Nos. 07-1206(L), 07-1265

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHEAST BEVERAGE CORPORATION;
B. VETRANO DISTRIBUTORS, INC.

Petitioners/Cross-Respondents

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 1035

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHEAST BEVERAGE CORPORATION, B. VETRANO DISTRIBUTORS, INC. Petitioners v. NATIONAL LABOR RELATIONS BOARD Respondent and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 1035 Intervenor	*	Nos. 07-1206(L), 07-1265 Board Case Nos. 34-CA-10139, 34-CA-10156

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court, counsel for the National Labor Relations Board ("the Board") certify the following:

(A) Parties and Amici: Northeast Beverage Corporation and its wholly owned subsidiary, B. Vetrano Distributors, Inc., were respondents before the Board and are petitioners in this Court in No. 07-1206 and respondents in No. 07-1265. Another wholly owned subsidiary of Northeast Beverage Corporation ─ Northeast Beverage Corporate of Connecticut, d/b/a/ Burt's Beverages, Inc. ─ was also a respondent before the Board. The Board is petitioner in this Court in No. 07-1265

and respondent in No. 07-1206. The Board's General Counsel was a party before the Board. International Brotherhood of Teamsters, Local No. 1035, was charging party before the Board and is intervenor in this Court.

(B) Rulings Under Review: No. 07-1206 is before the Court on the petition of Northeast Beverage Corporation and B. Vetrano Distributors, Inc., for review of an order issued by the Board on May 25, 2007, and reported at 349 NLRB No. 110. No. 07-1265 is before the Court on the Board's cross-application for enforcement of the same order.

(C) Related Cases: This case has not previously been before this Court or any other court. The Board is not aware of any related cases pending in or about to be presented to this Court or any other court.

/s/ Linda Dreeben
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Dated at Washington, DC
this 27th day of June, 2008

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LOCAL NO. 1035

Intervenor

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Northeast Beverage Corporation and B. Vetrano Distributors, Inc. (hereafter referred to individually as

"Northeast" and "Vetrano," respectively, and collectively as "the Companies"), for review of an Order of the National Labor Relations Board ("the Board"), and on the Board's cross-application for enforcement of its Order. International Brotherhood of Teamsters, Local No. 1035 ("the Union"), has intervened in support of the Board.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order issued on May 25, 2007, and is reported at 349 NLRB No. 110. (A 595-601.)[1] The Board's Order is a final order within the meaning of Section 10(f) of the Act. The Companies filed their petition for review on June 14, 2007. The Board filed its cross-application for enforcement on July 6, 2007. Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a)(1) of the Act by threatening employees with

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

discipline, and violated Section 8(a)(3) of the Act by suspending six employees and later discharging and refusing to hire or consider hiring five of them, because they engaged in protected concerted activity and joined and supported the Union.

2. Whether substantial evidence supports the Board's finding that the Companies violated Section 8(a) (5) and (1) of the Act by bypassing the Union and dealing directly with an employee concerning severance pay.

RELEVANT STATUTORY PROVISIONS

Relevant portions of the Act are set forth in the addendum to this brief.

STATEMENT OF THE CASE

On unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Companies were a single employer and had violated Section 8(a)(1), (3), and (5) of the Act. The parties later stipulated to the single-employer status of the Companies. After a hearing, Administrative Law Judge Eleanor MacDonald found that the Companies had violated the Act as alleged in the complaint. She recommended that the Companies be ordered to cease and desist from the conduct found unlawful and to take affirmative remedial action. (A 601-26.) The Companies filed exceptions.

The Board (Chairman Battista and Members Liebman; Member Schaumber dissenting) affirmed the administrative law judge's findings of violations and

adopted her recommended order. (A 595-601.) The Companies filed a petition for review, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

Northeast, a company based in Rhode Island, acquired two beer and soft drink distributors: Vetrano, located in Bristol, Connecticut, in October 2001, and Burt's Beverages, Inc. ("Burt's"), located in Bethel, Connecticut, in April 2002.[2] The Union represented the drivers, helpers, and warehousemen at Vetrano, while Burt's employees had no bargaining representative. (A 595, 602; 100-01.) The contract between Vetrano and the Union contained a no-strike, no-lockout clause which provided, in pertinent part (A 602-03; 323-24):

> Article XVI
>
> NO STRIKE-NO LOCKOUT
>
> Section 1. The Union guarantees the employer that there will be no authorized strikes, work stoppages or other concerted interference with normal operations by its employees during the term of this Agreement.

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[2] The parties stipulated at the hearing that, after their acquisition by Northeast, Vetrano and Burt's, together with Northeast, were a single employer. (A 12, 296-97.)

Section 2. The employer guarantees that it will not lock out its employees during the term of this Agreement. For the purposes of this section, an authorized strike, work stoppage or other concerted interference with normal operations is one that has been specifically authorized or ratified by the General Executive Board of the International Union or one which has been called or sanctioned, directly or indirectly, by representatives of [T]eamsters Local No 1035.

Section 3. In the event that the above job actions occur, the International Union shall not be liable, financially or otherwise, provided, however that within twenty-four (24) hours after actual notice in writing or by telegram from the employer that the International Union notify the local officers that such action is unauthorized and instruct such officers to bring it to the attention of the involved employees. The Local Union whose members are involved in such unauthorized action shall not be held liable thereafter, if it would otherwise be liable, provided that it meets the following conditions:

(a) The Union promptly posts notices in conspicuous places at the affected company and at the Local Union office stating that such action is unauthorized.

(b) The Union promptly orders its members to resume normal operations.

Section 4. The employees who instigate or participate in such job actions in violation of this Agreement shall be subject to discharge or discipline. In this event, their sole recourse to the grievance and arbitration procedure shall be limited to the question of whether, in fact, they did instigate or participate in such strike or work stoppage.

After its acquisition of Burt's, Northeast decided to consolidate the operations of Vetrano and Burt's. At a meeting with representatives of the Union on May 13, 2002, the Companies' representatives informed them of the decision to consolidate. Although the Union suggested consolidating the operations at the Vetrano facility or a new facility, the Companies stated that they would probably use the Burt's facility because it was larger and closer to more customers than the

Vetrano facility. (A 603-04; 195-96, 260.) The Companies asked which Vetrano employees would work at Bethel, where the Burt's facility was. The Union replied that in the event of a merger, all the Vetrano unit employees should be offered jobs at Bethel, in order of seniority. Northeast President Kenneth Mancini said that the Vetrano employees could apply for jobs at Bethel, but that no jobs were currently available there, and he did not know how many would be available in the future. (A 603-04; 198-99, 261-64, 273-74.)

B. The Vetrano employees leave work to meet with officials of the Union and the Companies, and are suspended and later discharged

The next bargaining session between the Union and the Companies concerning the effects of the consolidation was scheduled for 10:00 a.m. on May 29. Between May 13 and May 29, the Vetrano employees heard about the impending consolidation, and repeatedly asked officials of both the Companies and the Union whether they would retain their jobs, seniority, and current pay levels. They received no answers. (A 595, 605, 606; 58-59, 125, 182.)

The drivers normally came to work early in the morning, loaded their own trucks, and helped other drivers load theirs. While loading trucks, the drivers were paid on an hourly basis. When the trucks were loaded, the drivers left to make deliveries, for which they were paid on a commission basis. (A 604; 45, 114.) They could select the order in which they made deliveries, except that some stores

restricted the hours during which they would accept deliveries. The drivers could take breaks, without limitation as to number or length, while they were on the road, and they were not required to complete their deliveries for the day by any specific time. If they missed a delivery to a supermarket, they could make it the next day. Vetrano had never disciplined a driver for missing a delivery. (A 605-08, 610; 44-45, 51, 66-67, 91-93, 130, 165, 245-48, 256-58, 287, 289.)

While loading trucks on the morning of May 29, the drivers expressed their concern that they might lose their jobs. They decided that they wanted to go to the meeting that day between the Union and the Companies to try to get answers to their questions. They clocked out and left the Vetrano warehouse about 8:00 a.m., and drove to the Union's hall in South Windsor, where the meeting was to take place, stopping at a diner along the way to formulate the questions they intended to ask. They did not check with any officials of the Union or the Companies before leaving the warehouse, but told a mechanic that they were leaving to attend a union meeting and that they would return. (A 605-08, 616; 36, 39, 59-61, 82-85, 126-27, 147-48, 154-56, 159-61, 167-70, 182-85.)

The employees arrived at the Union's hall about 9:45 a.m. Between 9:45 and 10:00, two officials of the Union came out and instructed the employees to return to work; one of the officials used an expletive. The employees said that they would return to work, but that they wanted answers to their questions about what

would happen to their jobs, and that they wanted to introduce themselves to the Companies' representatives. The Union's representatives said that the employees could not attend the bargaining session, which was a closed meeting, but could come inside the hall briefly and introduce themselves to the Companies' representatives. (A 605 & n.11, 616; 14-15, 40-43, 62-63, 85-87, 127-28, 149-50, 161-62, 186-88, 192-93.)

Two of the Companies' representatives arrived shortly after 10:00. However, the Companies' attorney did not arrive until about 10:30. After his arrival, the Union and the employees met with the Companies' representatives. By 10:45, the employees (except for Joe Pignatella and union steward Gary Everett, who were scheduled to attend the bargaining session and not scheduled to work) had left the Union's hall to return to the Vetrano warehouse. They arrived at the warehouse 30 to 40 minutes later. (A 616-17; 41, 53-54, 63-64, 88-89, 99, 128-29, 163, 189, 191.) When they reached the warehouse, a sales manager told them that they were suspended until further notice. (A 605, 608; 65, 89-90, 151, 164.) If they had been permitted to begin their deliveries when they arrived at the warehouse, they could have completed all or almost all of the deliveries that day. (A 619-20; 251, 286-91.)

At the negotiating session, the Companies' representatives initially told the Union that the employees were suspended pending investigation, but later said that

they could return to work the next day but would still be subject to further discipline. (A 607, 609, 610; 18-19, 140-41, 202-04, 219, 270-71.) The Union asserted that the suspension violated the collective-bargaining agreement. (A 610; 275.)

On May 31, the Companies sent a letter to six of the eight drivers who had participated in the events described above, stating that they viewed the drivers' conduct as "an illegal job action," that they were investigating the drivers' "participation in or instigation of the activities in issue," and that once the investigation was completed, they would "impose appropriate discipline up to and including discharge." (A 611; 350.)[3] Subsequently, John Vetrano, general manager of the Vetrano facility, interviewed five of the six drivers and had them fill out questionnaires.[4] The questionnaires asked when the drivers had arrived at work on May 29, when they expected to begin making deliveries, how long the deliveries would have taken (all the drivers said 6 to 8 hours), and when they had

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[3] This letter was sent to the following drivers: Ricardo Bosques, Robert Collins, Christopher Fedor, Paul Johnson, Jerzy Marczewski, and Russell Towle. It was not sent to drivers Joseph Pignatella and Gary Everett (the shop steward), because they had not been scheduled to drive on May 29 and therefore could not be disciplined. (A 22.)

[4] Driver Johnson was never interviewed and never filled out a questionnaire. (A 613; 268.)

left to go to the Union's hall, but not when they returned. (A 609; 222, 236, 559-73.)

The suspended drivers returned to work on May 30 and continued to perform their former functions until June 14, the last day of operations at Vetrano. On that day, General Manager Vetrano told the drivers that it was their last day, expressed regret, and told several of them that they were good workers and that he would give them good references for jobs at Burt's or elsewhere. (A 614; 45-46, 67-68, 94, 152, 165.) Also on June 14, at a negotiating session, the Companies informed the Union that it was the last day of work for the Vetrano employees, and that the employees who had left work on May 29 (see above, p. 9 n.3) were discharged, except for Fedor, who would only be suspended for that day. (A 612 & n.38; 205, 213.)

About June 19, the Companies mailed letters to the five discharged drivers, notifying them of their discharge. (A 609; 233-34.) Also on June 19, the five drivers, having seen a newspaper advertisement for drivers at Burt's, went to Burt's and filled out applications. None of them were interviewed or offered a job. (A 623; 49-50, 69-70, 95-96, 153, 166.) Alex Reveliotty, a consultant for the Companies, instructed Burt's not to interview or hire the five drivers because they had been discharged by Vetrano. (A 609, 615; 172, 235.) Reveliotty knew that Burt's was nonunion and that Mancini, president of the Companies, did not want to

recognize the Union or hire the Vetrano drivers at Burt's. (A 603, 612; 228, 230, 232.)

C. The Union and the Companies negotiate over severance pay; the Companies bypass the Union and deal directly with an employee

The Union and the Companies held additional bargaining sessions on May 29, June 5, and June 14. On May 29, the Union said that all eight unit employees were interested in jobs at Burt's. The Companies replied that there would probably not be any jobs, but that one employee, Christopher Fedor, would be offered a supervisory position. (A 609; 20, 21.)

In a letter to the unit employees on May 31, the Companies advised them of the decision to merge the two facilities and operate solely out of Bethel. The letter stated that it did not appear that jobs would be available for the unit employees at Bethel and that the Companies had offered half a week's severance pay for each employee for each full year of service. This offer was conditioned on the employees' continuing to work at the Vetrano facility until it was shut down. (A 611; 351-52.)

On June 5, the Union told the Companies that an advertisement for drivers at Bethel had appeared in the Waterbury newspaper a few days earlier. Although the advertisement was for "DELIVERY DRIVER" and said that two specified types of driver's licenses were required, the Companies asserted that the advertisement was

for part-time warehouse employees. The Union again requested preference in hiring at Burt's for all the Vetrano employees. The Companies replied that no jobs were presently available at Burt's but that Vetrano employees could apply for jobs there. (A 611-12; 24, 104-06, 272, 360.)

On June 14, the Companies notified the Union that they had received state approval to merge the Vetrano and Burt's liquor licenses, and that Vetrano would therefore close the next day. They said that, since vacancies had occurred at Burt's, the three unit employees not discharged as a result of the May 29 incident – Pignatella, Everett, and Fedor – would be hired if they applied for jobs at Burt's. If they declined employment at Burt's, Fedor would receive $15,000 in severance pay, Everett would receive $11,000, and Pignatella would receive $10,600. The Union said that Pignatella would accept severance pay and that Everett, Fedor, and Paul Johnson should be hired at Burt's. The Companies ruled out hiring Johnson because of his discharge. (A 612; 107-08, 208-09, 212, 213.)

When Everett went to hand in his warehouse key after the last day of work at Vetrano, he saw Reveliotty, the Companies' consultant, and said that the Companies' offer of considerably less severance pay to him and Pignatella than to the less senior Fedor was insulting. A day or two later, Reveliotty telephoned Everett and said that the Companies would offer $15,000 in severance pay to each

of the three employees. Everett said that was better, but he would still rather have a job. (A 613; 131-33.)[5]

In a telephone conversation with union attorney Gregg Adler on June 17, company attorney Thomas Budd said that if Fedor accepted a job at Bethel, the Companies would pay Everett and Pignatella $15,000 each in severance pay. He did not offer to pay $15,000 to all three employees. (A 613 & n.42, 624; 27, 28, 35, 362.)

On June 18, Everett called Union Secretary-Treasurer Christopher Roos and said he would not accept a job in Bethel, since the severance pay offer had been increased to $15,000. Roos angrily telephoned Adler and accused him of making a deal without consulting Roos. Adler replied that he had never made a deal; there had been a brief discussion with Budd about the possibility of more severance pay if Fedor accepted a job, but Budd had made no specific offer. The next day, Roos received a voice mail from Mancini offering $15,000 in severance pay to each of the three employees. (A 613; 109-11.)

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[5] Everett applied for a job at Burt's and was interviewed, but ultimately accepted severance pay instead. He was never offered a job. (A 130-31, 143-44.)

In a fax to Budd on June 18, Adler accused Reveliotty of dealing directly with employees by telling Everett that all three employees would get $15,000 in severance pay if they declined employment in Bethel. (A 613; 356.) Budd replied by e-mail that he had mentioned the offer in his June 17 telephone conversation with Adler. (A 613; 357.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Liebman; Member Schaumber dissenting) found, in agreement with the administrative law judge, that the drivers' conduct on May 29, 2002, was concerted activity for mutual aid and protection in furtherance of a labor dispute within the meaning of the Act, was not in breach of the contractual no-strike clause or otherwise indefensible, and was therefore protected activity. Accordingly, the Board majority found that the Companies violated Section 8(a)(1) of the Act by threatening to discipline or discharge employees, and violated Section 8(a)(3) and (1) of the Act by actually suspending six employees, discharging five of them, and refusing to hire or consider hiring the five discharged employees at Burt's, all because of that protected activity. (A 595-97.) The Board majority further found, as an additional reason for finding the discharges, suspensions, and refusals to hire or consider unlawful, that they were motivated by union animus and therefore violated Section 8(a)(3) and (1) of the Act. (A 595-96 n.6, 26-28.) Finally, the

Board unanimously found, in agreement with the administrative law judge, that the Companies violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with a unit employee concerning severance pay. (A 624-25.)

The Board ordered the Companies to cease and desist from the conduct found unlawful and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to offer the five unlawfully discharged employees (see above, p. 9 & n.3) immediate instatement to the positions for which they applied at Burt's and make them whole for any losses suffered as a result of the refusal to hire or consider them, as well as for losses suffered as a result of their unlawful suspensions;[6] to expunge from their records any reference to the unlawful suspensions and discharges and notify the employees in writing that this has been done and that the suspensions and discharges will not be used against them in any way; and to post copies of an appropriate notice at the Burt's facility and mail copies of the notice to all former Vetrano employees. (A 625-26.)

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[6] No backpay was ordered for Christopher Fedor, who was suspended but not discharged, because he had accepted the Companies' severance package and signed a general release of all claims against the Companies. (A 625; 549-51.) However, the expunction order described in the text below (A 625, par. 2(b)) applies to Fedor as well as to the other five discriminatees.

SUMMARY OF ARGUMENT

1. The drivers' action in leaving work to meet with union and management representatives was protected by the Act. The desire to protect their jobs and working conditions gave rise to a labor dispute within the meaning of Section 2(9) of the Act. Under *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), concerted activity in furtherance of a labor dispute is protected even though the employees do not present a specific demand to the employer. It loses its protection only if it is unlawful, violent, in breach of contract, or so disloyal to the employer as to be indefensible. The employees' action here fell into none of these categories.

a. The action was not indefensible. Concerted activity does not automatically lose its protection merely because it occurs during working time or causes the employer some harm. The Board may balance the legitimate interests of the employees and the employer. Here, the Board reasonably struck the balance in favor of the employees. The information the employees sought concerned the critical subject of their short-term job security, they had previously tried and failed to obtain that information from the Companies and the Union, and they needed to call their concerns to the attention of union and management representatives before a scheduled bargaining session. Moreover, their absence from work for 3 hours caused minimal harm to the Companies. They returned to work in time to

complete all but a few of the day's scheduled deliveries, and the Companies had never previously disciplined a driver for missing a delivery.

b. The action was not in breach of the no-strike clause in the contract between the Union and the Companies. It did not involve economic coercion in support of a demand for concessions and was therefore not a strike. Moreover, the no-strike clause prohibited only strikes, work stoppages, or concerted interference with operations which were authorized or ratified by the international union or called or sanctioned by the local union. The local union officers here expressed strong disapproval of the job action.

c. The action was not in derogation of the Union's status as exclusive bargaining representative. The employees did not attempt to bargain with representatives of management, and their action was in support of the Union's position that all unit employees should be hired at Bethel upon the closure of the Vetrano facility.

2. The Companies' refusal to hire the employees at Bethel was motivated by union animus. At the bargaining table, the Companies falsely stated that no jobs were available even as they placed advertisements for drivers in local newspapers. The employees were good workers with experience in driving the routes now being serviced from Bethel, but the Companies rejected them while hiring drivers without comparable experience. The stated reason for not hiring the

discriminatees—that they lived too far from Bethel ─ was pretextual, since the Companies hired employees who lived even farther from Bethel. The prior termination of employees, which was based on their protected concerted activity and was therefore unlawful, could not be a lawful reason for refusing to hire them.

3. The Companies violated Section 8(a)(5) and (1) of the Act by dealing directly with an employee concerning severance pay. The credited testimony shows that the Companies offered employee Everett more severance pay than they had previously offered the Union, and only subsequently made the higher offer to the Union. The offer to Everett was in his capacity as an employee, rather than in his capacity as a union steward. He had complained about the previous offer as an individual employee. The Companies, in making the higher offer to him in response to his complaint, did not ask him to inform the Union of the offer. Moreover, the Companies made the same offer to another employee who played little or no part in the negotiations.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANIES VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING TO DISCIPLINE EMPLOYEES, AND VIOLATED SECTION 8(a)(3) OF THE ACT BY SUSPENDING SIX EMPLOYEES AND LATER DISCHARGING AND REFUSING TO HIRE OR CONSIDER HIRING FIVE OF THEM, BECAUSE THEY ENGAGED IN PROTECTED CONCERTED ACTIVITY AND JOINED AND SUPPORTED THE UNION

A. Introduction

This case involves six employees whose jobs were placed in jeopardy by the impending closure of the facility where they worked and transfer of its functions to another facility recently acquired by the Companies. The employees, at this "particularly vulnerable time" (A 597 n.12), sought "prompt information regarding their imminent financial future" (A 597). When despite the "obvious urgency" of such information (*id.*), they could not obtain it from either the Companies or the Union, they left work for approximately 3 hours in a desperate effort to obtain the information from the officials most likely to possess it. For this, they were discharged (except for one senior employee who was only suspended for a day), and, despite praise and promises of good references from their former supervisor, they (again excepting the one senior employee) were not even interviewed for equivalent jobs at the Companies' remaining facility.

The Board found that the employees' conduct was protected under the Act, and that the suspension of six employees and subsequent discharge of five of them therefore violated the Act. The Board further found that the reliance on the unlawful discharges as a ground for refusing to hire the employees at the remaining facility was equally unlawful. Finally, the Board found that the refusal to hire was unlawful for the additional reason that it was motivated by union animus. As shown below, the record amply supports these findings.

B. Applicable Principles and Standard of Review

An employer violates Section 8(a)(1) of the Act by discharging or taking adverse action against employees for engaging in concerted activity which is protected by Section 7 of the Act. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962); *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28-29 (D.C. Cir. 1998). When the adverse action is motivated by union animus, it also violates Section 8(a)(3) of the Act. *See Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 103 n.1, 104 (D.C. Cir. 2003).

The General Counsel has the burden of proving that protected activity occurred and that it was a substantial or motivating factor in the decision to take adverse action. Once this burden is met, the employer can prevail only by proving, as an affirmative defense, that it would have taken the same action even in the

absence of the protected conduct. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d at 30.

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. *See Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835-36 (D.C. Cir. 1998). This requirement is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Services, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1988). In particular, the Court will "not reverse the Board's adoption of an ALJ's credibility determinations unless . . . those determinations are 'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d at 28 (citations omitted).

The Board's construction of the Act is entitled to deference if "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Accord *Brockton Hospital v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002). The determination of when concerted activity is "for mutual aid or protection," and thus protected, "is for the Board . . . in the first instance as it considers the wide variety of cases that come before it." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978). That determination involves "the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management," and "the balance struck

by the Board is 'subject to limited judicial review.'" *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (citations omitted).

C. The Employees' Conduct was Protected

It is undisputed that the drivers' action on May 29 was concerted. Six employees participated in it, and the Companies were aware of this from the outset. Nor is there any dispute that the discharge of five of the drivers was motivated by that action. The discharge letters sent to them gave, as the only reason for the discharge, the allegedly "illegal work stoppage on May 29, 2002." (GCX 20.) Similarly, Northeast President Mancini attributed the terminations to the fact that the drivers had "walked off the job without authority" and the refusal to hire or consider hiring the drivers at Bethel to the discharges: "I said these guys have been terminated, don't hire them." (A 266.) Accordingly, if the May 29 action was protected, both the discharge of the drivers and the subsequent refusal to hire them at Bethel violated the Act. Similarly, if the Board properly found the May 29 job action protected, then its further finding (A 620), that the Companies' May 31 letter threatening the employees with discipline and discharge because of that action (A 350) violated Section 8(a)(1), is entitled to affirmance, for such a threat clearly violates Section 8(a)(1) when directed to protected activity. *See, e.g., Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001).

In finding the employees' activity protected, the Board majority found that it was "'mutual aid' directly related to a labor dispute. . . ." (A 595.) Section 2(9) of the Act (29 U.S.C. § 152(9)) defines a "labor dispute" as "any controversy concerning terms, *tenure*, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, *maintaining*, changing, or *seeking to arrange* terms or conditions of employment. . . ." (emphasis added). The employees' action here fell squarely within this language. They were directly concerned with the "tenure" of their employment and with "maintaining," if possible, both their jobs and the existing terms and conditions of employment, or, in the alternative, "seeking to arrange" employment at Bethel if continued employment at Vetrano's was impossible. As the Board observed (A 597), "they hoped to influence [the Companies] to retain them after the merger [of the Bristol and Bethel facilities]." *Cf. Five Star Transportation, Inc. v. NLRB,* 522 F.3d 46, 52-54 (1st Cir. 2008) (bus drivers' letters to school district urging it to reconsider award of contract to company which drivers feared would not maintain existing wages and benefits held in furtherance of labor dispute and thus protected).

In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962), the Supreme Court held that a walkout by employees to protest intolerably cold conditions at their place of work was protected by Section 7, and involved a "labor dispute"

within the meaning of Section 2(9), even though there was no disagreement between the employees and the employer that the shop was too cold, and even though the employees had not presented a specific demand to the employer. The Court observed, "The language of Section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." 370 U.S. at 14. The Court noted that individual employees had previously complained to the employer about the cold, but to no avail. Finally, when the shop furnace broke down on a bitterly cold day, the employees "took the most direct course to let the company know that they wanted a warmer place in which to work;" they "walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the 'miserable' conditions of their employment." *Id*. at 15. In these circumstances, the Court held, no more specific demand for remedial action was required.

Although this case did not involve the sort of inhumane working conditions present in *Washington Aluminum*, it did involve "the most fundamental of concerns to any employees – whether they would continue to have employment with the [Companies], and under what terms and conditions." (A 596). They feared (with good reason: the Vetrano operations were shut down 16 days later, with no advance notice to the employees) that the loss of their jobs was imminent. Two of

them (Collins and Towle) had recently been laid off by another employer without prior notice, and feared that the same thing would happen again. (A 37, 81, 146). As in *Washington Aluminum*, the employees, before leaving work, had made repeated efforts to resolve their concern, by asking both union and management officials for information about their future, only to be rebuffed by both. Finally, they "took the most direct course to let the [C]ompan[ies] know" about their concerns; they "walked out together in the hope that this action might spotlight their complaint." The Board was justified in finding *Washington Aluminum* controlling here.

Washington Aluminum held that concerted activities such as those occurring here are protected unless they are "unlawful, violent, or in breach of contract," or can be "characterized as 'indefensible' because they . . . show a disloyalty to the workers' employer which . . . [is] unnecessary to carry on the workers' legitimate concerted activities.'" 370 U.S. at 17 (citations omitted). The Board found here that the drivers' conduct was not indefensible (A 597, 618), nor was it in breach of contract (A 595 n.6, 617, 619-20) or in derogation of the Union's status as exclusive bargaining representative (A 618). The Companies challenge all of these findings. As shown below, these challenges are without merit.

1. The employees' conduct was not indefensible

The classic example of disloyal, and hence "indefensible," conduct, which forfeits the protection of the Act, is disparagement of the employer's product or business policies, unrelated to any criticism of its labor policies. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464, 471 (1953) (product disparagement); *Endicott Interconnect Technologies v. NLRB*, 453 F.3d 532, 534-35, 537 (D.C. Cir. 2006) (accusing management of "tanking" the employer's business or "putting it into the dirt"). Nothing like that happened here. At most, the employees' absence from work for slightly more than 3 hours caused a few deliveries to be missed. However, "the fact that an employee's actions may cause some harm to the employer does not alone render them disloyal." *Mohave Electric Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000). Rather, the Board may balance the employees' interest in engaging in the activity in issue against the harm done to the employer's legitimate interests. In this case, the Board struck the balance in favor of the employees. It cited the urgent need for, and critical nature of, the information they sought: information concerning their short-term future as employees of the Companies and the possible need to seek employment elsewhere. (A 597 & n.12.)

Congress, by enacting the WARN Act (29 U.S.C. §§ 2101, 2102(a)), requiring covered employers to give employees or their bargaining representative

60 days' notice of a planned plant closing or mass layoff, recognized the vital interest of workers (including those whose employers may be too small to be covered by the WARN Act) in such information. The Board was warranted in finding the need for such information to be both compelling and immediate.[7]

In addition, although the reasonableness of the decision to engage in concerted activity is irrelevant to its protected status (*Washington Aluminum*, 370 U.S. at 16), the employees' decision here was clearly reasonable. They had tried, and failed, to obtain the needed information from both the Companies and the Union. The Companies' suggestion (Br 21, 24) that they should have waited until after the May 29 bargaining session and then asked their steward what he had learned there amounts to an assertion that they should have followed the same course that had previously been futile. They were not required to do so.

In addition, the drivers' 3-hour absence from work caused minimal harm to the Companies. The employees' credited testimony shows that they always

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[7] Contrary to the Companies' contention (Br 33-34), the Board did not establish a *per se* rule that any walkout for the purpose of obtaining information about terms and conditions of employment is protected. Chairman Battista, who cast the deciding vote, expressly disclaimed such a rule. He based his conclusion on "the particular exigencies of the case" – the critical nature of the information sought, the failure of both the Companies and the Union to respond to the employees' questions, and the brief duration of the work stoppage. (A 597 n.12). The absence of any of these facts could lead to a different result.

intended to return to work on the morning of May 29.[8] They did return by 11:30. Manager John Vetrano conceded that Towle could have completed his route if permitted to start it then. (A 251.) As to the other drivers, the testimony of Union Steward Gary Everett, credited by the administrative law judge (A 620 n. 53), shows that, if permitted to start deliveries at 11:30, Bosques could have made all his deliveries (A 288), Marczewski could have made all but one of his (A 290), and Collins all but two of his. (A 290-91.) The three deliveries they would have missed were all to supermarkets, and it is clear from the record that Vetrano had

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[8] The Companies' assertion (Br 25) that the employees intended to attend the entire bargaining session, and thus miss a whole day of work, is really an attack on the administrative law judge's credibility resolutions, which this Court will not reverse "unless. . . . [they] are 'hopelessly incredible', 'self-contradictory', or 'patently unsupportable.'" *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (citations omitted). The six drivers, all of whom the administrative law judge found credible (A 604 n.8, 606 n.12, 607 nn. 18, 21, 608 nn. 24, 27), all testified that they intended, and told the Union's representatives that they intended to return to work that day. (A 37, 42, 60, 62, 83, 87, 147, 150, 160, 162, 189, 191.) Company Attorney Budd acknowledged (A 214) that the Union's representatives advised him of this intention at the May 29 meeting.

The Companies' contention rests entirely on an answer given by Paul Johnson (A 77, quoted at Co. Br 7) to an improper compound question. The administrative law judge properly concluded (A 605) that since Johnson was never specifically asked whether he wanted to attend the entire meeting, his answer was too equivocal to overcome the specific testimony of the other drivers. Moreover, the Companies, who never interviewed Johnson prior to his discharge, were obviously unaware of his alleged undisclosed intent to stay for the whole meeting, and therefore could not have relied on that intent in deciding to discharge him or the other drivers.

always allowed drivers who missed a supermarket delivery to make it the next day, and never disciplined a driver for missing a delivery. (A 257, 287.) Thus, the Company is seeking to justify its discharge of these four employees on the ground that their conduct had consequences which had never previously been considered serious enough to warrant discipline.

Paul Johnson was scheduled to make a delivery to Liquor Depot, the Companies' largest customer, by 7:30 a.m. (A 249-50, 255.) By the time the drivers left work to go to the Union's hall, it was 8:00 a.m. However, even assuming that Johnson could have left in time to make the delivery, the record shows that deliveries to Liquor Depot were frequently missed because of the early delivery time (A 73), and that Liquor Depot had accepted late deliveries in the past (A 92). There is no evidence that the Companies requested, and Liquor Depot refused or would have refused, permission to make a late delivery on May 29.

The Companies, however, contend (Br 29-34) that, regardless of the impact on their operations, concerted activity during working time is "an unprotected usurpation of working time." Contrary to their contention (Br 32-33), *Washington Aluminum* cannot be distinguished on this ground. It involved a walkout by seven of the eight employees in violation of a plant rule forbidding employees to leave their work without permission of the foreman. 370 U.S. at 16-17. Moreover, concerted activity during working time does not have to be a full-blown strike to

be protected. The Board balances the impact of the conduct on the employer's operations against the employees' need to act during working time. *See Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29-30 (D.C. Cir. 1998) (discussing *Ohmite Mfg. Co.*, 290 NLRB 1036 (1988)).

Here, as shown above, pp. 28-29, the adverse impact on the Companies' business was small, amounting at most to four deliveries delayed for a day. In contrast, the need for drivers to act when they did was great. As the Board noted (A 597), they wanted to meet with representatives of both the Union and the Companies and to influence the latter to employ them at Bethel after the Vetrano facility was closed. Indeed, the Companies repeatedly (Br 22, 23-24, 26, 34) stress the employees' desire to influence the ongoing negotiations over the effects of that closure. To induce the parties to address their concerns during those negotiations, the employees had to meet with them before, not after, the next bargaining session took place. Accordingly, the Board properly found that the employees were justified in leaving work to have such a meeting.

The cases relied on by the Companies (Br 30-32) are clearly distinguishable. *Gulf Coast Oil Co.*, 97 NLRB 1513, 1514, 1516 (1952), involved drivers who, solely "for their own convenience," went to the union hall to discuss union organization, deliver signed authorization cards, and get initiated into the Union – all activities which could have been performed outside working time and which,

although often occurring at the employer's premises, can be banned there during working time under nondiscriminatory rules. *See Republic Aviation Corp. v. NLRB*, 327 U.S. 793, 803-04 n.10 (1945) (quoting *Peyton Packing Co*., 49 NLRB 828, 843-44 (1943)).

GK Trucking Corp., 262 NLRB 570, 572 (1982), expressly relied on *Republic Aviation* in finding unprotected the action of two drivers in missing work to attend an off-premises meeting called to elect a union steward. The Board noted that the purpose of the meeting "was unrelated to [the drivers'] own concerns" and that "[t]here was no urgency which called for a worktime consultation with union officials. . . ." 262 NLRB at 573. As shown above, the facts here are the opposite in both respects.

Both *Terri Lee, Inc*., 107 NLRB 560 (1953), and *Michigan Lumber Fabricators, Inc*., 111 NLRB 579 (1955), were like *Gulf Coast Oil* and *GK Trucking*, and unlike this case, in involving employee attempts to meet only with a union, not with representatives of management, during working time, and in the absence of any showing of a necessity for using working time for that purpose. In *Terri Lee*, the union was not the employees' bargaining representative, and they sought a meeting with the union merely to "find out" what could be done about a cut in their piece rates. They had no intention of protesting that cut or seeking to induce the employer to rescind or modify it. 107 NLRB at 562. Moreover, at least

two of the four employees in issue lied about their reasons for leaving work – an independent ground for discharge. *Id*. at 563. In *Michigan Lumber,* the employees left work to hold a union meeting to discuss a pending grievance. Such meetings had never previously been held during working time, and there was no showing of a need to do so where the meeting was merely to inform union members of the status of the grievance. 111 NLRB at 580, 583.[9]

Thus, none of the cases cited by the Companies support their broad argument that concerted activity during working time must rise to the level of a full-blown strike to come within the Supreme Court's holding in *Washington Aluminum*. Rather, as the Board majority held here (A 596-97 & n.12), such activity is protected where, as here, it seeks to influence ongoing negotiations as well as to obtain urgently needed information on a subject of vital importance to the employees.

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[9] Contrary to the Company's contention (Br 32), *Newport News Shipbuilding & Dry Dock v. NLRB*, 631 F.2d 263, 266-67 (4th Cir. 1980), held an informational work stoppage unprotected solely because it was in breach of a contractual no-strike clause (an issue discussed below, pp. 34-38), and did not hold that the work stoppage was unprotected "regardless of the labor contract." The court distinguished, but did not disapprove, *Empire Steel Mfg. Co.*, 234 NLRB 530, 533-34 (1978), which squarely held protected a meeting "where information regarding a concern of the employees was related to them" (631 F.2d at 267), and which began during lunch period, but ran 5 to 10 minutes into work time.

2. The employees' conduct was not in breach of contract

The Act does not protect a strike or work stoppage in violation of a contractual prohibition. *See NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 344 (1939); *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1029 (D.C. Cir. 1986). However, a contractual waiver of the right to strike, like other contractual waivers of rights under the Act, "must be 'clear and unmistakable.'" *IBEW Local 1395 v. NLRB*, 797 F.2d at 1029 (citations omitted). Here, the Board unanimously (A 595 n.6, 599 n. 7, 617, 619) found that the employees' job action did not violate the contractual no-strike clause. As shown below, the Board's conclusion was proper.

Initially, the Board found (A 619) that the employees did not engage in a strike. Section 501(2) of the Labor Management Relations Act (29 U.S.C. § 142(2)) defines the term "strike" as including "any strike or concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." The Board, however, has declined to interpret the term broadly in determining whether concerted activity is in breach of contract and therefore unprotected. Rather, it has limited the term to "conduct intended to bring pressure upon an employer to change his ways." *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978). Here, although the Board found (A 597) that the employees hoped to persuade the Companies to employ them at Bethel, they did not attempt to compel this result through the use of economic pressure.

As noted above, pp. 27-28, they always intended to return to work on May 29, and, if permitted to do so, could have completed all of the day's scheduled work except for a few missed deliveries which, under the Companies' established practice, would not have resulted in discipline. The element of economic coercion inherent in the concept of a "strike" is thus absent here.

The Companies further contend (Br 27-29) that the employees' action, even if not a "strike," violated the further contractual prohibition against "work stoppages or other concerted interferences with normal operations." However, the contract here does not prohibit all strikes, work stoppages, or concerted interference with normal operations, but only those which are "authorized." The contract also specifically defines "authorized" to mean, "specifically authorized or ratified by the General Executive Board of the International Union or . . . called or sanctioned, directly or indirectly, by representatives of [T]eamsters Local No. 1035." (A 323-24.) The case thus differs from *IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1028, 1034-35 (D.C. Cir. 1986), where the contract prohibited, without qualification, "*any* strike . . . or other curtailment of work" (emphasis added), and also, unlike the contract here, obligated "*each employee covered by the agreement*" to assist the employer (a public utility) in maintaining its service to the public, thereby "preclud[ing] any argument that only union-authorized strikes are covered." 797 F.2d at 1035 & n.7 (emphasis added by Court).

The Board, in finding (A 617) that the employees' job action was not in breach of the contractual no-strike clause, expressly relied on the language of the contract here, which, unlike the language in *IBEW Local 1395,* clearly prohibits only union-authorized strikes or job actions. To read it, as the Companies do, as prohibiting all strikes or other work stoppages or concerted interference with normal operations would render meaningless the word "authorized" in Section 1 of the no-strike clause and the definition of that term in Section 2. This would violate the principle, recognized by the Companies (Br 26), that "'every word in an agreement should be given meaning.'" *Guardsmark LLC v. NLRB*, 475 F.2d 369, 378 (D.C. Cir. 2007) (quoting *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 170 (D.C. Cir. 1981)). The Board's construction of the contract, on the other hand, complies with that principle by treating the language in question as limiting language. *Cf. Silver State Disposal Service, Inc.*, 326 NLRB 84, 86 (1998) (clause stating "the Union shall neither call, encourage, nor condone any work stoppage" does not prohibit employees from engaging in unauthorized work stoppages).

The only extrinsic evidence the Company cites to support its argument that the no-strike clause should be read broadly in contradiction of its plain language is the testimony of Union Secretary-Treasurer Christopher Roos that he believed (although he was not sure) that the contract prohibited an authorized "wildcat" strike. (A 117.) However, Roos admitted that he had played no part in the

negotiation of that contractual language, which existed prior to his becoming secretary-treasurer or a business agent, nor had he ever participated in an arbitration proceeding involving an interpretation of the no-strike clause. (A 118-19.) The subjective belief of an individual not involved in contract negotiations cannot broaden a no-strike clause beyond its plain language; only the mutual agreement of the parties can do so. *See IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). There is no evidence here that the negotiators of the no-strike clause agreed that it would cover unauthorized strikes. Moreover, Roos testified that, to him, a "wildcat" strike meant a violent strike – one where the employees "go out ripping the place apart and . . . walk off the job and kind of cause a ruckus. . . ." (A 124). The employees' action here plainly did not meet this definition. Accordingly, the Board was warranted in finding that Roos' interpretation of the no-strike clause was entitled to no weight (A 611, 617 n.52) and that the clause covered only union-authorized job actions (A 596 n.7).

It is clear that the job action was not "authorized" within the meaning of the contractual no-strike clause. It was certainly not authorized or ratified by the international union; there is no evidence that any officer of that union even knew about it. Nor did anyone from the local union authorize it. It is undisputed that the employees did not consult Secretary-Treasurer Roos, Business Agent Hammond, or any other official of the local union before leaving work. (A 38-39, 60, 83-84,

147-48, 160.) It is also undisputed that, when the drivers arrived at the Union's hall, both Hammond and Roos expressed strong disapproval of their action, with Hammond using an expletive, and both called upon them to return to work immediately. (A 40, 62, 86-88, 127-29, 149, 162-64, 186-88.) Finally, Shop Steward Gary Everett (who could not authorize a strike in any event (A 283, 520)) expressed disapproval of the drivers' action and accompanied them to the Union's hall only when they insisted, unanimously, on going anyway. (A 125-26, 135, 183-85.) Thus, the job action was employee-initiated and carried out against the Union's wishes. The Board therefore properly found that it was not an "authorized" strike prohibited by the contract.

3. The employees' conduct was not in derogation of the Union

The Companies contend (Br 34-35) that the employees' action was unprotected because it was in derogation of the Union's status under Section 9(a) of the Act (29 U.S.C. § 159(a)) as the exclusive bargaining representative of the unit employees. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 60-63, 66-70 (1975), the Supreme Court held unprotected an attempt by minority employees to bargain separately with their employer about the elimination of all alleged racial discrimination. The Court stressed the need to avoid "fragmentation of the bargaining unit along racial or other lines," the employer's "strong and legitimate objections to bargaining on

several fronts," and the union's "legitimate interest in presenting a united front . . . and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests." 420 U.S. at 70. None of those concerns are present here.

Where the employees do not attempt to bargain directly with their employer, the Board will still find their action unprotected if they present demands inconsistent with the position of their bargaining representative. *See, e.g., River Oaks Nursing Home,* 275 NLRB 84, 86 (1985). However, employee activity in support of the union's bargaining position remains protected, for it neither divides the bargaining unit nor compels the employer to bargain on two fronts. *See East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 999-1000 (1982), *enforced*, 710 F.2d 397, 400-03 (7th Cir. 1982).

In this case, the employees, although seeking to meet with representatives of management, never attempted to bargain with those representatives. As the Companies note (Br 33), the employees here "*did not* seek to put pressure on the [Companies] to change a term or condition of employment." This is in contrast to the situation in *Emporium*, 420 U.S. at 60-61, where there was a specific finding that the dissident employees had attempted to engage in separate bargaining.

Further, although the employees presented no specific demand to the Companies, the Board found (A 597) that their objective was their retention after

the merger of the Vetrano and Burt's facilities. This was exactly what the Union was seeking in bargaining. It had demanded in a prior bargaining session that all the unit employees be hired at Bethel after the merger (A 102), and it adhered to that position at subsequent sessions (A 20, 106, 229, 263-64.) Thus, the Companies did not have to deal with two separate sets of demands; the Union and the employees were taking the same position. Moreover, since all the unit employees joined in the job action, the bargaining unit was not fragmented, nor was the Union's ability to present a united front impaired.

The Companies rely (Br 34-35) not on any substantive difference in position between the employees and the Union, but solely on the Union's expressed disapproval of the employees' tactics. However, the Union did eventually agree to the employees' remaining at the union hall for a limited period of time to introduce themselves to management, and the employees did not exceed the terms of that agreement. It is not necessary, for employee action to be protected, that the union expressly approve it. *See East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 401 (7th Cir. 1983) (union's instructions to strikers to return to work did not render strike unprotected).

D. The Refusal to Hire the Employees at Bethel was Motivated By Union Animus

As an independent basis for finding unlawful the refusal to hire the five terminated drivers at the Bethel facility, the Board found (A 595-96 n.6, 620-23)

that it was motivated by a desire not to hire a significant number of unionized drivers at the facility. This finding involved application of the test announced in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), and approved in *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393 (1983). Under that test, a violation of the Act is established upon the General Counsel's showing that an employer's opposition to an employee's protected union activity was a motivating factor in the employer's decision to take adverse action against the employee, unless the employer can show, as an affirmative defense, that it would have taken the same action even in the absence of the protected conduct. *See NLRB v. Transportation Management Corp*., 462 U.S. at 397, 401-03; *Ark Las Vegas Restaurant Corp. v. NLRB,* 334 F.3d 99, 104-05 (D.C. Cir. 2003).[10] As shown below, the record in the case amply supports the Board's finding of unlawful motivation.

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[10] In *FES (a Division of Thermo Power)*, 331 NLRB 9, 12 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002), the Board announced two additional requirements for finding an unlawful refusal to hire: that the employer was hiring or had concrete plans to hire at the time of the alleged discrimination, and that the applicants had the experience or training relevant to the announced or generally known requirements for the job (or that those requirements were not uniformly adhered to or were pretextual or applied as a pretext for discrimination). The Board found here (A 624) that the first requirement was satisfied by evidence that the Companies hired six new drivers at Bethel within a month after the discriminatees applied there, and the second by evidence that each of the discriminatees had a CDL license, the most significant qualification mentioned in the Companies' advertisements for drivers. (Collins, whose CDL license was suspended soon

First, the Companies' union animus is clear from the testimony of their own consultant, Alex Reveliotty, that Northeast President Mancini did not want either to recognize the Union at Bethel or to hire the former Vetrano drivers. (A 231, 232.) In contrast, the Companies hired non-bargaining unit employees who had worked at Vetrano: Operations Manager Vetrano, sales personnel, and a foreman. (A 175-78.) Of course, hiring those individuals did not create a risk of bringing in the Union.

The Companies' misleading statements to the Union about job availability at Bethel also support the finding of union animus. The Companies repeatedly asserted at the bargaining table that no jobs were available for the employees at Bethel even as they placed advertisements for drivers in local newspapers. (A 226, 360, 368.) When confronted with the advertisements, they asserted, contrary to the plain language of the advertisements, that they were only for warehousemen. (A 104, 107.) The Board reasonably inferred (A 621-22) that the attempt to conceal

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afterwards, had applied in the alternative for work as a helper or warehouseman (A 374) and was qualified for both positions). Moreover, the discriminatees here, unlike those in *FES*, were not strangers to the Companies, but were former employees terminated when their job site closed and now seeking employment at another of the same employer's facilities. Their situation is thus closely analogous to that of a predecessor's employees whom a successor employer refuses to hire — a situation governed by *Wright Line,* not by *FES. See W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1347-48 (D.C. Cir. 2008).

job availability was designed to discourage union members from applying. *See Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 231 (D.C. Cir. 1995).

It is undisputed that the discriminatees were good workers; upon the closing of Vetrano, Operations Manager Vetrano told each one that he was a good worker and that he (John Vetrano) would be happy to give him a good reference. (A 46, 68, 94, 152, 165.) Two of them, Johnson and Marczewski, had worked for Vetrano for more than a year. (A 57, 145.) They were thus familiar with the Vetrano routes which were now being serviced from Bethel. In addition, the high turnover rate among drivers, as well as the anticipated increase in the work load at Bethel due to the closure of the Vetrano facility, led to heavy hiring at Bethel in June. (A 173-74.) Nevertheless, the Companies did not hire or even interview the Vetrano drivers, while they hired numerous drivers without comparable experience. The preference for inexperienced employees over experienced ones supports an inference of discrimination. *See Great Lakes Chemical Corp. v. NLRB*, 967 F.2d 624, 628-29 (D.C. Cir. 1992); *W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1349 (D.C. Cir. 2008).

The Board also relied (A 622) on the pretextual nature of the Companies' stated reasons for refusing to hire the discriminatees. In particular, it noted that Bethel Operations Manager James Davenport testified that he preferred employees who lived close to Bethel and would not hire anyone living in Bristol. (A 276.)

However, the three Vetrano drivers who were offered jobs in Bethel–Fedor, Pignatella, and Everett–all lived in Bristol (A 392), while discriminatee Bosques lived in Waterbury. (A 384.) Moreover, the record shows that several salesmen and members of management lived near Hartford, which is farther from Bethel than Bristol is. (A 282, 389-96.) These include John Vetrano (West Simsbury), Sales Manager Anthony Tornaquindici (West Hartford), Merchandiser Fred Bergeron (Southington), office employee Catherine Vetrano (Bristol), warehouseman Joshua Wilbur (Sharon), and sales employees Virginia Aiken (Bristol), Paul Lipinski (Farmington), Jeff Nelson (Coventry), and Bruce Thompson (Bristol). (A 393, 395, 396.) Moreover, none of the advertisements for Bethel employees, including those for drivers, indicated a geographic preference. (A 281.) The discrediting of the stated reason for refusing to hire the former Vetrano drivers supports an inference that the real reason was union animus. *See Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995).

The Companies point out (Br 37-38) that the three drivers not discharged because of the May 29 job action were offered jobs at Bethel.[11] However, it is

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[11] The Companies also assert (Br 37) that the Union never told them which drivers wanted jobs at Bethel. However, the record clearly shows that the Union repeatedly told the Companies that all the drivers (except Pignatella, who was not a discriminatee) wanted jobs at Bethel. (A 20, 105-06, 199, 227, 229.) Moreover, it is undisputed that all five discriminatees went to Bethel and applied in person for jobs. (A 47-48, 69-70, 95-96, 152-53, 165-66, 363-67, 369-88.) Accordingly, the

settled that the hiring of some prounion employees does not preclude a finding that the refusal to hire others was discriminatorily motivated. *See Great Lakes Chemical Corp. v. NLRB*, 967 F.2d 624, 628 (D.C. Cir. 1992). Moreover, only on June 14 did the Companies indicate that the three remaining Vetrano drivers could apply for jobs at Bethel. (A 29, 284-85.) By then, they knew that Pignatella was unlikely to do so. (A 106, 208.) The Companies had indicated that Fedor would be offered a supervisory position, which would take him out of any bargaining unit. (A 103.) Thus, their offer would have added only one union supporter, Everett, to the employee complement at Bethel. *Cf. Elastic Stop Nut Division of Harvard Industries v. NLRB*, 921 F.2d 1275, 1278, 1281 (D.C. Cir. 1990) (unlawful refusal to hire found where successor employer offered jobs to 68 of predecessor's 242 bargaining unit employees).

The Companies contend (Br 38) that, even in the absence of union animus, they would have refused to hire the five drivers because of their role in the May 29 job action. We have shown above, pp. 22-39, that the job action was protected activity, and that the drivers therefore could not lawfully be discharged for engaging in it. Accordingly, that protected activity cannot be the basis of a successful *Wright Line* defense.

Companies cannot seriously contend that they were unaware that the discriminatees wanted to be hired at Bethel.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANIES VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY BYPASSING THE UNION AND DEALING DIRECTLY WITH AN EMPLOYEE CONCERNING SEVERANCE PAY

The complaint here did not allege, nor did the Board find, that the Companies were obligated to bargain about the decision to consolidate the Bristol and Bethel facilities and operate solely from Bethel.[12] However, it is settled that an employer is required to bargain about the effects of a managerial decision on unit employees, even when bargaining about the decision itself is not required. *See First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 681 (1981). In particular, severance pay for employees terminated as a result of such a decision is a mandatory subject of bargaining. *See Honeywell International, Inc. v. NLRB,* 253 F.3d 125, 127, 131-32 (D.C. Cir. 2001).

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[12] The Companies informed the Union that its labor costs were at least as high at Bethel as at Bristol. (A 231.) They also advised the Union that the decision to consolidate in Bethel was due to the larger size of the existing Bethel facility and its proximity to the majority of the Companies' customers. (A 260.) No amount of bargaining could have altered the latter two facts. Compare *Food and Commercial Workers Local 150-A v. NLRB,* 1 F.3d 24, 30-32 (D.C. Cir. 1993) (relocation decision motivated by labor costs held mandatory subject of bargaining) with *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 687-88 (1981) (partial closing due to third party's reduction in fee paid to employer held not mandatory subject of bargaining).

An employer may not bypass its employees' bargaining representative and bargain directly with the employees, for the obligation to bargain with the statutory representative "exacts the negative duty to treat with no other." *Medo Photo Supply Corp. v. NLRB,* 321 U.S. 678, 684 (1944) (citations omitted). Accord *Toledo Typographical Union No. 63 v. NLRB,* 907 F.2d 1220, 1222, 1223-25 (D.C. Cir. 1990). In particular, a unilateral grant to employees of concessions greater than those previously offered to their union "is necessarily inconsistent with a sincere desire to conclude an agreement with the union." *NLRB v. Katz,* 369 U.S. 736, 745 (1962). Both these principles apply to effects bargaining. *See, e.g., Royal Typewriter Co.,* 209 NLRB 1006, 1014 (1974), *enforced,* 533 F.2d 1030, 1039-40 (8th Cir. 1976).

Here, the Companies, at the last effects bargaining session, held on June 14, 2002, offered the Union $15,000 in severance pay for employee Chris Fedor, but only $10,600 for Gary Everett and $11,600 for Joe Pignatella. (A 25, 108.) However, 2 or 3 days later, Company Consultant Reveliotty phoned Everett and said that the Companies would offer each of the three employees $15,000. (A 133). Only on June 19, in a voice mail to Union Secretary-Treasurer Roos (A 111) and a letter to union attorney Adler (A 358-59) did the Companies make this higher offer to the Union.

The Board unanimously (A 598 n.1, 624-25) found unlawful direct dealing on these facts. It discredited the testimony of company attorney Budd that he had made the same offer to union attorney Adler on June 17 that Reveliotty had made to Everett, and instead credited Adler's testimony that the June 17 offer to him was conditioned on Fedor's accepting a job at Bethel instead of severance pay (A 27, 31), whereas the offer from Reveliotty to Everett was unconditional. (A 624.) The Board noted (*id.*) that Adler's contemporaneous note of the telephone conversation with Budd (A 34-35, 362) supported his testimony, whereas Budd, who customarily confirmed his oral offers to the Union in subsequent written letters or faxes (A 341-42, 348-49, 353-55, 357), failed to produce any such written confirmation of the alleged June 17 offer, nor did he take notes of the telephone conversation. (A 212.)

The Companies contend (Br 38-40) that their offer of increased severance pay to Everett was proper because he was the union steward and a participant in the effects bargaining sessions. However, the offer resulted from a chance encounter between Everett and Reveliotty in which Everett characterized the prior offer as an insult to him and employee Pignatella, not as an insult to the Union. (A 132.) When Reveliotty phoned Everett to advise him of the revised offer, he did not say that he was making the offer to Everett as a representative of the Union or

that Everett should inform the Union of it. (A 133.)[13] There is no evidence that the Union advised the Companies, or otherwise gave them reason to believe, that Everett, rather than Secretary-Treasurer Roos or attorney Adler, was the proper person to whom bargaining proposals should be made. Moreover, the Companies also communicated their revised offer to Pignatella, whose role in negotiations was minimal and who was not even at the last two bargaining sessions. (A 23, 26, 56, 134.) The offer was plainly communicated to him as an employee, and the communication strongly suggests that the Companies likewise made the offer to Everett as an employee, rather than as a union representative.

In *Kurdziel Iron of Wauseon, Inc.,* 327 NLRB 155, 156, 160, 162 (1998), relied on by the Companies (Br 40), the member of the union's negotiating committee not only initiated the conversation with the plant manager about increased benefits, but insisted on an immediate answer to the question whether decertification of the union would result in increased benefits. The Board noted that the employer had taken no action as a result of the conversation, and held that merely answering a union negotiator's question away from the bargaining table is not direct dealing. 327 NLRB at 162. Here, the Companies did not merely answer

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[13] Reveliotty testified (A 226) that Budd informed him, incorrectly, that he had already made the offer to the Union.

a question by Everett, but made a specific offer of increased benefits, not to the Union but to him, in response to his complaint.

Similarly, in *Colorado-Ute Electric Assn.,* 295 NLRB 607, 622 (1989), *reversed on other grounds,* 939 F.2d 1392 (10th Cir. 1991), the union steward's complaint related, not to the employer's bargaining position, but to the size of the wage increase she received under the employer's merit pay system. This was the functional equivalent of filing a contractual grievance, and a steward who files such a grievance is no less acting as an employee representative because the grievance relates to her own pay or benefits. *Cf. NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 832 (1984) (employee who invokes contractual right is acting on behalf of all employees). In contrast, Everett's complaint related to the substance of the Companies' severance pay proposal – that is, to an offer of contract terms, not to enforcement of existing terms. A complaint of the former type, unlike the latter, is one that an individual employee can make without necessarily being a representative of the other employees. Moreover, in *Colorado-Ute,* as in *Kurdziel* but unlike this case, the employer did not promise the steward an additional merit increase, but only promised a further review at the time appropriate under the contract. 295 NLRB at 622-23. Such a promise is too indefinite to constitute direct dealing. The same cannot be said of a specific offer to increase benefits to a level beyond that offered to the Union.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for review should be denied and that the Board's Order should be enforced in full.

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June 2008

ADDENDUM

Relevant portions of the National Labor Relations Act, as amended (29 U.S.C. §§ 151 et seq.):

Section 2(9) (29 U.S.C. § 152(9)):

Sec. 2. When used in this Act –

* * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee.

Section 7 (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8 (29 U.S.C. § 158):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in exercise of the rights guaranteed in section 7 [section 157 of this title];

*** * * ***

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

*** * * ***

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).

Section 9(a) (29 U.S.C. § 159(a)):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been give the opportunity to be present at such adjustment.

Section 10(e) (29 U.S.C. § 160(e)):

(e) The Board shall have the power to petition any court of appeals of the United States . . . wherein the unfair labor practice occurred or wherein such person resides or transacts business, for the enforcement of such order . . . No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such object shall be excused because if extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . .

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11, 952 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 27th day of June, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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