguments rest upon a complete distortion of the record evidence and supply no grounds for a challenge to credibility at this late date.

---

[6] The Board found (A 26 n.4) it unnecessary to determine whether the applicants, who were all journeymen plumbers, actually qualified for the vacant positions because Natalello had not questioned their qualifications, and no issue regarding qualifications had been raised on brief. As the Company has also waived that issue in its brief to this Court, no question concerning whether the "qualifications" aspect of the Board's test has been met is presented here.

Montinarelli testified that, having made his interest in securing employment abundantly clear months earlier, he first heard from Natalello about his inquiries in early April, when Montinarelli confirmed that he was still interested and Natalello indicated that he would hire him but did not know when. (A 265-67, 311.) Contrary to the Company (Br 21), Legler's phone log regarding a message that Montinarelli left on March 26—namely, that he had given his employer notice—presents no obstacle to Montinarelli's version of his events. Montinarelli had pressed Natalello for employment in February and he continued to pressure his former coworker, Company Superintendent McDermott, to no avail, according to McDermott's own admission (A 529-30)), through mid-March. Having not heard from Natalello through that date, it made perfect sense that Montinarelli would try to impel Natalello to offer him a job by reporting he had given his employer notice, though he obviously retained the option of continuing to work unless and until he found something else.

On the other hand, Natalello's testimony—that he had offered Montinarelli a job in mid-February but that Montinarelli had put him off because he did not want to leave his employer "high and dry" (A 719)—cannot be reconciled with McDermott's testimony. Not only was McDermott clear that Montinarelli's phone calls asking him for help obtaining a position with the Company persisted through mid-March, but also he testified that Montinarelli from the outset in early February

had indicated urgency in securing a job because he feared that being laid off from his current one was imminent. (A 266-67.)

Similarly distorted is the Company's attempt (Br 20) to convert Legler's phone log, regarding her conversation with Gary Swanson in mid-March, into a documentary conflict with the credited version of events. The Company claims (Br 20) that Legler's note to Natalello—to the effect that Swanson is "loyal-dependable-not union!!" (A 905) —proves that there were no jobs available. Its argument is that Legler believed Swanson when he told her that he was opposed to unions and therefore her response to his job inquiry—that the Company was not hiring—must somehow be taken at face value. To the contrary, it is just as plausible that Legler's note to Natalello was a tongue-in-cheek jibe at Swanson's attempt to pass himself off as something he was not (he was a paid union business agent).

In any event, there is no reason to take Legler's response that the Company was not hiring as anything other than a stock answer that she gave to all phone inquiries. Indeed, there would seem to have been no reason to apprise Natalello of the availability of a "loyal-dependable-not union" applicant if the Company was no longer hiring. And, if Legler was unfamiliar with who Swanson actually was, it strains credulity to believe that Natalello did not know that Swanson was a paid representative of an area union. Thus, Natalello's failure to contact Swanson on

receipt of Legler's note is no evidence that the Company was not hiring at the time of Swanson's inquiry.

The Company's remaining arguments similarly distort the facts and present no grounds for disturbing the judge's credibility findings. Thus, contrary to the Company (Br 21), Trevor Claffey did not testify that both "Montinarelli and Soper had offers of employment from CNP before Claffey ever contacted CNP." Rather, his testimony was simply that both of these coworkers, like everyone else familiar with the employment picture in the area, encouraged him to contact Natalello, who had just won several big contracts, stating that "[t]hey had the work going" and employment opportunities "looked good." (A 401-02.) Nor did Claffey contradict himself in stating that it was not until April 1 that Natalello said that he was prepared to hire Claffey but had no present job for him. To the contrary, Claffey was quite emphatic in his testimony that he never spoke to Natalello in mid-March, and that, when he spoke to him on the phone in late March, Natalello did not say that Claffey had a job. He was certain that Natalello did not indicate that he was prepared to hire Claffey when things opened up until the two met on April 1. (A 378-80, 403.)[7]

[7] Here again, Legler's phone log of March 26—that Claffey had returned Natalello's call—only confirms Claffey's testimony that the two played phone tag before they met. (A 374-75, 405, 892.) It does not indicate that a decision to hire Claffey was made or communicated before that date, which, as noted, Claffey flatly and credibly denied.

Finally, the Company's reliance (Br 20-21) on the testimony of two company job superintendents to make a case for reversing the judge's credibility resolutions falls far short of the mark. Contrary to the Company (Br 21), the judge cannot be faulted for failing to afford any weight to the testimony of Paul Battaglia to the effect that Soper called in mid-March to thank him for his help in Soper's successful effort to secure a job. Soper was adamant that he first spoke with Natalello in early April, and that he did not tell Battaglia that he had been hired earlier in mid-March. (A 327, 338-39). Given the acts of intimidation and coercion that the Board found that Natalello had committed, and the failure of the other superintendent, Andy McDermott, to offer any evidence supportive of the Company's case, even though the Company apparently expected him to, the Board can hardly be faulted for failing to attach any weight to the testimony of Battaglia on this point. Indeed, Battaglia was so intent on helping the Company's case that he denied that the Company even had a sign posted on its trailer forbidding in-person applications. (A 562-63.)

The Company insistence (Br 18) that McDermott's testimony helps its case completely distorts his testimony. In response to questioning by company counsel, McDermott testified that Natalello told him that he had hired "all three," but refused to place that conversation within a time frame that could help the Company. Rather, he testified that all he could say was that that conversation

occurred sometime before the beginning of June. (A 531-32, 535-36.) And, while the Company would simply ignore it, McDermott admitted that Montinarelli's phone calls in late February and continuing in early March asking for McDermott's assistance in seeking employment quickly became as bothersome as they were pointless. (A 529-30.) Thus, that Montinarelli decided to cease asking McDermott for help after three or four fruitless calls is proof of exactly nothing.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment enforcing the Board's Order in full.

_____
RICHARD A. COHEN
Senior Attorney

National Labor Relations Board
1099 14th St. NW
Washington, DC 20570
(202) 273-2995

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

ROBERT J. ENGLEHART
Supervisory Attorney

National Labor Relations Board

March 2007

H:cnpmechanical-final-rerc