Nos. 06-2038, 07-1406, 07-1407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

CONSOLIDATED BISCUIT CO.

Respondent/Cross-Petitioner

BAKERY, CONFECTIONARY, TOBACCO WOKERS AND GRAIN MILLER INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor/Petitioner

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

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JULIE B. BROIDO
Supervisory Attorney

JEFF BARHAM
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2996
(202) 273-1724

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

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BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor/Petitioner

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

FINAL BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court upon the application of the National Labor Relations Board to enforce, and the cross-petition of Consolidated Biscuit Co. ("the Company") to review the Board's Decision and Order,

which issued against the Company on April 28, 2006, and is reported at 346 NLRB No. 101. That Order is final with respect to all parties. (D&O1-41,A12-52.)[1] The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLC ("the Union") has moved to intervene on the Board's side, but filed an intervenor's brief improperly challenging dismissed complaint allegations.[2]

The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to remedy unfair labor practices. This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), as the unfair labor practices occurred in McComb, Ohio. The application for

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[1] Record references in this final brief are primarily to the original record and the Joint Appendix ("A"). Additionally, a limited set of documents inadvertently excluded from the Joint Appendix can be found in the Supplemental Appendix ("SA"). "D&O" refers to the Board's decision and order. "Tr" refers to the transcript of the unfair labor practice hearing, "GCX" and "RX" to the exhibits of the General Counsel and the Company, and "JX" to joint exhibits. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

[2] The Board and the Company moved to strike the Intervenor's brief, but the clerk tentatively treated the Union's motion to intervene as a petition for review, while referring the issue to the hearing panel. (10/11/07 Order, SA.) Pursuant to the clerk's October 15 letter resetting the briefing schedule, the instant revised proof brief responds to the Company's 12/6/06 Opening Brief, as well as the complaint dismissal challenges inappropriately raised in the Union's 2/19/07 Intervenor Brief. (10/15/07 Order, SA.)

enforcement filed on July 31, 2006, was timely, as the Act places no time limitation on such filings.

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of settled principles of law to well-supported factual findings. Therefore, the Court may not be significantly assisted by oral argument. Should the Court desire oral argument, the Board believes that 15 minutes per side will suffice for the parties to present their views.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by threatening employees with loss of benefits, plant closure, and stricter discipline; by suggesting the futility of unionization; and by coercively restricting employees' union activities.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by threatening employee Cheri Todd and denying her a promotion; by threatening employee William Lawhorn and discharging him; and by warning and discharging employee Russell Teegardin, because of their union activities.

3. Whether the Court lacks jurisdiction to consider the Company's untimely challenges to the Board's remedial order.

4. Whether the Board reasonably dismissed allegations that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees John Green, Gary Hill, Thomas Thompson, Tyrone Holly and Patti Wickman.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed against the Company by the Union, the Board's General Counsel issued a consolidated amended complaint alleging violations of Section 8(a)(1) and (3) of the Act. Following a hearing, an administrative law judge issued a decision and recommended order finding merit to most of the complaint allegations. (D&O12-41,A23-52.) After the Company and the General Counsel filed timely exceptions, the Board issued its decision and order, affirming most of the judge's unfair labor practice findings, with slight modification, and adopting the portions of his recommended order remedying those violations. (D&O1-12,A12-23.) The Board, however, reversed some of the judge's findings, and dismissed the corresponding complaint allegations. *Id.*

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company Hears about Teegardin's and Lawhorn's Union Organizing Activities, and Tells Holly and His Coworkers Not To Discuss the Union

The Company manufactures cookies, crackers, and other baked goods at its facility in McComb, Ohio. (D&O12,A12.) In February 2002, employees Russell Teegardin and William Lawhorn contacted another union about organizing the Company's facility, and distributed authorization cards to coworkers. Within a few weeks, however, those organizing efforts ceased. Thereafter, Teegardin and Lawhorn sought to organize their coworkers on behalf of the Union. Company supervisors observed Teegardin and Lawhorn with union literature during their first two months of organizing activity. (D&O13,20,A24,31; Tr239,A728(Wilson),Tr269,273, A672,673(Telford),Tr967-70,A629-32(Teegardin),Tr1281-83,A494-96 (Lawhorn).)

Employee Tyrone Holly was also involved in the early organizing efforts, and openly supported the Union. In the spring of 2002, Packaging Manager Gary Birkmeyer and First Shift Manager Dennis Herod accused Holly of harassing his coworkers about the Union and warned him not to discuss the Union on company time. (D&O29,32,A40,43; Tr1143-45,

A310-12(Holly).) The Company, however, regularly permitted employees to discuss a variety of other non-work topics on company time. Also, on a number of occasions, supervisors discussed the union campaign with employees during working time. (D&O32-33,A 43-44; Tr894,A449 (W.Kelley),Tr946-47,A515-16(Medina),Tr1132,A701(Thompson), Tr1145,A312(Holly),Tr1568,1571,A740,743, (Keller).)

B. The Company Calls the Police in Response to Union Activity; Denies Todd a Promotion Due to Her Union Activity; Threatens Employees with Plant Closure, Loss of Benefits, and Stricter Discipline in the Event of Unionization; and Tells Hill that She Cannot Distribute Union Literature

On May 21, union agent Wayne Purvis and several prounion employees began distributing union literature across the street from the Company's main entrance. In response, a company security guard called the police pursuant to previous instructions from Security Supervisor Mark Wurgess. A police officer arrived within minutes, entered the plant, and returned 15-20 minutes later to tell the union supporters that they were violating the Company's no-solicitation rule and would have to leave. However, after Purvis explained that the employees were engaged in union organizing, the officer conferred with Second Shift Manager Douglas Benjamin, and told the union supporters that they could continue their

activity. (D&O33,A44; Tr679-80,A67-68(Benjamin),Tr840-42,A556-58 (Purvis),Tr1283-86,A496-99(Lawhorn).)

Cheri Todd was one of the employees who distributed union literature on May 21. During Todd's shift immediately following her handbilling, Third Shift Manager Daniel Kear told her, in a meeting with Packaging Manager Chris Sherrick, that because of her union activity she would not receive the promotion to fill-in lead that he had discussed with her the day before. (D&O 34,A45; Tr480-81,486,A450-51,455(Kear).)

Around the same time that prounion employees began openly handbilling, company managers started warning employees about the consequences of unionization. Packaging Supervisor Diane Tate told employee Holly that a union couldn't change anything at the Company, and that the Company would lose client firms if employees unionized. (D&O29,33,A40,44; Tr1146,A313(Holly).) Line Supervisor Susan Henry asked retiree Shirley Kelley, as she distributed union literature with Teegardin, whether Kelley was "telling these people that they could lose their Christmas bonus." (D&O34,A45; Tr870-71,A439-40(S.Kelley), Tr974-76,A634-36(Teegardin),Tr1602,A271(Henry).) Mechanic Supervisor James Keller held a meeting with about five employees, and told them that affiliating with the Union would cause the Company to lose its contracts

with Nabisco and go bankrupt. On a regular basis, during the month of June, Keller would enter the production area and yell that the Union would cause the plant to close or lose contracts. (D&O34-35, A45-46; Tr977-79,A637-39(Teegardin).) Supervisor Betty Gerren told William Kelley, and two coworkers with whom he had been discussing the Union in the breakroom, that they had better watch what they were doing because the Company would get tougher on them if the Union got in. (D&O35,A46; Tr876-78,A441-43(W.Kelley).)

In mid-June, employee Cathy Hill was distributing literature on the sidewalk in front of the plant, about 20-25 feet from the employee entrance, when a security guard told her that she was not allowed to handbill on company property. (D&O35,A46; Tr1034-37,A274-77(C.Hill),Tr1183-84, A81-82(Benroth).)

C. Teegardin and Lawhorn Continue To Distribute Union Literature; the Company Runs an Unprecedented Criminal Background Check on Teegardin, and Issues Written Warnings to Teegardin and Other Employees for "Harassing" Coworkers about the Union

Throughout the spring and summer of 2002, prounion employees continued to distribute authorization cards and handbills outside of the Company's entrance several times per week until the August 15 election. The Company perceived Teegardin and Lawhorn to be leaders in the

organizing effort, as they personally campaigned for the Union in front of the plant on an almost daily basis. (D&O13,20-21,A24,31-32; Tr163,A405 (Johnson),Tr316,A340(Ivan),Tr842,A558(Purvis).)

On June 5, the Company's top human resources official took the unprecedented step of running a criminal background check on Teegardin, but found no record of criminal activity. The Company did not normally run such checks on incumbent employees. (D&O13-14,A24-25; Tr108-09,153-56,181-82,1361-62,A388-89,397-400,409-10,421-22(Johnson),Tr246, A734(Wilson).) On June 22, Maintenance Manager Al Wilson warned Teegardin to stop "harassing" his coworkers about the Union, and placed a memo in his personnel file documenting the warning. Later on, to obscure the fact that he had castigated Teegardin for union activity, Wilson added an alternative memo to Teegardin's file that made no mention of his union activity. (D&O14,A25; Tr242-45,A730-33(Wilson),Tr986-88,A646-48 (Teegardin),JX2–pp.274,284A773,779.)

In mid-June, employee Kevin Hassan angered Teegardin by sarcastically telling coworkers that Teegardin had promised them a substantial raise if they voted for the Union. On June 24, Teegardin and Hassan had a verbal altercation near the Company's main entrance concerning the alleged promise; Hassan cursed at Teegardin, and the two

called each other liars and exchanged challenges to fight. Hassan reported the incident directly to Company President James Appold, and eventually signed and backdated a statement about the incident, which Appold's secretary personally typed. The Company, however, never asked Teegardin or any of the prounion witnesses for their version of the incident. (D&O14-15,A25-26; Tr13,SA(Recko),Tr979-86,A639-46(Teegardin),Tr1723-32, 1743-57,A232-41,250-264(Hassan),JX2–p.281,A776.)

On June 26, the Company issued Teegardin a written warning for his role in the incident, but did not discipline Hassan. The Company based the June 26 warning partly on Manager Wilson's June 22 admonition to Teegardin not to be "so forceful" in discussing the Union with coworkers and "not to try to keep after them." (D&O14-15,A 25-26; Tr241,A729 (Wilson),JX2–pp.279-82,A774-77.)

Employees Gary Hill and Thomas Thompson were active union supporters who regularly distributed union handbills near the Company's main entrance. On June 27, Warehouse Manager Rick Quinn told Hill and Thompson that he had received multiple complaints against them for "harassing" their coworkers about the Union, and warned them against continuing their union advocacy. Without telling Hill or Thompson, Quinn also placed notes in their personnel files noting that the Company had

received complaints about their soliciting coworkers on working time, and reminding them that "any further complaints will result in disciplinary action." (D&O25,A36; Tr761-65,A567-571(Quinn),Tr1049-51,1084-85, A279-81,295-96(G.Hill),Tr1100-01,1131-32,A678-79,700-01 (Thompson),JX6–p.575,A823,JX7–p.706,A828.)

D. The Company Reiterates Its Threats that Employees Will Lose Jobs and Benefits If They Select the Union, and Conducts a One-Sided Investigation of Antiunion Employee Whitted's Accusations Against Teegardin

On August 1, First Shift Manager Dennis Herod, in the presence of Supervisor Lori Herod, initiated a conversation about the Union with Thompson. After asking Thompson why he favored the Union, Herod said that if the employees chose union representation, President Appold might move production lines to other facilities. (D&O36,A47; Tr1108-11,A680-83 (Thompson).)

In the days leading up to the August 15 election, President Appold required all employees to attend one of the 7-8 meetings during which he lectured them about the consequences of unionization. Specifically, Appold told employees that bargaining would "start from zero," and "with a clean slate," rather than from employees' existing wages and benefits. Appold added that many of their current benefits would probably be lost in

bargaining. (D&O36,A47; Tr1152-55,A317-20(Holly),Tr1874-77,A354-57 (Ivan).)

Also in early August, employee Donald Whitted attempted to provoke Teegardin during an outdoor union demonstration by following Teegardin around with an antiunion sign, and twice bumping into Teegardin with his shoulder. The next day, Whitted again attempted to provoke Teegardin by stopping his cart during a work shift. Teegardin immediately complained to his supervisor, Herb Telford, about Whitted's work-time conduct, but the Company took no steps to investigate Teegardin's allegations. (D&O16, A27; Tr682-83,A69-70(Benjamin),Tr989-94,A649-54(Teegardin),Tr1423, 1427-28,A713,714-15(Whitted).)

Teegardin was participating in the next day's union handbilling session when Whitted walked by, put his thumb in his mouth and yelled to the prounion employees: "Waa, Waa. Tell it to your Mother." Either Teegardin or prounion employee Leo Hacker responded by yelling something about Whitted sucking the male sexual organ. Whitted told Teegardin that he considered the remark to be sexual harassment, and promptly reported the incident to Teegardin's supervisor. The Company took statements from two witnesses to the incident, but did not make any inquiries to its security guards or any prounion employees, or review the

videotape from its security cameras to corroborate Whitted's accusations. (D&O16-17,A27-28; Tr100-02,A381-83(Johnson),Tr994-97,A654-57 (Teegardin),Tr1416-18,A710-12(Whitted),JX2-pp.266-67.)

E. Supervisor Gerren Warns Lawhorn that He Will Be Discharged If the Union Loses; Lawhorn Escorts Union Representative Hilliard through the Plant To View an Election Notice; the Union Loses the Election; the Company Discharges Lawhorn

Several days before the election, Lawhorn's supervisor, Betty Gerren, stopped by his house, where Lawhorn and two coworkers were making prounion signs. Gerren warned Lawhorn that if the Union did not win the election, Lawhorn would be fired. (D&O21,37,A32,48; Tr868-69,A437-38 (S.Kelley),Tr878-79,A443-44(W.Kelley),Tr1289-90,A501-02(Lawhorn).)

On the eve of the election, Lawhorn attended a preelection conference along with representatives from the Company, the Union and the Board. Near the end of the meeting, union representatives asked to see the election notices posted inside the facility. Human Resources Manager Jack Johnson escorted the group to see a notice posted on a bulletin board just inside a security guard station. He then agreed to have someone meet the union representatives at the adjacent EZ Pack facility, so that they could view the election notice posted there. Johnson, however, did not offer to have a supervisor or manager escort the union representatives to the EZ Pack

facility, nor did Johnson give them directions. (D&O21,A32; Tr71-74, A361-64(Johnson),Tr857-60,A560-63(Purvis),Tr913-14,A299-300 (Hilliard),Tr1014-16,A534-36(Price),Tr1298-99,A503-04(Lawhorn).)

Accordingly, Union Representative Bill Hilliard asked Lawhorn to escort him to the EZ Pack facility. In Johnson's presence, Lawhorn and Hilliard immediately purchased hairnets (required in the plant's production area) from a security guard. Lawhorn and Hilliard then took the most direct route to EZ Pack, which required them to walk through the production area of the main plant. After viewing the election notice in EZ Pack, they returned to the main plant entrance without incident. (D&O21-22,A32-33; Tr860-62,A563-65(Purvis),Tr914-21,A300-07(Hilliard),Tr1016-19, A536-39(Price),Tr1300-06,A505-11(Lawhorn).)

The Union lost the August 15 election by a vote of 485 to 286. (D&O12,A23; GCX1(t).) On that day, President Appold met with Vice President Larry Ivan and Manager Johnson to discuss Lawhorn's escorting Hilliard through the plant, and they decided to discharge Lawhorn. When Lawhorn reported for work the next day, Ivan told him that he was being terminated for taking an unauthorized visitor through the plant. After Lawhorn's discharge, the Company altered his termination notice to add that he was also being for electioneering. (D&O22,A33; Tr75-78,A365-68

(Johnson),Tr333-34,A347-48(Ivan),Tr1306-07,A511-12(Lawhorn),JX1–pp.157-58.)

F. President Appold Orders a Second Criminal Background Check and Discharges Teegardin

Also on August 15, Manager Johnson called Teegardin's former supervisor at Hisan—Teegardin's former employer. In response to Johnson's questions, the supervisor denied that Teegardin had harassed anyone at Hisan. The next day, Johnson spoke to two other Hisan officials who confirmed that Teegardin's discharge from Hisan "had nothing to do with sexual harassment." (D&O17,A28; Tr109-13,A389-93(Johnson), JX2–pp.270,290,A770,784.)

About one week later, President Appold initiated another criminal background search on Teegardin. This time, Appold discovered that in 1987, Teegardin had been convicted of driving under the influence of alcohol, which he had not disclosed on his employment application. It was highly unusual for President Appold to initiate such a search, and for the Company to check the background of an incumbent employee. (D&O17, A28; Tr104-08,153-56,A384-88,397-400(Johnson),JX2–pp.284-88,A779-83.)

Appold immediately directed Supervisor Donald Hager to monitor and record Teegardin's union activity, and turn in his notes to Appold.

Appold also removed Teegardin from the weekend overtime schedule. Three days later, Managers Johnson and Wilson told Teegardin that he was being fired for "sexually harassing" Donald Whitted, and for failing to report his conviction on his employment application. (D&O17,A28; Tr96-99, A377-80(Johnson),Tr214-16,A62-64(Babb),Tr249,A735(Wilson),Tr643-58,A205-220(Hager),Tr997-1002,A657-62Teegardin),JX2–pp.263-72, 293-94,A764-72,786-87.) By contrast, the Company continued to employ Marvin Hinton, even though it had disciplined him multiple times for incidents including sexual harassment, and knew that he had concealed two criminal convictions on his job application. (D&O3n.14,A14.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista, Members Walsh and Schaumber) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by telling employees not to talk about the Union on company time, suggesting that supporting the Union would be futile, calling the police in response to Union activity, telling Todd that she would not be promoted because of her Union activity, threatening loss of benefits, stricter discipline and plant closure for supporting the Union, and predicting that Lawhorn would be fired if the Union lost the election. (D&O1-2&n.4-7,14,21,25,29,

33-39,A12-13,25,32,36,40,44-50.) The Board (Chairman Battista dissenting) also found that the Company violated Section 8(a)(1) when President Appold threatened employees with loss of benefits in preelection speeches. (D&O1n.5,A12.) Additionally, the Board (Member Schaumber dissenting) found that the Company violated Section 8(a)(1) by telling Hill that she could not distribute union literature on company property.[3] (D&O2n.6, A13.)

The Board further agreed with the judge that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by denying Todd a promotion, by giving Teegardin warnings, and by discharging Lawhorn and Teegardin, all based on their union activities. (D&O3&n.13-15,14-20,23-24,34,A14,25-31,34-35,45.) The Board (Chairman Battista and Member Schaumber, Member Walsh dissenting), however, reversed the judge's recommended findings that the Company further violated Section 8(a)(3) and (1) of the Act by discharging five other employees.

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[3] The Board, however, found it unnecessary to pass on the judge's recommended finding that Supervisor Brown violated Section 8(a)(1) by telling Holly that the Company would lose business because a union is known to strike. (D&O1n.4,33,A12,44.) The Board (Member Walsh dissenting in part) also reversed the judge's recommended finding that the Company committed additional violations of Section 8(a)(1) of the Act. Accordingly, the Board dismissed the relevant complaint allegations.

Accordingly, the Board dismissed the corresponding complaint allegations. (D&O2-7,A13-18.)

The Board (Member Schaumber dissenting) adopted the judge's recommended broad cease-and-desist order, to which no exceptions were filed. (D&O1n.2,A12.) Affirmatively, the Board's order requires the Company to offer Todd the position of fill-in lead; to offer full reinstatement to Lawhorn and Teegardin; and to make them whole for any lost earnings or benefits. Additionally, the order requires the Company to remove from its files any reference to the unlawful warnings and discharges, and to notify them in writing that this has been done and that the unlawful acts will not be used against them. Finally, the order requires the Company to post copies of a remedial notice.[4] (D&O11-12,A22-23.)

SUMMARY OF ARGUMENT

The record conclusively demonstrates that the Company repeatedly violated the Act by coercing employees, and by punishing and discharging prominent union supporters. The Company began its campaign of intimidation by calling the police within minutes after prounion employees began handbilling for the Union outside the facility. Over the next few

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[4] The Board, in agreement with the judge, set aside the representation election and severed and remanded the representation proceeding to the Regional Director for Region 8 to conduct a new election. (D&O8,A19.)

weeks, the Company unlawfully warned employees against talking about the Union and distributing union literature. Further, company officials suggested that supporting the Union would be futile, and threatened employees with stricter discipline, loss of benefits, and plant closure in a series of coercive interactions, culminating in pre-election meetings where President Appold made his unlawful threats. Substantial evidence supports the Board's findings that these coercive statements and actions were unlawful.

The Company, however, did not stop with this unlawful intimidation. It also targeted prominent union supporters for adverse employment actions—denying Todd a promised promotion, burdening Teegardin's file with disciplinary warnings, and ultimately terminating Teegardin and Lawhorn for blatantly pretextual reasons. The Company betrayed its unlawful motive for each of these actions by admitting outright that it was denying Todd her promotion because of her union activity, by disciplining Teegardin for engaging in protected activity, and by warning Lawhorn that he would be discharged for his union activity just a few days before taking that action. Further, the timing of the Company's actions was stunningly obvious: Todd was denied her promotion within hours of her prounion

handbilling, and Lawhorn and Teegardin were discharged within days of the representation election.

Highlighting the circumstantial evidence of unlawful motive is the fact that Lawhorn's alleged misconduct occurred as he escorted a union representative through the plant to view an election notice with the Company's tacit approval, and the fact that the Company's background checks on Teegardin were unprecedented. Moreover, the Board reasonably found that the Company's stated justifications for its adverse actions—which it based on manufactured evidence, one-sided investigations, and disparately harsh treatment—were thinly veiled pretexts to disguise the Company's unlawful motive. Thus, substantial evidence supports the Board's findings that by taking these adverse actions, the Company violated Section 8(a)(3) and (1) of the Act.

This Court is jurisdictionally barred from considering the Company's untimely challenges to the Board's broad cease-and-desist order and its decision to set aside the representation election, and sever and remand the ongoing representation proceeding to the Regional Director.

Finally, substantial evidence supports the Board's finding that the Company did not violate the Act by discharging five other employees weeks or months after the election. The Board reasonably rejected the

administrative law judge's contrary evaluation of the record evidence and concluded that the Company would have terminated those employees even absent their union activity. The Union's challenges to the Board's findings are premised upon an erroneous standard of review and are otherwise meritless.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES, SUGGESTING THE FUTILITY OF UNIONIZATION, AND COERCIVELY RESTRICTING THEIR UNION ACTIVITIES

This is a case in which the Company demonstrated its vehement opposition to the union activities of its employees by repeatedly violating the Act from the moment that the organizing campaign began. The Company sent a clear message by calling the police within minutes after prounion employees first appeared outside the facility, and followed that coercive act by issuing serious and repeated threats about the consequences of unionization. Additionally, the Company warned several prounion employees not to discuss the Union with coworkers or to distribute union literature outside the facility. There can be little doubt that the Board reasonably found each piece in this mosaic of intimidation to be unlawful.

A. An Employer Violates Section 8(a)(1) of the Act by Coercing Its Employees and Interfering With the Exercise of their Statutory Right To Engage in Union Activity

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their rights under Section 7 of the Act. Section 7, in turn, guarantees employees "the right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities . . . ." The test for a Section 8(a)(1) violation is whether the employer's conduct has a reasonable tendency to coerce; actual coercion is not necessary. *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005).

In assessing the coercive impact of an employer's statements, the Court "defers to the [Board's] judgment and expertise." *Dayton Newspapers*, 402 F.3d at 660 (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)). The Board's factual findings regarding coercion and interference with protected activity must be upheld if they are supported by substantial evidence, even if the reviewing court could justifiably make different findings. 29 U.S.C. § 160 (e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). "The Board's application of the law to the facts is also reviewed under the substantial evidence standard, and the Board's reasonable inferences may not be displaced on review." *Indiana Cal-Pro,*

Inc. v. NLRB, 863 F.2d 1292, 1297 (6th Cir. 1988). Deference to the Board's factual findings is particularly appropriate where, as here, there is conflicting testimony. *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000). In such cases, this Court's review is "severely limit[ed]", and the Board's credibility determinations should be affirmed unless they have "no rational basis." *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 967 (6th Cir. 2003); *see also Tel Data Corp. v. NLRB*, 90 F.3d 1195, 1199 (6th Cir. 1996) (credibility determinations should be affirmed "unless they are inherently unreasonable or self-contradictory").

We show below that the Company repeatedly took actions that would reasonably tend to coerce its employees.

B. Substantial Evidence Supports the Board's Findings that the Company Unlawfully Threatened Employees with Loss of Benefits, Plant Closure and Stricter Discipline, and Suggested that Unionization Would Be Futile

1. President Appold and Supervisor Henry threatened employees with loss of benefits

Substantial evidence supports the Board's findings (D&O1,34,37, A12,45,48) that the Company unlawfully threatened its employees with loss of benefits as a consequence of unionization. The threats came from President Appold, who stated during pre-election captive audience meetings that bargaining would "start from zero", and from Line Supervisor Henry,

who predicted during a union handbilling session that the employees could lose their Christmas bonus. The Board reasonably found that those statements had a coercive tendency.

As this Court has explained, an employer's statements that bargaining will start from zero are coercive when the context suggests that benefits will be lowered to penalize employees for selecting a union to represent them in bargaining. *General Fabrications*, 222 F.3d at 231. *Accord Federated Logistics & Operations*, 340 NLRB 255, 255-56 (2003), *enforced*, 400 F.3d 920 (D.C. Cir. 2005). Here, Appold's remarks violated 8(a)(1) because they implied that employee support for the Union would be met with a regressive bargaining stance by the Company, and that unionization would be futile. (D&O 36-37,A47-48.) Further, the coercive nature of the statements could only have been increased by their source—President Appold, the top company official. *See NLRB v. C.J.R. Transfer, Inc.*, 936 F.2d 279, 283 (6th Cir. 1991); *Indiana Cal-Pro*, 863 F.2d at 1301.

Vice President Ivan's uncontroverted description of the meetings establishes that President Appold told virtually all of the bargaining unit employees that if they selected a union, bargaining would "start from zero[.]" (D&O36,A47; Tr1877,A357(Ivan).) Appold then emphasized that current benefits could be lost: he said that "you don't start where you're at

and bargain . . . you start with a clean slate." *Id.* He further cemented the implication that the Company would bargain from scratch by pointing out that many benefits currently enjoyed by the employees—turkeys, hams, and cookie boxes—would probably be lost in bargaining. (D&O36,A47; Tr1155,A320(Holly).)

There is no merit to the Company's claim (Br 55) that Appold's statements were lawful because he prefaced them with a description of bargaining as involving "give and take." *See TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420-21 (5th Cir. 1981) (finding a violation where the employer threatened to bargain from scratch despite president's remarks that benefits could go up or down). By predicting that specific benefits would be lost, Appold exacerbated the coercion inherent in his statement. Taken together with the many other 8(a)(1) violations that the Company committed before the meetings (pp.27-46 below), substantial evidence supports the Board's finding that employees could reasonably perceive Appold's comments as predicting that the Company would take a regressive bargaining posture in retaliation for employees' union activity.

The Company (Br 55) errs in relying on *Gravure Packaging, Inc.*, 321 NLRB 1296, 1299 (1996), where the employer qualified his statement that bargaining would begin at zero by acknowledging that benefits could also be

gained during bargaining, and adamantly denying a rumor that he would sell or close the business in the event of unionization. President Appold's threats contained no such caveats.

Adding to the coercive effect of Appold's speeches was Line Supervisor Henry's earlier threat to employees, who were distributing union handbills, that they "could lose their Christmas bonus" by selecting the Union to represent them. (D&O34,A45; Tr1602,A271(Henry).) Henry did not even attempt to tie her remarks to the nature of the collective-bargaining process, but instead simply asserted that the loss of a specific benefit could result from union organizing. Contrary to the Company (Br 49), Henry's use of the word "could" (rather than "would") does not render the prediction lawful; unlike the employers in the cases cited by the Company, Henry was not saying that existing benefits were merely part of the give and take of the bargaining process. As such, Henry's threat is an obvious violation of the Act. *See Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994) (supervisor unlawfully told employees they "could" lose benefits, and made no attempt to tie his prediction to collective bargaining).

2. Supervisor Keller unlawfully threatened Teegardin and his coworkers with plant closure, and Manager Herod threatened employees that President Appold would move production lines to other facilities if the Union won

A threat of plant closure in response to organizing activity restrains and coerces employees in violation of Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619-20 (1969); *NLRB v. Garon*, 738 F.2d 140, 142-43 (6th Cir. 1984). Indeed, this Court recognizes that "in view of an employee's natural interest in continued employment, threats of plant closure are 'among the most flagrant of unfair labor practices.'" *Indiana Cal-Pro*, 863 F.2d at 1301 (quoting *Gissel Packing*, 395 U.S. at 611). Thus, as the Board reasonably found (D&O1,34-36,A12,45-47), the statements by company supervisors that explicitly or implicitly threatened plant closure were clear violations of the Act.

In early June 2002, Teegardin overheard Supervisor Keller telling his subordinates that affiliating with the Union would cause the Company to lose its contracts with Nabisco and go bankrupt. Teegardin also saw Keller enter the production area on a regular basis and yell that the Union would cause the plant to lose contracts and close. Reasonably crediting Teegardin's testimony, the administrative law judge appropriately found that

Keller's threats were unlawful. (D&O34-35,A45-46; Tr977-78,A637-638 (Teegardin).)

The Company (Br 50) argues that the judge should not have credited Teegardin's uncorroborated testimony over Keller's uncorroborated general denials. The judge, however, reasonably assigned more weight to Teegardin's detailed narrative because Keller merely responded to leading questions from company counsel. *See Tecmec, Inc.*, 306 NLRB 499, 503-04 (1992) (finding unpersuasive testimony that simply responds to leading questions), *enforced mem.*, 992 F.2d 1217 (6th Cir. 1993); *see also U.S. v. Brito*, 907 F.2d 392, 395 (2d Cir. 1990) (noting that "leading questions tend to mute . . . the evaluation of . . . credibility"). Furthermore, the Company fails to note that when Keller testified in narrative form on another topic (Tammy Medina), the judge credited him and dismissed the relevant complaint allegations. (D&O37, A48; Tr1567-78,A739-50(Keller).) In these circumstances, the Company can hardly complain (Br 50) that it was "inherently unreasonable" for the judge to discredit Keller when he gave one-word responses to leading questions.

First Shift Manager Dennis Herod also threatened that President Appold might move production lines to other facilities if employees chose union representation, as employee Thomas Thompson credibly testified.

(D&O36,A47; Tr1108-11,A680-83(Thompson).) The judge reasonably credited Thompson over Herod, noting that Herod simply answered three leading questions, and never gave narrative testimony about the union-related conversation that he admittedly had with Thompson. (D&O36,A47; Tr1819-20,A272-273(D.Herod).) Moreover, as the judge noted, Herod completely undermined his credibility by responding to the first leading question in a nonsensical fashion—claiming that he did not recall discussing the union campaign with Thompson moments after affirming that they had discussed the Union during the same conversation. (D&O36n.52,A47.)

Under Thompson's credited version of the conversation, it is plain that Manager Herod threatened employees with plant closure. Rather than concede this point, the Company dodges the issue by mistakenly relying on the Seventh Circuit's approval of a supervisor's statement, in *NLRB v. Champion Labs.*, 99 F.3d 223, 228 (7th Cir. 1996), that "I hope you guys are ready to pack up and move to Mexico." This Court, however, has previously criticized the reasoning in that case, and made clear that under the law of this Circuit, serious threats of plant closure are deemed coercive regardless of whether they are "couched in ostensibly friendly or even humorous terms." *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 278-79 (6th Cir. 1999).

3. Supervisor Gerren threatened Kelley and his coworkers with stricter discipline if they supported the Union

It is well established that an employer violates the Act by threatening employees with stricter discipline as a consequence of unionization. *See, e.g.*, *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000). Yet, that is just what Supervisor Gerren did when she told William Kelley and two coworkers that "You'd better watch what you're doing. They're going to get tougher on you. If you get a Union in here, they'll be watching you." (Tr878,A443(W.Kelley).) The Board reasonably found that by making this statement, Gerren coercively threatened them with stricter discipline. (D&O1,35,A12,46.)

The Company does not dispute that it is unlawful for an employer to threaten employees with stricter discipline for supporting the Union. Rather, it argues (Br 51) that Gerren's remarks were too ambiguous to be interpreted as threats. To the contrary, the Board and the courts have found that words almost identical to Gerren's constitute unlawful threats of stricter discipline. *See, e.g.*, *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 930 (5th Cir. 1993) (supervisor's threat that if union won "things were going to get a lot tougher around here"); *Mack's Supermarkets*, 288 NLRB 1082,

1098-99 (1988) (manager's threat that "if the Union went in . . . he'd have to change," he could "get tougher").

Gerren's remarks were not the least bit ambiguous. They clearly forecast a warning of stricter discipline for prounion employees, and foreshadowed the Company's future pretextual discharges of prominent union supporters Lawhorn and Teegardin.[5] Accordingly, substantial evidence supports the Board's finding (D&O1,35,A12,46) that her threat violated Section 8(a)(1) of the Act.

4. Supervisor Tate unlawfully suggested that supporting the Union would be futile

An employer violates Section 8(a)(1) of the Act by implying that supporting a union would be futile. *NLRB v. E.I. Dupont De Nemours*, 750 F.2d 524, 527-28 (6th Cir. 1984). Here, Supervisor Diane Tate did just that by telling employee Holly that a union couldn't change anything at the Company, and that the Company would lose clients if its employees unionized. (D&O29,33,A40,44; Tr1146,A313(Holly).) Tate did not deny making the threats of futility to Holly, nor did she offer any context that would tend to mitigate the coerciveness of her remarks. Accordingly, substantial evidence supports the Board's conclusion that Tate's warnings

[5] Indeed, it was Gerren who unlawfully warned Lawhorn, one week before his discharge, that he would be fired if the Union lost the election. (D&O21,37,A32,48.) *See* pp.48-50 below.

were unlawful. *See Kamtech, Inc. v. NLRB*, 314 F.3d 800, 805 (6th Cir. 2002) (finding unlawful foreman's statement that employee's union organizing "isn't going to do any good" and "[is] a waste of time").[6]

5. There is no merit to the Company's assertion that its threatening remarks were protected under Section 8(c) of the Act

The Company unsuccessfully attempts to defend Supervisor Tate's threat of futility (Br 45-47), and Supervisor Henry's threat of lost benefits (Br 49-50), by suggesting that they were protected under Section 8(c) of the Act (29 U.S.C. § 158(c)). Section 8(c) permits an employer to make non-threatening predictions concerning the likely consequences of unionization—provided that they are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Gissel Packing*, 395 U.S. at 618. The statements here, however, were conspicuously silent as to the objective factual bases for the Company's prediction that employees would lose jobs

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[6] The Company (Br 47) acknowledges that the Board did not rule on the complaint allegation that Supervisor Margie Brown threatened Holly that supporting the Union would be futile. Nevertheless, the Company makes the curious request that this Court not "enforce the Board's finding that Brown's statement violated 8(a)(1)." As noted, however, the Board "found it unnecessary to pass on the judge's finding with respect to the statements of Supervisor Margie Brown." (D&O1n.4,A12.) Accordingly, there is no issue concerning Brown before this Court.

and benefits if they selected the Union. Lacking a demonstrable basis in fact, the statements by Tate and Henry necessarily carried the unlawful "'implication that [the] employer may or may not take action on his own initiative for reasons unrelated to economic necessities and known only to him.'" *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1298 (6th Cir. 1988) (quoting *Gissel Packing*, 395 U.S. at 618)).

Unlike the Company's threats here, the employer predictions in the cases cited by the Company (Br 46,49) were protected by Section 8(c) because they were supported by independent facts or explicitly connected to the vagaries of the bargaining process. For example, in *Pentre Electric, Inc. v. NLRB*, 998 F.2d 363, 369-70 (6th Cir. 1993), the prediction that unionization would lead to lost business was lawful because the employer relied on the objective fact that most of its customers did not employ union contractors. Similarly, in *DTR Indus., Inc. v. NLRB*, 39 F.3d 106, 114 (6th Cir. 1994), the employer relied on explicit industry practices in telling employees that they would suffer layoffs. In *TVI, Inc.*, 337 NLRB 1039 (2002), the employer relied on documentation detailing its slim profit margin in asserting that it could not afford to pay higher wages, and that unionization could lead to job losses. Further, in *Flexsteel Indus., Inc.*, 311 NLRB 257 (1993), and *CPP Pinkeron*, 309 NLRB 723 (1992), the

employers only broached the possibility that unionization could lead to lost jobs or benefits in the context of explaining the give and take of the bargaining process.

In contrast, here company supervisors gave no basis at all for their predictions that a union would necessarily drive off customers and cause employees to lose current benefits. Thus, unlike the cases cited above, the Company failed to demonstrate that its supervisors were relying on objective factors beyond its control. Accordingly, there is no merit to the Company's attempt to find sanctuary under Section 8(c) for its supervisors' unlawful threats.

C. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Restricted Employees' Union Activities

1. The Court should summarily enforce the Board's finding that the Company unlawfully warned Hill and Thompson against "harassing" coworkers about the Union

In June 2002, Warehouse Manager Rick Quinn told employees Gary Hill and Thomas Thompson that he had received multiple complaints against them for "harassing" their coworkers about the Union, and warned them against continuing their advocacy. Quinn also secretly placed notes in their personnel files documenting complaints about soliciting coworkers on

working time, and stating that "any further complaints will result in disciplinary action."[7] (D&O25,A36; Tr761-65,A567-71(Quinn),Tr1049-51, 1084-85,A279-81,295-96(G.Hill),Tr1100-01,1131-32,A678-79,700-01 (Thompson),JX6–p.575,A823,JX7–p.706,A828.) It is settled that an employer cannot impose discipline for engaging in protected activity merely by labeling union campaigning as "harassment." *Whirlpool Corp.*, 337 NLRB at 727, *enforced mem.*, 92 Fed. Appx. 224 (6th Cir. 2004); *Nichols County Health Care Center*, 331 NLRB 980, 981 (2000).

Notably, the Company's brief fails to mention, much less defend, the warnings to Hill and Thompson that the Board found unlawful. (D&O1-2, 12,25,A12-13,23,36.) Thus, the Company has waived any challenge to the Board's findings, and the Court should summarily affirm the portion of the Board's order that is based on the uncontested findings. *NLRB v. Talsol Corp.*, 155 F.3d 785, 793-94 (6th Cir. 1998) (court summarily enforced Board's uncontested findings); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 368 (6th Cir.1991) (party's failure to address Board's findings constitutes an abandonment of right to object).

[7] The Company issued a similarly unlawful warning to Teegardin. *See* pp.57-60 below.

2. The Company discriminatorily prohibited employees from discussing the Union on company time

It is settled that an employer violates Section 8(a)(1) of the Act by discriminatorily prohibiting employees from discussing union-related topics, while permitting discussion of other non-work topics during company time. *Brandeis Machinery & Supply Co. v. NLRB*, 412 F.3d 822, 833-34 (7th Cir. 2005); *Frazier Indus. Co.*, 328 NLRB 717, 717-19 (1999), *enforced*, 213 F.3d 750 (D.C. Cir. 2000). Here, employee Holly credibly testified that Packaging Manager Gary Birkemeyer warned him early in the union campaign that he "wasn't supposed to talk about the Union on Company time." (D&O32,A43; Tr1144-45,A311-12(Holly).) Further, the Company, acting on supervisors' complaints, warned other prounion employees to stop discussing the Union on company time. (Tr1084-85,A295-96(G.Hill), Tr1131-32,A700-01(Thompson),JX2-p.274.)

By contrast, the Company does not dispute that it permitted employees to discuss other non-work topics during working hours, and that on several occasions, supervisors initiated discussions about the Union with employees during working time. (D&O32-33,A43-44; Tr894,A449 (W.Kelley),Tr946-47,A515-16(Medina),Tr1132,A701(Thompson), Tr1145,A312(Holly),Tr1568,1571,A740,743(Keller).) As Birkemeyer did

not deny giving Holly the warning, substantial evidence supports the Board's finding that the Company's discriminatory warnings to employees not to discuss the Union on company time were unlawful.[8] (D&O32-33, A43-44.)

3. Company officials unlawfully called the police at the first sign of union activity, and warned Hill not to distribute union literature outside its facility

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by calling the police and directing them to order union representatives and prounion employees to disperse. (D&O1, 33-34,A12,44-45.) The Company further violated Section 8(a)(1) by telling employee Cathy Hill that she could not distribute union literature in front of its facility. (D&O1-2,35,A12-13,46.)

The Company (Br 48-49) does not take issue with the settled rule that an employer violates the Act by calling the police and asking them to halt admittedly lawful union activity. *See Cumberland Farms, Inc. v. NLRB*, 984 F.2d 556, 559 (1st Cir. 1993). Instead, the Company raises three meritless

[8] Supervisor Herod, who was also present during the conversation, did not deny that Birkemeyer told Holly not to discuss the Union on company time. (D&O29n.39,A40; Tr1145,A312(Holly).) The Company is mistaken in asserting (Br 44) that Holly testified that Supervisor Donald Hager was present during the conversation. In any event, Hager never denied that Birkemeyer gave Holly the warning either.

defenses. First, the Company incorrectly asserts that the Board found unlawful only Security Supervisor Wurgess's instruction to call the police if there was union activity—not the Company's act of calling the police. The Board plainly stated that the Company "violated Section 8(a)(1) through . . . instructing security guards to call police at the first sign of union activity *and calling the police to the facility*." (D&O1,A12) (emphasis added). Thus, Supervisor Wurgess's instruction to call the police in response to union activity cannnot be isolated from the undisputed fact that the police showed up within minutes of the Union's first rally in front of the facility, and ordered the union organizers and employees to disperse because they allegedly were violating the Company's no-solicitation policy. (Tr679-80,A67-68(Benjamin),Tr840-42,A556-58(Purvis),Tr1283-86,A496-499 (Lawhorn).)

There is no more merit to the Company's further claim (Br 48-49) that its act of calling the police was not coercive because, assertedly, employees remained unaware that the Company had asked the police to come. Given the sequence of events, it is plain that the Company was the source of the directive. After all, it is undisputed that when the police officer arrived at the facility, he spent 15-20 minutes in the plant, after which he emerged to tell the union supporters that they were violating the Company's no-

solicitation rule and had to leave. *Id.* Thus, the officer obviously based his directive on instructions that he had received from the Company.

The Company further errs in contending (Br 48) that the administrative law judge should not have credited alleged double hearsay testimony: Second Shift Manager Douglas Benjamin's admission that he spoke to the company security guard who had called the police, and that the guard admitted that Security Supervisor Wurgess had told him to call the police at the first sign of union activity. (Tr679-80,A67-68(Benjamin).) The Company did not raise a hearsay objection before the judge, nor did it argue in its exceptions to the Board that the judge had improperly credited any testimony based upon hearsay. Judicial consideration of the Company's belated claim is therefore barred by Section 10(e) of the Act (29 U.S.C. § 160(e)), which provides in relevant part that "no objection that has not been urged before the Board . . . shall be considered by the Court," absent extraordinary circumstances not present here. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (appellate court lacked jurisdiction over party's challenge to Board decision on issues not expressly presented to the Board below); *Lee v. NLRB*, 325 F.3d 749, 752 (6th Cir. 2003).

In any event, Benjamin's testimony—which the judge credited over Wurgess's denial—was not hearsay at all, but rather an admission by a party opponent. After all, it was the Company's own shift manager who explained that a company security guard admitted that Supervisor Wurgess gave the unlawful directive. Thus, even if the Company had preserved its argument for judicial review, it would have to be rejected. Admissions by a party opponent are not hearsay. *See Stalbosky v. Belew*, 205 F.3d 890, 895 (6th Cir. 2000) (citing FED. R. EVID. 801(d)(2)(D)).

The Company (Br 51-52) fares no better in contesting the Board's finding that the Company violated the Act when its security guard told Cathy Hill that she was not allowed to handbill on company property. (D&O35,A46; Tr1034-37,A274-77(C.Hill).) The Company does not dispute the general rule that such a discriminatory warning is unlawful.[9] Instead, the Company suggests that the incident was isolated and de minimis—claims that the Board reasonably rejected after viewing the incident "in the context of the other contemporaneous unlawful actions restricting prounion employee activity . . . ." (D&O2n.6,A13.) Considering the Board's well-supported findings concerning those other unlawful actions (above pp.24-40), the Court should reject the Company's suggestion that it was entitled to

[9] *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 570-72 (1978), *cited in UPS, Inc. v. NLRB*, 228 F.3d 772, 776 (6th Cir. 2000).

a free bite of the apple when it attempted to stifle Hill's undeniably lawful union activity.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY THREATENING TODD AND DENYING HER A PROMOTION; BY THREATENING LAWHORN AND DISCHARGING HIM; AND BY WARNING AND DISCHARGING TEEGARDIN, BECAUSE OF THEIR UNION ACTIVITIES

The Company did not stop at making coercive comments to its workforce concerning their union support. Rather, as we now show, it took a series of discriminatory adverse actions against known union supporters, beginning with threatening and denying Todd a promotion the day after she distributed union handbills, and ending with discharging Lawhorn and Teegardin days after the election.

A. An Employer Violates Section 8(a)(1) and (3) of the Act by Threatening and Taking Adverse Actions in Retaliation for Union Activities

It is settled that an employer violates Section 8(a)(1) by threatening an employee with adverse action for engaging in union activities. *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284, 1291 n.2 (6th Cir. 1997); *NLRB v. Marmon Transmotive,* 551 F.2d 732, 733 (6th Cir. 1977). As noted above p.22, the test is whether the employer's conduct has a reasonable tendency to coerce; actual coercion is unnecessary.

Section 8(a)(3) of the Act bans "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." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse action against an employee to discourage union activities. *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 225-26 (6th Cir. 2000).[10]

Whether an employer's adverse action violates the Act typically depends on its motive. In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397, 401-03 (1983), the Supreme Court approved the test for determining motive that the Board articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) ("*Wright Line*"), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that antiunion considerations were a "motivating factor" in the employer's adverse action, the Board's conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the employer's affirmative defense that

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[10] Because antiunion discrimination necessarily coerces employees in the exercise of their rights under Section 7, "a violation of section 8(a)(3) constitutes a derivative violation of section 8(a)(1)." *Architectural Glass and Metal Co., Inc. v. NLRB*, 107 F.3d 426, 430 (6th Cir. 1997).

the same action would have been taken in the absence of union activity. *Transportation Management*, 462 U.S. at 395, 397-403; *General Fabrications*, 222 F.3d at 226; *see also Arrow Elec. Co. v. NLRB*, 155 F.3d 762, 766 n.5 (6th Cir. 1998) ("an employer bears the burden of persuasion as to its affirmative defense").

Where, as here, the record shows that the neutral reason asserted by the employer for its adverse action was a pretext—that is, the reason did not exist or was not in fact relied upon—the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's union activity. *Wright Line*, 215 NLRB at 1084. *Accord W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 873 (6th Cir. 1995).

Motive is a question of fact, and the Board may rely on circumstantial as well as direct evidence to determine the employer's motive. *Id.* Where, as here—concerning Todd and Lawhorn—there is a direct admission of unlawful motive, it may be overcome only if it is "so destroyed by other facts and circumstances that it cannot be credited . . . ." *NLRB v. L.C. Ferguson*, 257 F.2d 88, 89-90 (5th Cir. 1958). *See also Adair Standish Corp. v. NLRB*, 912 F. 2d 854, 861 (6th Cir. 1990) (direct admissions show unlawful motive). Further, circumstantial evidence also strongly supports the Board's finding of antiunion motive—namely, the Company's expressed

hostility to the union activities of Todd, Lawhorn, Teegardin and other union supporters, the timing of the adverse actions, the Company's disparately harsh treatment of Teegardin, the failure of the Company's proffered reasons for the adverse actions to withstand scrutiny, and the many other contemporaneous unfair labor practices that the Company committed. *See General Fabrications*, 222 F.3d at 225-26; *W.F. Bolin*, 70 F.3d at 871.

Because motive is a factual question, judicial review of that issue is limited "to determining whether the Board's inference of unlawful motive is supported by substantial evidence—not whether it is possible to draw the opposite inference." *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424-25 (11th Cir. 1998). *Accord ITT Automotive v. NLRB*, 188 F.3d 375, 384 (6th Cir. 1999). Where conflicting testimony makes witness credibility central to the analysis, the judge's credibility determinations "should ordinarily be affirmed unless they are inherently unreasonable or self-contradictory." *Tel Data Corp.*, 90 F.3d at 1199.

B. The Court Should Summarily Enforce the Board's Finding that the Company Unlawfully Told Todd that She Would Not be Promoted Because of Her Union Activity, and that Finding Establishes that the Company Further Violated the Act by Carrying Out Its Unlawful Threat

As shown above p.42, it is settled that an employer violates Section 8(a)(3) and (1) of the Act by denying an employee a promotion in retaliation

for her union activities. It is equally settled that by informing the employee of the discriminatory reason for denying her a promotion, an employer violates Section 8(a)(1). *NLRB v. Marmon Transmotive*, 551 F.2d 732, 733 (6th Cir. 1977).

In its opening brief, the Company does not challenge the Board's finding that the Company violated Section 8(a)(1) when Third Shift Manager Dan Kear admittedly told Todd that because of her union activity—distributing union literature on May 21—the Company would not give her the promotion to fill-in leadperson that he had discussed with her on May 20. (D&O1,34; Tr480-81,486,A12,45;450-451,455(Kear).) The Company has therefore waived any challenge to the Board's finding that by making this coercive statement, the Company violated Section 8(a)(1). Accordingly, the Board is entitled to summary enforcement of the portion of its Order based on the uncontested finding. *See* cases cited above p.35.

Kear's admission that Todd would not be promoted because of her union activity also provides direct evidence of the Company's unlawful motive for the adverse action. *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980). Thus, substantial evidence supports the Board's

finding that the Company, by admittedly denying Todd a promotion because of her union activity, violated Section 8(a)(3) and (1) of the Act.

There is no merit to the Company's assertion (Br 44) that it did not discriminate against Todd because she assertedly "declined" the promotion "voluntarily" during the same conversation in which Kear told her that she could not have the job because of her union activity. By admittedly denying Todd a promotion because of her support for the Union, the Company engaged in unlawful discrimination.

C. The Company Unlawfully Threatened Lawhorn with Discharge and Carried Out Its Threat by Discharging Him on Blatantly Pretextual Grounds

Substantial evidence supports the Board's finding that the Company threatened to discharge Lawhorn because of his union activity. The Company then carried through on the threat by discharging him less than a week later on obviously pretextual grounds that were nonetheless explicitly related to his union activities. As we now show, both actions were unlawful.

1. The Company unlawfully threatened Lawhorn with discharge

Substantial evidence supports the Board's finding that Supervisor Betty Gerren unlawfully threatened Lawhorn with discharge. Lawhorn's uncontroverted testimony, corroborated by two coworker witnesses, was that

on August 10, just a few days before the election, Gerren unexpectedly stopped by Lawhorn's home and saw him making prounion signs. Gerren then told him, "you know if the Union doesn't get voted in, you'll be fired." (D&O21,37,A32,48; Tr869,A438(S.Kelley),Tr879,A444(W.Kelley), Tr1289-90,A501-02(Lawhorn).) Few statements could be more chilling to employees' union activity than the threat of discharge, and the Board reasonably found that Gerren's words coercively suggested that the Company would retaliate against employees for their union activities. (D&O21n.22,A32.)

There is no merit to the Company's claim (Br 41) that Gerren's statements were just friendly remarks. As the Board found, consistent with precedent, even if Gerren meant to give a friendly warning, the remarks still had an inherent tendency to coerce.[11] *See NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 550 (6th Cir. 1984) ("The mere existence of friendly relations between a supervisor and an employee does not preclude a finding that the supervisor employed coercion violative of the Act). Nor are the Company's cases (Br 40) to the contrary. In *J.C. Penny Co. v. NLRB*, 123 F.3d 988,

[11] Nor does the Company find meaningful support in the record for its assertion (Br 41) that Gerren and Lawhorn were friends. Lawhorn's testimony simply indicates that Gerren had been to his home on two previous occasions. (Tr1288,A500(Lawhorn).) Had the Company desired to clarify the nature of their relationship, it could have cross-examined Lawhorn on that subject or called Gerren to the stand, yet it did neither.

994 (7th Cir. 1997), the remark at issue—"I'm glad that you've got a husband"—was too vague to constitute a threat of discharge, unlike Gerren's words here, which could support no other meaning. In *Alterman Transportation Lines, Inc.*, 308 NLRB 1282, 1289 (1992), the warnings came from a personal friend who (unlike Gerren) did not supervise the threatened employee.

There is no more merit to the Company's argument (Br 40-41) that Gerren's status as a "low-level supervisor" somehow excused the threat. The Company overlooks the undisputed fact that Gerren directly supervised Lawhorn. (Tr1280-81,A493-94(Lawhorn).) The Company does not challenge (Br 39-41) the Board's reasonable inference that Gerren "was privy to information indicating that [the Company] was planning or looking for an excuse to fire Lawhorn." (D&O21, A32.) Moreover, the coercive effect of Gerren's words was heightened by the fact that her prediction came true: the Company discharged Lawhorn less than one week later for union-related activities.

2. The Company unlawfully discharged Lawhorn

Substantial evidence supports the Board's finding that Lawhorn's union activities were a motivating factor in the Company's decision to discharge him. Gerren's unlawful threat, discussed above, is direct evidence

of the Company's unlawful motive. Moreover, the timing of Lawhorn's discharge—the day after the election—creates an inference that union animus was the reason. *See NLRB v. Aquatech, Inc.*, 926 F.2d 538, 545-46 (6th Cir. 1991); *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 (6th Cir. 1980). Finally, the Company does not deny that it was aware of Lawhorn's union activity. Company agents admitted at the hearing that they perceived Lawhorn as a union spokesperson, and the Company premised its pretextual reason for discharging Lawhorn on his act of escorting a union representative through the plant on the eve of the election. Thus, the only real question before this Court is whether substantial evidence supports the Board's finding that the Company would not have discharged Lawhorn in the absence of his union activity.

As the Board reasonably found, the Company grasped at an obviously pretextual excuse for firing Lawhorn. Vice President Ivan, after meeting with President Appold and Human Resources Manager Johnson, informed Lawhorn that he was being discharged for escorting Union Representative Hilliard through the production area of the plant on their way to viewing an election notice. Considering that Lawhorn escorted Hilliard with Johnson's tacit approval—and in plain view of several company supervisors who made no effort to stop the alleged misconduct—the Board reasonably concluded

that the Company "would not have fired Lawhorn . . . in the absence of its tremendous hostility towards the Union and Lawhorn's union activities." (D&O23,A34.)

The undisputed facts amply support the Board's finding of pretext. The Company implicitly approved Lawhorn's presence in the plant, since Lawhorn attended the pre-election meeting as an employee representative of the Union, and Hilliard asked Lawhorn, in Manager Johnson's presence, to show him the way to the EZ Pack facility to view an election notice. Moreover, the Company knew that Lawhorn did not try to sneak Hilliard into the plant because they bought hairnets from a company security guard in Johnson's presence; and hairnets are admittedly required only in the Company's production area, not in EZ Pack. Before discharging Lawhorn, Vice President Ivan even reviewed the videotape of Lawhorn and Hilliard purchasing the hairnets. (D&O23-24,A34,35.)

Furthermore, the Company could not seriously take issue with Lawhorn's escorting Hilliard through the production area. After all, Manager Johnson authorized Hilliard to view the election notice in the adjacent EZ Pack building, without offering him an escort or giving him directions. (D&O21,A32.) In these circumstances, Lawhorn reasonably filled the void as Hilliard's escort, and took the shortest route—"the way

[he] always went"—through the factory, rather than taking a longer outdoor route around the factory's perimeter. (Tr1301,A506(Lawhorn).)

Considering that neither Johnson nor any other company official (including the security guard who sold them the hairnets, and the several supervisors who saw them in the production area) said anything to Lawhorn and Hilliard about their chosen route through the facility, the Board reasonably found that "an employer without a discriminatory motive would not have fired Lawhorn under these circumstances." (D&O24,A35.) In sum, the Board reasonably found pretextual the Company's claim that Lawhorn was fired for what was, at most, a misunderstanding that no company agent made any attempt to correct.

The Board was further reasonable to find pretextual the Company's second rationale for Lawhorn's discharge—fabricated sometime after the fact—that he and Hilliard allegedly were electioneering on their walk through the plant. As the Board noted, when Vice President Ivan terminated Lawhorn, he said only that Lawhorn was being fired for taking an unauthorized visitor through the plant. Apparently recognizing the inadequacy of this pretextual reason, the Company belatedly manufactured the electioneering rationale after Lawhorn's discharge. (D&O22-23,A33-34.)

The judge, however, reasonably found—based on a wealth of circumstantial evidence—that the Company was unaware of any electioneering allegations at the time of Lawhorn's discharge. Thus, the Company could not possibly have relied on any supposed electioneering when it decided to discharge Lawhorn. Specifically, Manager Johnson admitted that although he participated in the decision to fire Lawhorn, he did not seek a statement from Terry Kreisher—the employee who allegedly overheard Lawhorn and a coworker, Kelly, chanting "Its union time"—until more than one week after Lawhorn's discharge. (Tr79-86,A369-76 (Johnson).) Moreover, it is significant that the Company never contacted, much less disciplined, Kelley for his alleged participation in electioneering. (Tr883-84,A445-46(W.Kelley).)

Furthermore, the judge reasonably discredited Vice President Ivan's claim that he spoke to Kreisher about Lawhorn's alleged electioneering before discharging Lawhorn. Kreisher's testimony did not corroborate Ivan's claim, and Ivan's notes from the discharge interview failed to mention electioneering. (JX1–p.165,A761.) Finally, the Board reasonably found that, after the Company discharged Lawhorn, Ivan manufactured the second page of Lawhorn's termination report (where the Company accused Lawhorn of electioneering), as Supervisor Frey flatly denied Ivan's claim

that she had prepared the second page. (Tr429,A107(Frey),JX1–pp.157-58, A755-56.)

In any event, the judge reasonably discredited Kreisher's testimony that Lawhorn chanted "it's union time." The mutually corroborative testimony of Lawhorn, Hilliard and Kelley establishes, contrary to Kreisher's claim, that Lawhorn made no such remarks. Moreover, although Kreisher claimed that he immediately told Supervisors Hager and Benjamin and employee Hassan about the incident, their testimony and Hassan's note documenting his conversation with Kreisher failed to mention any electioneering activity. (JX1–pp.163-64,A759-60.)

Accordingly, on this record, the Board reasonably rejected as pretextual the Company's belated claim that it discharged Lawhorn for electioneering; that claim was as pretextual as the Company's initial claim that it discharged Lawhorn for escorting a union representative through the plant. By offering those pretextual reasons for Lawhorn's discharge, the Company only cemented the inference that it discharged Lawhorn because of his union activity. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995).

D. The Company Unlawfully Disciplined and Discharged Teegardin

The Board found that the Company violated Section 8(a)(3) and (1) of the Act by issuing Teegardin disciplinary warnings for his union-related activities soon after he began openly organizing, and by running unprecedented background checks that ultimately served as a pretext for discharging him. As we now show, the Board reasonably found that the Company's actions were unlawful.

1. The Company unlawfully disciplined Teegardin

As this Court recognizes, disciplinary action short of discharge or suspension can violate Section 8(a)(3) and (1) of the Act. *See, e.g.*, *Sam's Club v. NLRB*, 141 F.3d 653, 655, 661-62 (6th Cir. 1998); *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861-62 (6th Cir. 1990). Moreover, the Board regards even informal admonitions as within the scope of Section 8(a)(3) if they "may be a foundation for future disciplinary action." *Whirlpool Corp.*, 337 NLRB 726, 739 (2002), *enforced mem.*, 92 Fed. Appx. 224 (6th Cir. 2004). Here, the Company issued Teegardin two warnings that it added to his file and subsequently claimed to rely upon as a basis for his discharge. (Tr1869,A65(Babb).) The record establishes that the first warning—for union "harassment"—was blatantly aimed at conduct protected by the Act,

while the second—for threatening a coworker—was meted out disparately to Teegardin as compared to Kevin Hassan, his openly antiunion adversary. Given these circumstances, together with the abundant findings of union animus discussed above, there is substantial evidence to support the Board's conclusions that both disciplinary warnings were unlawful.

a. The Company unlawfully disciplined Teegardin on June 22

It is settled that an employer cannot discipline an employee for engaging in protected activities merely by labeling them "harassment." *Whirlpool Corp.*, 337 NLRB at 727; *Nichols County Health Care Center*, 331 NLRB 980, 981 (2000). Here, Maintenance Manager Wilson warned Teegardin against "harassing people about union support" and told him not to be "so forceful" when discussing the Union. (JX2–p.274,A773.) Wilson then placed a memorandum in Teegardin's file asserting that the Company had received several complaints concerning Teegardin's "harassing people"

about the Union.[12] The Board reasonably found that by taking these actions, the Company violated Section 8(a)(3) and (1).[13]

There is no merit to the Company's assertion (Br 27-28) that Teegardin's conduct was unprotected, and therefore that the June 22 warning was lawful. As the Company's own cases make clear, determinations as to whether an employee's union activity falls outside of the Act's protection "are properly made only on the basis of allegations of harassment backed up by a factual record[.]" *Martin Luther Memorial Home, Inc.*, 343 NLRB No.75, n.14 (2004).[14] Thus, it was incumbent on the Company to call

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[12] Later, Wilson added a second version of the warning to Teegardin's file in which all references to the Union were removed—an act supporting the judge's reasonable inference that the Company sought to conceal the original warning's discriminatory import. (D&O14&n.7,A25; JX2–p.283, A778.)

[13] There is no merit to the Company's assertions (Br 26,30) that the administrative law judge found only a Section 8(a)(1) violation. Although the judge's analysis focused on Section 8(a)(1), in his conclusions of law, which the Board adopted, he found that the Company's warnings to Teegardin on both June 22 and June 26 violated Section 8(a)(3) and (1). (D&O14-16,38,A25-27,49.)

[14] The other cases cited by the Company (Br 27) are distinguishable. In *BJ's Wholesale Club*, 318 NLRB 684 (1995), an employee repeatedly solicited a coworker during working time, contrary to the employer's policy. By contrast, as the judge found (D&O14,A25), the Company did not have a valid, nondiscriminatory rule prohibiting employees from discussing the Union during working time. *See* pp.36-37 above. In *Aramark Serv., Inc.*, 344 NLRB No. 68 (2005), the Board deferred to an arbitrator's decision

witnesses who could establish a solid factual basis for its claims of "harassment." Instead, the Company offered only Wilson's vague recollection that two unknown employees thought they were being harassed because Teegardin "was being loud with them." (Tr244,A732(Wilson).) The Company therefore failed to meet its burden of showing that Teegardin's union activity fell outside of the Act's protection, as the Board reasonably found. (D&O14,A25.)

On review, the Company argues (Br 27-28) for the first time that because the judge found the violation sua sponte, based on the hearing testimony, it did not have the opportunity to fully and fairly litigate the issue. The Company, however, failed to raise its due process argument before the Board in exceptions or in a timely motion for reconsideration. (Exceptions, A1-11.) Accordingly, this Court lacks jurisdiction under Section 10(e) of the Act to consider the Company's due process claim. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *International Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281n.3 (1975); *Lee v. NLRB*, 325 F.3d 749, 752 (6th Cir. 2003).

In any event, the judge reasonably found that Teegardin's June 22 warning was closely related to his June 26 warning and his discharge, both

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involving an employee who physically poked and verbally abused coworkers.

of which were alleged in the complaint, and fully litigated below. (D&O14,A25; GCX1(z)-¶31,A885.) Indeed, the June 26 warning contained a written description of the June 22 warning for harassment, with the threat that "[a]ny further infractions will result in further disciplinary action up to and including termination of employment." (JX2–pp.279-80,A774-75.) In short, the Company had an opportunity to litigate all relevant factors leading to Teegardin's June 26 warning and his August termination, which necessarily included Teegardin's discipline on June 22. Accordingly, the Board reasonably adopted, in the absence of exceptions, the judge's finding that the June 22 warning was fully and fairly litigated. (D&O3,14,A14,25.) *See Action Auto Stores*, 298 NLRB 875, 875 n.2 (1990), *enforced mem.*, 951 F.2d 349 (6th Cir. 1991).

b. The Company unlawfully disciplined Teegardin on June 26

The Board reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by giving Teegardin a written warning on June 26 for using "obscene and threatening language" against a coworker, Hassan. In finding that the Company warned Teegardin on June 26 because he was a union activist, the Board reasonably relied on the Company's prior warning to Teegardin on June 22, which, as shown above, was unlawful. (D&O15-16,A26-27.) Thus, by predicating its June 26 warning on the unlawful June

22 warning (Tr 241,A729(Wilson)), the Company effectively admitted a discriminatory motive. Further, as to the June 26 incident, the judge found that although Teegardin and Hassan cursed at each other and exchanged challenges to fight, he could not resolve the contradictory testimony at to "who initiated the confrontation[.]" (D&O14-15,A25-26.)

The Board also reasonably relied on the Company's disparately harsh treatment of Teegardin, as compared with Hassan, and its one-sided investigation of the incident. The Company did not even ask Teegardin or any of the union witnesses for their version of the incident, whereas President Appold bent over backwards to help Hassan write down his version of the altercation. The Company treated Teegardin in a disparately harsh manner by taking action against him while failing to discipline Hassan for his admitted role in provoking and participating in the confrontation. On similar facts, in *One Stop Immigration and Education Center, Inc.*, 330 NLRB 413, 419-20 (1999), *enforced mem.*, 25 Fed.Appx. 524 (9th Cir. 2001), the Board found that an employer acted unlawfully by discharging a union activist for fighting, after it helped his antiunion adversary record his version of the fight, but refused to examine the activist's file for a description of the incident. Moreover, the Company's one-sided investigation of the incident "supplies significant evidence that disciplinary

action was triggered by an unlawful motive." *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 299n.5 (5th Cir. 1984). The Board reasonably found that the Company performed a one-sided investigation precisely so that Teegardin could be disciplined without getting to tell his side of the story. (D&O15,A26.)

There is no merit to the Company's claim (Br 31) that it also disciplined Hassan for his role in the incident, and thus did not treat Teegardin more harshly. As company counsel stipulated at the hearing, Hassan's personnel file contained no record of any discipline for the altercation with Teegardin. (Tr13,SA(Recko).) The judge reasonably found that the Company did not discipline Hassan; he rejected as fabricated the unsigned, undated document on a blank piece of paper—a purported warning notice—that inexplicably never made its way into Hassan's personnel file. (D&O15,A26; RX23,A1246.) The Company presents no compelling reason for disturbing the judge's decision to rely on the Company's stipulation rather than the suspicious document. Accordingly, substantial evidence supports the Board's conclusion that the Company violated Section 8(a)(3) and (1) by issuing Teegardin the discriminatory and coercive warning on June 26.

2. The Company unlawfully discharged Teegardin

a. The Company targeted Teegardin because of his union activities

As the Board found, "the evidence that [the Company] discharged Teegardin for discriminatory reasons is overwhelming." (D&O17,A28.) Teegardin's status as a prominent union supporter and his discharge within days of the union election—considered together with the Company's numerous violations of Section 8(a)(1), its discriminatory actions against Todd and Lawhorn, and its unlawful disciplinary warnings to Teegardin—more than suffice to establish the Company's unlawful motive. *See* cases cited above pp.43-45.

The evidence of unlawful motive, however, does not stop there. As we show below, the Company also conducted several unprecedented background checks on Teegardin—actions for which it could provide no credible explanation. The Board reasonably inferred that the Company conducted those checks because it was looking for an excuse to discharge him. Moreover, the Company conducted a blatantly one-sided investigation of an allegation that Teegardin sexually harassed an antiunion coworker, Don Whitted. Finally, the Company's disparately harsh treatment of

Teegardin, as compared to employee Marvin Hinton, further establishes its unlawful motive.

b. The Company seized on pretextual reasons for discharging Teegardin

Faced with strong evidence supporting the Board's finding that the Company had an unlawful motive for discharging Teegardin, it was incumbent on the Company to show, as an affirmative defense, that it would have taken the same action even absent his protected activity. *See Arrow Elec.*, 155 F.3d at 766 n.5 ("an employer bears the burden of persuasion as to its affirmative defense"). The Company asserts (Br 33) that it discharged Teegardin for falsifying his employment application and for sexual harassment. Substantial evidence, however, supports the Board's finding that the Company seized on these incidents as a pretext to mask the Company's true motive, which was to get rid of a prominent union activist.

The Board reasonably found that the Company's unprecedented criminal background checks on Teegardin betrayed an unlawful motive, and exposed as pretextual the Company's faux reliance on the prior conviction that the checks uncovered. It is undisputed that within weeks of Teegardin's regular handbilling with union representatives outside of the Company's entrance, Jack Johnson, the Company's highest human resource official, ran a criminal background check on Teegardin. At the unfair labor practice

hearing, Johnson could offer no credible reason for this unprecedented search of an incumbent employee, and speculated that he might have done so in response to an anonymous tip. (Tr109,A389(Johnson).) The judge reasonably discredited Johnson's claim about the alleged tip and inferred that Company President Appold, who did not testify, ordered Johnson to conduct the search in the hope of finding a justification for getting rid of Teegardin. (D&O13n.6,A24.) The Company offers no compelling reason to disturb the judge's credibility determination.

Not satisfied with this fruitless attempt, the Company conducted a new criminal background check on August 23, just two days after the Union filed its election objections. Again, to justify his action, Manager Johnson offered only the previously discredited excuse that he was acting on a (nonexistent) tip. (Tr107-08,153-56,A387-88,397-400(Johnson).) When the August search uncovered a DUI conviction from 1987 that Teegardin had not disclosed on his employment application, President Appold immediately seized on it as a pretext for discharging him. Given the Company's false reason for conducting this unprecedented search, the Board reasonably viewed the inquiry with a skeptic's eye, especially in light of its timing—the very day that Appold directed a subordinate to monitor Teegardin's union activities. (D&O17&n.16,A28.) Moreover, Johnson admitted that the

Company probably wouldn't have done a criminal background check on Teegardin even if he had listed the DUI conviction on his job application, and that the conviction would not have disqualified Teegardin from being hired. (D&O18,A29; Tr187-88,A411-12(Johnson).)

The Board reasonably viewed as pretextual the Company's other stated rationale for discharging Teegardin: his alleged sexual harassment of antiunion coworker Whitted. (D&O19-20,A30-31.) On August 7, about a week before the election, Teegardin and some coworkers were demonstrating for the Union outside of the plant, while other employees, including Whitted, were demonstrating in opposition. Whitted tried to provoke Teegardin by leaning into him and following him around. When Whitted continued attempting to provoke Teegardin on the shop floor, Teegardin complained to his supervisor. Although the supervisor reported the incident to management, the Company did nothing. The next day, when Whitted again saw Teegardin and other prounion employees demonstrating outside the plant, he taunted them. At that point, either Teegardin or another employee made an obscene remark and gesture to Whitted, which Whitted immediately reported to Teegardin's supervisor. (D&O16,A27.)

Thereafter, the Company handled the incident in an entirely one-sided manner. The Company did not interview Teegardin or any prounion

witnesses, nor did it speak to its security guards or review videotapes of the incident. Instead, the Company took a statement from Whitted and one employee witness whose claims about seeing Teegardin make a lewd gesture the judge found incredible. (D&O16n.13,17,A27,28; Tr1451-53,A266-268 (Hendrix).) As the Board reasonably found, the Company's one-sided investigation demonstrated that it had little interest in ascertaining what actually transpired between Whitted and Teegardin. Rather, the Company was trying to create a paper trail to justify getting rid of Teegardin. *See Esco Elevators*, 736 F.2d at 299n.5.

Dissatisfied with its flimsy allegations of sexual harassment against Teegardin, the Company attempted to dig up more dirt on him. Thus, on August 15, the day of the election, and the day that top company officials were deciding to terminate union activist Lawhorn, Manager Johnson began contacting three officials at Hisan—Teegardin's former employer—in a vain attempt to label him a serial harasser. The Hisan officials told Johnson that Teegardin had not engaged in any sexual harassment. The judge reasonably discredited Johnson's testimony that he called Hisan based on yet another anonymous tip. Rather, the judge reasonably found that the Company's inquiries were a further transparent attempt to search for an excuse to discharge Teegardin. (D&O17-18,A28-29; Tr110-12,A390-92(Johnson).)

c. The Company treated Teegardin in a disparately harsh manner

Finally, the Board reasonably relied on the Company's disparately harsh treatment of Teegardin as evidence that its stated reasons for discharging him were pretextual. Like Teegardin, employee Marvin Hinton failed to report a prior conviction on his employment application. Even though the Company soon discovered this omission, it hired Hinton anyway; he was not a union activist. Furthermore, the Company did not discharge Hinton when he was later accused of falsifying a lab report and sexually harassing a coworker by putting his hand on the coworker's leg and saying "I want to fuck you in the ass, I'm going to take you home. You're my bitch." (D&O3n.14,18,A14,29; GCX44-pp.1650-53,A981-83.) Thus, the Company's considerably more lenient treatment of Hinton—who, like Teegardin, had failed to disclose a prior conviction and was accused of sexual harassment—exposes the falsity of the Company's claim that it would have discharged Teegardin for those offenses. (D&O3n.14,A14.) Accordingly, substantial evidence supports the Board's rejection of the Company's proffered justifications for discharging Teegardin as thinly veiled pretexts.

III. THIS COURT LACKS JURISDICTION TO CONSIDER THE COMPANY'S UNTIMELY CHALLENGES TO THE BOARD'S REMEDIAL ORDER

Before this Court, the Company argues (Br 56-57) for the first time that the Board erred in issuing a broad cease-and-desist order, which the Board adopted on the judge's recommendation, and in the absence of exceptions. (D&O1n.2,A12.) Thus, the Company failed to present any challenge to the broad order when this case was before the Board—either in its exceptions to the judge's recommended order, or by way of a motion for reconsideration of the Board's order. Accordingly, under Section 10(e) of the Act, the Court lacks jurisdiction to consider the challenge that the Company raises for the first time on review. *See* cases cited above p.57.

The Court also lacks jurisdiction to consider the Company's argument (Br 57-59) that the Board erred in setting aside the election and severing and remanding the representation case to the Board's Regional Director so that a new election could be held. Although the Board consolidated the representation proceeding with the unfair-labor-practice case for the purpose of conducting a single hearing in which the election objections and the unfair-labor-practice complaint allegations could be litigated, as noted, the two cases are now severed, and only the unfair-labor-practice case is before the Court. (D&O8,A19.) Thus, the Board's ruling severing and remanding

the representation case, and the representation case itself, have not yet resulted in a final, judicially reviewable order. They are therefore not before the Court in the instant unfair labor practice proceeding. *See U.S. Electrical Motors, Inc. v. NLRB*, 722 F.2d 315, 320-21 (6th Cir. 1983). Accordingly, the Court lacks jurisdiction to consider the Company's premature attack on the Board's interim ruling in the ongoing representation case.

IV. THE BOARD REASONABLY DISMISSED THE COMPLAINT ALLEGATIONS THAT THE COMPANY UNLAWFULLY DISCHARGED FIVE OTHER EMPLOYEES

As explained above pp.42-43, under *Wright Line*, even if record evidence raises an inference that antiunion considerations were a motivating factor in discharges, the employer retains an opportunity to show that it would have taken the same actions in the absence of the employees' union activities. Here, the Board reasonably found that the Company provided legitimate reasons for discharging five additional employees, effectively rebutting any evidence of discriminatory motive.

A. The Substantial Evidence Standard of Review Is Not Altered When the Board Rejects Some of the Administrative Law Judge's Conclusions

Where, as here, the Board finds that an employer's challenged conduct did not violate the Act, and accordingly dismisses a complaint allegation, judicial review is extremely limited: the dismissal must be upheld

unless it lacks a rational basis or is unsupported by substantial evidence. *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992). Thus, "[i]t is not necessary that [the Court] agree that the Board reached the best outcome in order to sustain its decision[]" to dismiss a complaint. *United Steelworkers of America, Local Union 14534 v. NLRB*, 983 F.2d 240, 244 (D.C. Cir. 1993).

The Union erroneously argues (Br 28-29) that a more stringent "special scrutiny" standard should apply to the instant dismissals because the Board disagreed with some of the judge's conclusions. That assertion—allegedly gleaned from other circuits' decisions—conflicts with the law of this Circuit and the Supreme Court. Indeed, as the Union admits (Br 28), this Circuit recognizes the well-settled principle that judicial deference is owed to the Board's findings rather than those of the judge, and that the substantial evidence standard is not altered when the Board and the judge disagree. *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995) (citing *Universal Camera*, 340 U.S. at 496).

In advocating its erroneous position, the Union repeatedly cites *Slusher v. NLRB*, 432 F.3d 715 (7th Cir. 2005)—even though the Seventh Circuit has long acknowledged that "asking whether the Board 'erred' [in overruling the judge] is . . . outside the scope of [*Universal Camera*] . . .

The sole issue . . . is whether there is 'substantial evidence' to support the Board's determination." *Kopack v. NLRB*, 688 F.2d 946, 952 (7th Cir. 1982). Moreover, even the Seventh Circuit recognizes that an administrative law judge's contrary findings may detract from the substantiality of the evidence only if they are demeanor-based. *Id.* at 953-54.

Here, the Board did not overrule any demeanor-based credibility determinations in finding that the Company did not violate the Act by discharging five additional employees. In any event, even if the Board reaches a different conclusion regarding witness credibility, a reviewing court would not require the Board's conclusion to be supported by something more than substantial evidence. *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955).

B. The Company Lawfully Discharged Green for Failing To Report for Work or Call In

On September 18, 2002, John Green was discharged for failing to report for work or call in for well beyond three consecutive days. The Board found Green's inaction was more than sufficient to warrant termination under company policy. Accordingly, the Board reasonably concluded that the Company would have discharged Green regardless of his limited union activities. (D&O4,A15.)

The key facts are not in dispute. On September 6, Green returned to work without restrictions after several months of medical leave and restricted work due to knee and shoulder injuries. Before completing a full day's work, however, Green received permission to go home. On September 9, his next scheduled workday, Green reported via phone that he would not be coming into work, but failed to give a reason. Thereafter, Green neither called in, nor reported for work on September 10 and 11. Instead, on September 11, Green delivered a doctor's note to the human resources office stating "seated work only until MRI of knee," but he never inquired about the availability of seated work. Two days later, Green's doctor faxed the Company MRI results revealing an injury to his knee. (D&O4,24,A15,35; Tr1252-54,1257-63,1274-75,A182-84,187-93,195-96 (Green),JX5–p.528,A810.)

Green did not report to work after September 13, and he made no effort to communicate with the Company about his continued absences. In fact, Green did not place a phone call to the Company until he received his September 18 termination notice. (D&O4,24,A15,35; Tr1264,1276-77, A194,197-98(Green).)

The Board had no need to choose between competing witness accounts to find that Green's admitted inaction was inexcusable. Contrary

to the Union (Br 34), Green did not testify about the substance of the Company's medical slip policy, or whether he fully complied with it. Moreover, a different company policy indisputably states that "[t]hree consecutive days absent with no report will result in discharge." (JX8-p.369,A831.) Thus, as the Board reasonably found, Green's failure to communicate with the Company for more than three successive workdays, in the absence of a total restriction from working, justified his termination under company policy. (D&O4,A15.)

The Board further reasonably rejected the judge's finding—championed by the Union (Br 35-36)—that by warning rather than discharging antiunion employee Kim Combs-Mason for failing to call in for three successive days, the Company exhibited a bias against Green. (D&O4, A15.) As the Board noted, Combs-Mason was not similarly situated with Green; the Company believed that her absence was protected by another federal law, as clearly indicated by the language on her warning. (GCX45-p.1297,A995.)

C. The Company Lawfully Discharged Hill and Thompson after They Disobeyed a Supervisor's Order

On January 3, 2003, Gary Hill and Thomas Thompson were terminated after disobeying an order to continue working until they were

relieved by the next shift. The critical facts surrounding the incident are virtually undisputed, since Hill and Thompson admitted defying Supervisor Kelly Frey's directive. Considering the evidence of their prior lawful discipline, the Board reasonably concluded that the Company would have discharged them regardless of their union activity. (D&O5,A16.)

Hill and Thompson worked on the palletizer—a machine that stacks product and tracks inventory and needs to be operated continuously. On December 26, they expected to be relieved 30 minutes before the end of their shift. When their replacement—Victoria Truesdale—failed to report on time, Hill told Supervisor Frey via telephone that he needed to shut down the palletizer and leave to make an appointment, and that Thompson had to catch a ride home with a coworker. Frey told Hill that they needed to stay and run the palletizer, and warned him that they would be reprimanded if they left. (D&O5,27,A16,38; Tr1064-69,A285-90(Hill),Tr1120-25, A689-94(Thompson),Tr1471,A475(Koontz),Tr1687-88,A144-45(Frey).)

Defying Frey, Hill and Thompson shut down the palletizer and clocked out at the end of their shift. The Company subsequently discharged Hill for insubordination and leaving without permission. It also discharged Thompson because his warning (for leaving work without permission) was his third within 12 months. (D&O5,28,A16,39; Tr1069-73,A29-294(Hill),

Tr1125-30,A694-99(Thompson),JX6-pp.566-67,A820-21,JX7-pp.653-54, A824-25.)

It is undisputed that the Company adhered to its policies in taking both actions. (D&O27,A38; JX8-pp.371-72,A832-33.) Thus, as the Board reasonably found, by directly defying his supervisor's order to continue operating the palletizer, Hill risked termination for insubordination. As the Board further found, the Company appropriately gave Thompson a warning for leaving work early on December 26, as he was never directly ordered to stay. Nevertheless, Thompson likewise risked discharge under company policy because the December 26 warning was his third in five months. (D&O5&n.22,A16.)

Contrary to the Union (Br 40-41), in concluding that Hill and Thompson were lawfully discharged, the Board did not disturb the judge's credibility determinations. Rather, the Board independently evaluated the undisputed evidence and found that Hill's and Thompson's actions justified their termination under company policy. As the Board noted, the Company had selected and trained Hill and Thompson to operate the new palletizer despite their ongoing union activity. Moreover, just before the December 26 incident, the Company had lawfully disciplined them for disobeying supervisory instructions about palletizer operations. Additionally,

Thompson had received an undisputedly lawful warning in August for taking an unauthorized break. Thus, ample evidence supports the Board's finding that the Company would have discharged Hill and Thompson for disciplinary problems, even absent their union activity. (D&O4-5,26, A15-16,37; Tr1062,A284(Hill),Tr1118-19,A687-688(Thompson),JX6-p.570, JX7-pp.655-56,A822,826-827.)

The Union (Br 40) errs in arguing the irrelevant point—flagged by the judge (D&O28,A39)—that the December 26 incident did not ultimately harm productivity because Truesdale arrived soon after her shift started. The Company did not cite loss of productivity as a basis for its actions; instead, the Company discharged Hill and Thompson for openly defying supervisory authority. (JX6-pp.566-67,A820-21,JX7-pp.653-54,A824-25.)

Finally, the Board reasonably concluded that evidence regarding discipline for similar offenses was too equivocal to establish the Union's claim of disparate treatment. The Company presented evidence that many employees were discharged for similar offenses, and the Union countered with examples of employees who received more lenient treatment. On this record, the Board reasonably concluded that although the Company "may not have acted with perfect consistency through the years," the evidence

failed to show "a disparity along Sec. 7 lines." (D&O5n.24,29,A16,40; RX7,RX18-20,A1048,1194-1245.)

D. The Company Lawfully Discharged Holly for Insubordination

The Company discharged Tyrone Holly for insubordination because he persistently defied supervisory orders—grounded in safety concerns—by refusing to change his shirt with buttons while in the production area. Substantial evidence supports the Board's conclusion that the Company would have discharged Holly for his intransigence regardless of his prior union activity. (D&O5-6,A16-17.)

By Holly's own account, he defied company safety regulations on January 18 by wearing a shirt with buttons to work in the production area. As Holly recognized, the Company had phased out button shirts in favor of snap shirts (after a consumer choked on a button that had fallen into a company product), and had issued snap shirts to employees instead. Thus, it should have been no surprise to Holly when his supervisor, Diane Tate, told him on January 18 to remove his shirt due to the hazard posed by its buttons. (D&O5,29,A16,40; Tr587-91,SA(Tate),Tr1170-72,A333-35(Holly), JX3-p.379,A793.)

It is also undisputed that Holly repeatedly failed to comply with Tate's orders. The first time Tate told him to change, Holly responded by

asking if he could go home, but he did not remove his shirt. When Tate later saw Holly still wearing his button shirt, she obtained a short-sleeved snap shirt and again asked him to change. The next time Tate encountered Holly, he had simply placed the short-sleeved snap shirt over his long-sleeved button shirt, leaving the buttons on his sleeves exposed. Tate again ordered Holly to change his shirt, and later paged him to remind him of the importance of completely removing the button shirt. Only after those repeated orders did Holly go to the uniform shop and change into a long-sleeved snap shirt. (D&O5-6,29,A16-17,40; Tr555-62,583,A602-09,626 (Tate),Tr1160-63,A324-27(Holly).)

On this record, the Board reasonably declined to substitute its business judgment for the Company's, and found that the Company had demonstrated that its decision to discharge Holly for insubordination based on his failure to comply with a direct order was legitimate and would have occurred even absent his union activity. Moreover, the Board found that the timing of Holly's discharge, five months after his last union activity, did not support an inference of unlawful motive. Finally, as the Board found with Hill and Thompson, the few examples of employees who committed multiple acts of insubordination failed to show a glaring disparity, especially considering that Holly's insubordination posed a "significant safety issue."

(D&O6,30,A17,41; RX7-8,A1048-64.) The Union presents nothing to detract from the substantial evidence underlying the Board's conclusion.

E. The Company Lawfully Discharged Wickman for Verbally Abusing her Coworkers

In January 2003, the Company discharged Patti Wickman for using abusive language against her Latino coworkers. Previously, the Company had warned and suspended Wickman and had changed her work duties for screaming and cursing at employees and managers in several incidents. (D&O6,31,A17,42; JX4-p.772-77,A802-07.) Thus, the Board reasonably concluded that the Company would have discharged Wickman for her latest use of abusive language, regardless of her union activity.

The incident that precipitated Wickman's discharge occurred on January 20, when three Latino employees reported to their supervisor that Wickman had called them "fucking bitches." They later confirmed their accusation through an interpreter in an interview with Shift Supervisor Daniel Kear. Kear asked Wickman about the incident and reminded her that she had been warned about this type of conduct before. Wickman tellingly responded that she "didn't do it *this time*." Further, even though Wickman denied the January 20 incident, she admitted that if she had been having a bad night she "probably would have been yelling or swearing all night." Kear suspended Wickman immediately, and the Company discharged her

soon thereafter. (D&O6,31,A17,42; Tr494-507,A456-69(Kear),Tr1224-26, 1243,A719-21,725(Wickman),JX4-p.453,A798.)

The Union (Br 47-48) attacks the evidence that Wickman used profanity on January 20, and also asserts that the Company treated her in a disparately harsh manner. The Board, however, rejected the judge's unsupported finding that Supervisor Kear's testimony about his investigation into the incident was impermissible hearsay merely because of the language barrier faced by Wickman's Spanish-speaking accusers. Instead, the Board found compelling evidence that the Company—after receiving mutually corroborative accounts through an interpreter—believed that Wickman had used the abusive language, and accordingly discharged her.[15] (D&O6,31, A17,42.)

Moreover, the Board found that the Company lawfully took a harsh stance with Wickman, not only because her abusive language was "ongoing in nature[,]" but also because the Company appropriately wanted to convey a "strong message" of "respect and dignity" that showed support for minority employees. (D&O6,A17; JX4-p.455,A800.) Indeed, even the judge noted evidence that the Company had previously discharged Jack

[15] Even if the judge credited Wickman's self-serving denial (D&O6,32,A17, 43), this Circuit does not require the Board to accept it. *See W.F. Bolin*, 70 F.3d at 874. Rather, the Board "may draw its own inferences, giving such statements the weight it deems appropriate." *Id.*

Marquart for using a racial slur similar to Wickman's expression of rancor against her Latino coworkers. (D&O31-32n.47,A42-43; RX9,A1065-76.) Given Wickman's open hostility toward Latinos at the unfair labor practice hearing and in her exit interview,[16] the Board found that the Company could reasonably view her actions as more serious than run-of-the-mill use of inappropriate language. Accordingly, the Board properly rejected the Union's claim of disparate treatment.

[16] Wickman reported that the thing she liked least about working at the Company was that there were "too many Latinos that didn't or wouldn't speak English." (Tr1243-44,A725-26(Wickman),JX4-p.502,A801.)

CONCLUSION

For the foregoing reasons, the Board respectfully asks the Court to enforce the Board's order in full, and deny the Company's and the Union's petitions for review.

JULIE BROIDO
Supervisory Attorney

JEFF BARHAM
Attorney

National Labor Relations Board
1099 14th St., NW
Washington, D.C. 20570
(202)273-2996
(202)273-1724

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board - February 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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	:	Nos. 06-2038, 07-1406,
Petitioner/Cross-Respondent	:	07-1407
	:	
v.	:	
	:	
CONSOLIDATED BISCUIT COMPANY	:	Board Case No.
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Respondent/Cross-Petitioner	:	
	:	
BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, AFL-CIO, CLC	:	
	:	
Intervenor/Petitioner	:	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 15,824 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of February 2008

UNITED STATES COURT OF APPEALS
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	:	
Intervenor/Petitioner	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's final brief in the above-captioned case have this day been served by first-class mail upon the following counsel at the addresses listed below:

Thomas J. Gibney, Esq.
Nicole A. Flynn, Esq.
Eastman & Smith LTD.
One Seagate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032

William I. Fadel, Esq.
Wuliger, Fadel & Beyer
1340 Sumner Court
Cleveland, OH 44115

_____

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 12th day of February, 2008