FINAL BRIEF

Nos. 06-2105, 06-2183

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EVERGREEN AMERICA CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 1964, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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

DAVID A. FLEISCHER
Senior Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570
(202) 273-2987

RONALD MEISBURG
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
AILEEN A. ARMSTRONG
Deputy Associate General Counsel
ROBERT J. ENGLEHART
Supervisory Attorney

National Labor Relations Board

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Heading – Cont'd **Page(s)**

TABLE OF CONTENTS

Heading – Cont'd **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

TABLE OF AUTHORITIES

Cases --cont'd: **Page(s)**

Statutes **Page(s)**

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 06-2105, 06-2183

EVERGREEN AMERICA CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

LOCAL 1964, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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

No. 06-2105 is before the Court on the petition of Evergreen America Corporation ("the Company") to review an Order of the National Labor Relations

Board ("the Board"). No. 06-2183 is before the Court on the Board's cross-application for enforcement of its Order. Local 1964, International Longshoremen's Association, AFL-CIO ("the Union"), has intervened in support of the Board.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (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)), as the Company transacts business within this circuit. The Board's Decision and Order, issued on September 21, 2006, is reported at 348 NLRB No. 12 (A 1131-1218.)[1] The Company filed its petition for review on October 17, 2006. The Board filed its cross-application for enforcement on November 9, 2006. 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 the Board is entitled to summary enforcement of the portions of its Order based on uncontested findings of violations.

---

[1] "A" references are to the printed appendix. "Tr" references are to transcript pages not included in the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by soliciting employee grievances, promising benefits, and threatening loss of benefits and other reprisals.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by granting unprecedented large across-the-board wage increases, an unusual number of promotions, and other benefits, to discourage employees from supporting the Union.

4. Whether the Board acted within its broad remedial discretion in ordering the Company to bargain with the Union as a remedy for its numerous, serious, and extensive unfair labor practices.

STATEMENT OF THE CASE

On unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint, which alleged that the Company had committed numerous violations of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) and that a bargaining order was necessary to remedy those violations. (A 1136-38; 84-86, 304-06, 327-36.) After a lengthy hearing, Administrative Law Judge Steven Fish issued a decision sustaining most of the allegations in the complaint, dismissing others, and recommending a bargaining order to remedy the violations found. (A 1136-1218.) The Company and the General Counsel filed exceptions.

The Board (Chairman Battista and Members Liebman and Walsh) affirmed most of the administrative law judge's findings of violations and his conclusion that a bargaining order was necessary to remedy those violations. The Board ordered the Company to cease and desist from the unlawful conduct, to bargain with the Union upon request, and to take other affirmative remedial action. (A 1131-36, 1217-18.) The Company filed a petition for review in this Court, and the Board filed a cross-application for enforcement.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Union's Organizational Campaign

In late March 2002, a representative of the Union met with two clerical employees who worked for the Company at the Maher Terminal in Port Elizabeth, New Jersey. Subsequently, on April 15, Union President Bob Levy met with 30 to 40 employees at the Holiday Inn in Elizabeth. Levy explained the organizing process and distributed union authorization cards which, he said, would authorize the Union to represent the employees. (A 1141; 9-11.)

Some authorization cards were signed at the meeting. Others were given to employees who distributed them to other employees; both groups of employees obtained signed cards from still other employees. By June 15, 2002, 62 of the 115

employees in the appropriate bargaining unit had signed authorization cards. (A 1132-33, 1142-49; 374-88, 395-99, 402-68, 523-70, 687.)

On June 4, the Union filed a petition for an election among the Company's clerical employees in northern New Jersey. (A 1131; 344 n.2.) The election was held on July 17, and the Union lost by a vote of 61 to 52. (A 1131; 344.)[2]

B. The Unfair Labor Practices

The Board found (A 1131, 1133) that the Company violated Section 8(a)(1) of the Act by unlawfully interrogating employees on 13 occasions; soliciting employee grievances and implicitly promising to remedy them on 15 occasions; explicitly making the same promise on 8 occasions; threatening reprisals on 9 occasions (A 1152-59); twice instructing employees not to attend union meetings and not to read union literature, but to throw it away; and once creating the impression those employees' union activities were under surveillance. The Board further found (A 1132, 1133) that the Company violated Section 8(a)(3) and (1) of the Act by granting unprecedented large across-the-board wage increases to bargaining-unit employees, and promoting an unprecedented number of such

[2] The Board, in addition to issuing a bargaining order, set aside the election because of the Company's unfair labor practices. (A 1135.)

employees prior to the election and by granting 8 other benefits, before and after the election, to dissuade the employees from supporting the Union.

Of the foregoing violations, the Company defends only speeches by Company President Thomas Chen on May 23 and July 16, 2002, found to constitute unlawful solicitations of grievances and promises of benefits; a letter to employees by 8 supervisors on the day of the election, found to be an unlawful threat of reprisals; and the wage increases, promotions, and granting of 5 other benefits. Only the factual findings related to the contested violations are set forth below.

1. Solicitation of grievances and promises of benefits

On May 23, Company President Thomas Chen conducted a meeting of all bargaining-unit employees, divided into two groups, in a large conference room. He read from a prepared speech, saying, "[L]et me state very clearly that we do not believe a union is in anyone's best interest and that all of our mutual concerns can be best addressed directly and without intermediaries who are strangers to our company." (A 1165; 734.) Chen added that, to improve the work atmosphere, he had asked some of the managers to consider what issues were important to the staff; that they were reviewing flexible hours, compensatory time off instead of overtime pay, a change in the semiannual review process, and a new cross-training system; that management was committed to improving the way information was

exchanged, and that if employees had any recommendations for improvement, management was happy to listen to and consider them. (A 1165; 737-38.)

Chen also informed the employees that the Company was reviewing its compensation package. He said, "[R]emember, we are committed to improving the quality of the communications between management and staff and making [the Company] a better place to work. To this end, we encourage all of you to feel free to express your views on how we can make this company a better place to work. I cannot promise you we will always agree, but I can promise you we will always listen." (A 1166; 740.)

In another speech to employees, on July 16, Chen said that "during this campaign, our management has been made to realize that we are far from perfect. I hope you will give [the Company] a chance to do better in the future" and that "[i]f [the Company] does not make the effort to deal with our employees' concerns now, we are simply giving renewed opportunities for unions to come into our workplace." After talking about the Company's policy of reevaluating its health-care and other employee-benefit programs, he added, "I hope you will give [the Company] one year to address your concerns. If you are not satisfied by the end of that period, you have the option to make this decision again." He concluded, "Let's make the best of this situation by giving [the Company] a chance. Please vote 'no' to [the Union] tomorrow." (A 1166; 741-44.)

2. Threats of Reprisals

On July 17, the day of the Board election, the Company distributed a letter, signed by 8 of its supervisors, including 4 junior vice presidents, to all unit employees. The letter read, in pertinent part (A 1134, 1158; 507-08):

* * * *

> We care deeply that the EGA we all have built over the years will change forever for the worse if Local 1964 is permitted to represent the employees of EGA. We care that the largest container lines will be impacted in a negative way forever. We care that a choice for Local 1964 will prevent what could be—greatness.
>
> All of our managers have come up through the company. EGA has always, and still does, practice a policy of promotion from within. Under a union environment, this may not be possible. We all have had to work very hard over the years. Things have not always been easy for us. We are like all EGA employees. Many EGA managers have been asked, "Why do you stay?" Our answer is: In EGA, we see a *good* company that could be *great.*
>
> Top management at Evergreen America, as well as Evergreen Taipei, have tried to ask for your continued support over the past few weeks. We ask that you give them this chance for greatness.

* * * *

> Most of us agree that EGA is a good company to be part of. Most of you realize that EGA could be a great company. EGA has this potential that has not yet been realized. The potential to become a great company is very close. We will never be able to achieve greatness within the union atmosphere.
>
> We *trust* and we *know* that Evergreen America management is committed to achieving greatness. And to improving this company and its employees. Do not settle for mediocrity. Do not give up your future. Together, we can realize the dream of all.
>
> Help us make Evergreen America the great company that it has the potential to be! Decline unionization at this time. Give us the chance to become great together.

3. Wage Increase

At least since 1988, the Company has evaluated employee wage rates annually in the spring. Wage increases, if any, are normally effective July 1. (A 1184; 223-24.) In 1999, the Company did not give its employees a wage increase because business was bad and it had incurred costs due to the restructuring of its offices. (A 1183, 1184 & n.112; 225.) On July 1, 2000, the Company gave wage increases to 82 of the 84 employees in bargaining-unit positions. All employees, except 2 who were newly hired, received a $100 per month cost-of-living increase, and most received performance-based increases up to $125 per month. (A 1185; 773-79.) The average increase for all of the Company's employees nationwide was 4.46 percent. (A 1184-85, 1191; 226, 780.)

The employees did not receive a wage increase on July 1, 2001, because business was bad. However, in October 2001, 68 of the 86 employees in bargaining-unit positions received performance-based wage increases. One employee received an increase of $425 per month, but 59 of the increases were between $75 and $175 per month, and 5 others were $225 per month. The average increase for all of the Company's non-management employees nationwide was 2.6 percent. (A 1182-83 & n. 107, 1185-86; 227-28, 784-90.)

During late 2001 and early 2002, various members of management told numerous bargaining-unit employees, in one-on-one conversations and in

departmental meetings, that the Company was doing badly and would have to cut costs. After the Union's organizational campaign began, members of management made similar remarks to several employees, but indicated that the employees would nevertheless get a pay raise. (A 1183; 24, 58, 80, 87, 113, 178, 202-03.)

Effective July 1, 2002, the Company granted a pay raise of $400 per month to all bargaining-unit employees. (A 1182; 469-79, 796-801.)

4. Promotions

All bargaining-unit employees were classified as either General Schedule ("GS") employees or assistant managers ("AMs"). The GS employees and AMs performed essentially the same job functions, but the AMs were paid $150 per month more, and only AMs were eligible for promotion to district manager, a supervisory position. (A 1193; 211, 284-86.)

The Company promotes employees on January 1 and July 1 each year. In 1999, the same factors that led the Company not to grant a wage increase also led it not to promote anyone. In 2000, it promoted 10 employees throughout the country from GS to AM in January, and 6 or 7 employees in July. Only one employee in the New York area was promoted in January and none in July. In 2001, 25 employees, including 5 in the New York area, were promoted from GS to AM in January, and 6 or 7 employees, none in the New York area, were promoted in July. (A 1194-95 & nn. 135, 137, 138; 244-45, 247, 249, 287, 296-98, 805-09.) Only 2

or 3 employees, all in Salt Lake City, were promoted in January 2002. (A 1195-96; 250.)

In June 2002, 62 bargaining-unit employees were GS employees and 53 were AMs. On July 1, the Company promoted 45 employees nationwide from GS to AM, including 20 employees in the bargaining unit. (A 1195-96; 299-300, 366-67, 469-79.) The unit employees promoted included Chris Yu and Fanny Kong, who had not received pay raises in 2001 because of poor evaluations, and Sherry Yao, who had worked for the Company for 13 years, but had not been promoted despite repeated recommendation by her former supervisor. (A 1194, 1197-98; 137-41, 149-53.) In notifying Yu of her promotion, her supervisor, Kevin Huang, told her that the Union was no good, asked her how she intended to vote in the coming Board election,[3] and, when she said she was undecided, said that the Company treated employees well and urged her not to let the Company down. (A 1197; 148-49.) Prior to her promotion, Yao had been called into the office of Vice-President Jimmy Kuo, who, after saying that the Union was no good for her, was controlled by the Mafia, and was just trying to take money, asked whether she

[3] In a subsequent telephone conversation with Yu on the day before the election, Huang not only interrogated her, but also threatened that if the employees chose the Union, the Company would be closed. (A 1152, 1153, 1159, 1161 & n. 69, 1162.)

had any suggestions of how the Company could change. Yao replied that she had worked for the Company for a long time and had never been promoted. (A 1164, 1194, 1198; 136-38.)[4]

5. Other grants of benefits

Prior to 1997, the Company required all employees to wear "appropriate business attire," which for men included a jacket and tie. In September 1997, the Company permitted employees to wear "business casual attire" on Fridays, but still prohibited "inappropriate" attire, such as sneakers, sandals, shorts, cutoffs, tank tops, micro minis, overalls, and (after 1999) tennis shoes, jeans, and sweat suits. (A 1177; 717, 733.)

In the pre-election meetings where, the Board found (A 1170), Supervisors Grogg and Siniscalchi unlawfully solicited employee grievances, at least one employee suggested allowing casual dress every day. (A 1162; 72.) On July 19, 2002 ─ 2 days after the Board election – the Company notified its employees by e-mail that, beginning on July 22, "business casual dress" would be permitted every day until Labor Day. (A 1177; 724.) At meetings of two departments in late August, employees asked whether business casual dress would be permitted year-

[4] Human Resources Manager Mike Liu also promised Yao benefits on the day of the Board election by saying that he would try to improve the Company's grievance procedure. (A 1164-65, 1173.)

round. On August 29, the Company announced that it would be. (A 1177-78; 715, 720, 722-23.)

Prior to 2002, the Company allowed employees 12 days per year of sick leave, with no carryover of unused leave to subsequent years. The sick leave could be used only for the employee's own illness. After employees complained about this policy, the Company changed it, effective October 1, 2002, to allow employees to use half of their sick days for illness of family members and to carry over any unused sick leave to the following year. (A 1179; 30, 53, 754-55.)

As of March 1, 2002, the Company gave its employees 9 full-day holidays, 2 half-day holidays, and 3 floating holidays each year. The full-day holidays included Martin Luther King Day, but Good Friday was not a holiday. (A 1180; 846.) During 2000 and 2001, employees at the Company's Baltimore and Chicago facilities suggested that Good Friday be substituted for Martin Luther King Day as a holiday, or that the employees have a choice of which one to take off. The Company rejected these suggestions. However, in early October 2002, the Company announced that, beginning in 2003, employees could choose to take either day off as a paid holiday, as long as at least one-third of the staff worked each day. (A 1180; 31-34, 754-55.)

The Company decides each year, based on financial concerns, whether to offer its employees a voluntary separation (early retirement) program, under which

retiring employees receive severance pay and continued medical coverage for themselves and their spouses. In 1995, the Company offered early retirement to employees who were 55 or older. From 1996 through 1999, the Company did not offer an early retirement program. On September 29, 2000, it offered such a program to employees who were at least 60 and had worked for the Company for at least 15 years. (A 1181; 1080-81.)

The Company did not offer an early retirement program in 2001. On October 21, 2002, it offered the program with the same eligibility requirements as in 2000. (A 1181; 1106.) However, a 57-year-old employee with a heart problem asked to be allowed to participate in the program. On November 5, 2002, the Company announced that any employee who was at least 57 and had worked for the Company for at least 15 years could participate in the early retirement program. (A 1181; 352-53, 1107.)

The Company holds a year-end holiday party at all of its offices every year. Prior to 2002, only employees were invited to these parties. (A 1181; 74.) At one of the meetings conducted by Supervisors Grogg and Siniscalchi, an employee suggested that members of employees' families be permitted to attend the parties. (A 1182; 74.) At the 2002 holiday party, employees were permitted to bring a spouse or guest. (A 1181; 21.)

At holiday parties prior to 2002, the Company conducted raffles. The winners received gift certificates or electronic equipment, ranging in value from $25 to $200. Only employees who attended the parties were eligible for these prizes, and not all of them won. (A 1182; 55-58, 70-71, 121, 131-32.) At Christmas 2002, all of the Company's employees, whether or not they attended the party, received a $400 gift card, redeemable at various stores. (A 1181; 21-23, 57-58, 122, 131.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Walsh) found, in agreement with the administrative law judge, that President Chen, in his May 23 and July 16 speeches to employees, violated Section 8(a)(1) of the Act by soliciting employee grievances and implicitly promising benefits (A 1134, 1170, incidents 15, 17); that the 8 supervisors' election-day letter to employees violated Section 8(a)(1) by threatening loss of benefits and other unspecified reprisals (A 1134, 1158-59); and that the granting of unprecedented large across-the-board wage increases, an unusually large number of promotions, and other benefits violated Section 8(a)(3) and (1) of the Act. (A 1132, 1133,

1176-82, 1193, 1198.)[5] The Board further found, in agreement with the administrative law judge, that the Union had valid cards from a majority of the employees in an appropriate bargaining unit as of June 15, 2002 (A 1132-33, 1149); that the unfair labor practices described above, as well as the other unfair labor practices (summarized above, p. 5) not contested in this Court, rendered it unlikely that a fair rerun election could be held (A 1133-34, 1211-14); and that these unfair labor practices had not been effectively repudiated (A 1134), nor had the passage of time diminished their effect. (A 1135.) Accordingly, the Board concluded that a bargaining order was necessary to remedy the unfair labor practices. (A 1135.)

The Board ordered the Company to cease and desist from the conduct found unlawful and from in any other manner interfering with, restraining, or coercing employees in the exercise of their statutory rights; to bargain, upon request, with

---

[5] The Board reversed or declined to pass on findings of two unlawful threats of plant closure, one unlawful solicitation of grievances, and one unlawful interrogation. (A 1131 nn. 3, 5.) Chairman Battista dissented from or declined to pass on one finding of unlawful interrogation, two findings of unlawful promises of benefits to the same employee, the finding that the election-day letter contained unlawful threats, and, except as to 3 employees, the findings of unlawful promotions. (A 1131-32 nn. 3-6.)

The Board also adopted the administrative law judge's recommended dismissal of additional allegations of violations: (A 1155, 1157-58, 1173, 1174, 1175-76, 1206-08.) The allegations that were dismissed or not passed upon are not in issue in this Court.

the Union and embody any understanding reached in a signed agreement; and to post copies of an appropriate remedial notice. (A 1217-18.)

SUMMARY OF ARGUMENT

1. The Board is entitled to summary enforcement of the portions of its Order based on the numerous uncontested findings of violations. The contested findings must be considered in the context of which the uncontested violations are a part.

2. President Chen's speeches contained implied promises of benefits and were therefore outside the protection of Section 8(c). The promise that the Company would always listen to employee proposals for changes in working conditions implied that it would sometimes agree to make changes. The request for a year to address employee concerns was accompanied by a statement that failure to deal with those concerns would lead to renewed organizational efforts by the Union. The speeches effectively reaffirmed the prior solicitations of grievances and promises of benefits by lower-ranking company officials.

3. The Company's election-day letter to employees unlawfully threatened loss of promotional benefits and other reprisals. The statements that promotion of employees from within might not be possible under a union environment, and that employees, by selecting a union, would give up their future, settle for mediocrity and make greatness impossible for the Company, and might change the Company forever for the worse, were not phrased as possible results of collective bargaining

or as demonstrably probable consequences beyond the Company's control. Accordingly, they implied that the Company would make adverse changes in the employees' status to punish them for selecting the Union. The prior unlawful threats of plant closure strengthened this implication.

4. The granting of wage increases, promotions, and other benefits was designed to discourage support for the Union and was therefore unlawful. The wage increase exceeded the total increase for the previous 3 years for most employees, and all employees received the same increase, whereas the amounts of prior increases had always depended in part on individual employees' performance. The Company failed to show legitimate reasons for these departures from practice. The wage increases in prior years had been less than the private sector average, despite concerns about turnover and meeting competition. The Company's revenue and profits had not significantly increased prior to the decision to increase wages.

The Company promoted 20 unit employees from GS to AM after promoting only 6 in the preceding three years. Moreover, the promotions, like the wage increases, were granted without regard to employees' performance. The number of promotions did not increase at the Company's other facilities, where no union campaign was in progress.

The post-election grants of benefits were also unlawful. Many of these benefits had been requested by employees in response to the Company's unlawful solicitation of grievances. Some had been requested, but rejected by the Company, before the Union's organizational campaign. The Company failed to offer a legitimate reason for granting some of the benefits, and its asserted reasons for granting others were properly found pretextual.

5. The Board acted within its broad discretion in issuing a remedial bargaining order.

a. The Union had a valid authorization card majority. The Board properly counted cards which the signers promptly returned, signed, to the solicitors, even though the solicitors did not observe the actual signing.

b. The Company's unfair labor practices made a fair election unlikely. The unlawful wage increases, promotions, and threats of plant closure were "hallmark" violations with a lasting effect on employees that cannot be cured by traditional remedies. The 47 separate nonhallmark violations, viewed cumulatively, also had a substantial adverse effect on the election process. The wage increase and many grants and promises of other benefits and threats of reprisal directly affected all unit employees. The Company disseminated news of the unlawful promotions to all unit employees. The Company's president approved the unlawful wage increases and promotions and participated in several

other unfair labor practices. At least six vice presidents also made unlawful threats or promises. Threats and promises are likely to be taken seriously and viewed as official company policy when top officials make them. The Company's unlawful grants of benefits after the election showed its continuing opposition to the Union and the likelihood of further unlawful conduct in the event of a rerun election. They also fulfilled the prior unlawful promises of benefit.

c. The Company has not shown mitigating factors that would render a bargaining order inappropriate. The unfair labor practices clearly had a tendency to undermine the Union's majority, and the Board was not required to show that they actually caused its election defeat. The Company's contention that its lawful conduct alone caused the Union to lose its majority rests on indefinite and unreliable hearsay testimony about employees' subjective reactions. The Company did not effectively repudiate the threats of plant closure by vague apologies which did not mention the threats and were accompanied and followed by further unlawful conduct. The passage of 4 years did not make a fair election possible. Nor did the Company's bargaining under a court order which has expired, or its entry into a contract which will automatically be nullified if the Board's bargaining order is rejected, show that a fair rerun election can be held with neither the court order nor the contract in effect.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER BASED ON UNCONTESTED FINDINGS OF VIOLATIONS

As noted above, pp. 5-6, the Company, in its brief, does not contest many of the Board's findings of violations of Section 8(a)(1) of the Act. Of the violations set forth by the Board at A 1133, the following are uncontested: the 8 threats of plant closure and job loss; the 13 unlawful interrogations; 13 of the 15 solicitations of grievances and implied promises of benefits; the 8 explicit promises of benefits; the 2 instances of instructions to employees not to attend union meetings or read union literature; and the creation of the impression that employees' union activities were under surveillance.[6] The Company has thereby waived any possible objections to these findings, and the Board is entitled to summary enforcement of the portions of its Order based on them. *See NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991).[7] "Moreover, the Company cannot contest certain

---

[6] The Company does contend (Br 30-31, 41-43, 56) that some of these violations, especially the threats of plant closure and job loss, were effectively repudiated by subsequent statements by President Chen. We discuss this contention below, pp. 56-57, in connection with the discussion of the Board's bargaining order.

[7] These portions include all of paragraph 1 of the Board's Order (A 1217) except paragraph 1(g), and the corresponding portions of the required notice to employees. (A 1218).

charges in a vacuum by not contesting others. The unchallenged violations remain in the case, 'lending their aroma to the context in which the issues are considered.'" *Id.* (citation omitted).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY SOLICITING EMPLOYEE GRIEVANCES, PROMISING BENEFITS, AND THREATENING LOSS OF BENEFITS AND OTHER REPRISALS

A. General Principles and Standard of Review

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to "interfere with, restrain, or coerce" employees in the exercise of their statutory rights. Section 8(c) of the Act (29 U.S.C. § 158(c)) protects the right of employers to express their views concerning unionization in general or a particular union, but only if "such expression contains no threat of reprisal or force or promise of benefit." Thus, an employer is free to "make a prediction as to the precise effect he believes unionization will have on his company," but "the prediction must be carefully phrased on the basis of objective fact to convey [his] belief as to demonstrably probable consequences beyond his control . . ." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Where the "prediction" contains "any implication that [the] employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," the statement becomes an unlawful threat of retaliation outside the protection of

Section 8(c). *Id. Accord NLRB v. Nueva Engineering, Inc.*, 761 F.2d 961, 966 (4th Cir. 1985). Similarly, implications that employees will receive benefits as a reward for rejecting a union are promises of benefit not protected by Section 8(c). *See, e.g., Multi-Ad Services, Inc. v. NLRB*, 225 F.3d 363, 372 (7th Cir. 2001); *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 853 (D.C. Cir. 1984). In particular, solicitation of employee grievances, when carrying an implied promise of benefits, is outside the protection of Section 8(c). *See NLRB v. Eagle Material Handling, Inc.*, 558 F.2d 160, 164 (3d Cir. 1977); *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), *enforced mem.*, 23 F.3d 399 (4th Cir. 1994).

Section 10(e) of the Act (29 U.S.C. § 160(e)) makes the Board's factual findings conclusive if supported by substantial evidence on the record as a whole. This requirement is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1988). *Accord WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). The same standard applies to the Board's application of the law to the facts. *See NLRB v. Air Contact Transport, Inc.,* 403 F.3d 206, 210 (4th Cir. 2005). The Board's interpretation of the Act must be upheld if it is "'rational and consistent' with the Act." *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 273 (4th Cir. 2003) (citation omitted).

B. President Chen Unlawfully Solicited Employee Grievances and Promised Benefits

As noted above, pp. 6-7, the Board found that President Thomas Chen unlawfully solicited grievances and promised benefits in speeches on May 23 and July 16. In the May 23 speech, he said that he had already asked managers to consider what items were important to the staff; announced that several specific items were already under review; and twice encouraged employees to submit suggestions for improving the work atmosphere and promised to listen to all such suggestions. (A 737-38, 740.) In his July 16 speech, he urged employees to give the Company "a chance to do better in the future," and stressed that if the Company did not "deal with our employees' concerns now, we are simply giving renewed opportunities for unions to come into our workplace." He asked for "one year to address your concerns." (A 741-43.)

As the Board noted (A 1172), these statements strongly suggested an intent, if the employees rejected the Union, to improve working conditions for the purpose of forestalling a second, successful union campaign. Thus, Chen referred on May 23 to several changes already under consideration, and said that, while he could not promise that management would always agree to changes proposed by employees, it would always listen to such proposals. The plain implication is that it would sometimes agree. The July 16 speech strengthened this implication, asking for a year "to address your concerns." If there were any doubt that the Company was

promising to remedy them, the explicit acknowledgement that failure to "deal with" those concerns would lead to renewed opportunities for unions surely dispelled it. The overall message to employees was clear: Reject the Union and the Company will remedy the problems which led its employees to seek unionization in the first place. This is a classic promise of benefits.

The Board also noted (A 1172) that Chen's speeches were merely one aspect of an "extensive and pervasive campaign of unlawful solicitation of grievances" as well as other unfair labor practices. As shown above, p. 21, the Company unlawfully solicited grievances on 13 other occasions, 8 of which included explicit promises to remedy them. If there were any ambiguity in Chen's speeches, this context would certainly lead employees to view them as a reaffirmation by the Company's top official of his subordinates' prior promises.

The Board also pointed out (A 1168-69) that the solicitations, including the statements by Chen, represented a substantial departure from the Company's prior practice. Before the Union's organizational campaign began, the Company not only did not solicit suggestions from employees, but also ignored whatever suggestions the employees did make. (A 68-69, 73, 124, 196.) The novelty of the solicitation of grievances reinforces the inference that the employer contemplates action on any grievances thus revealed and is seeking to convince employees that no union is needed. *See, e.g.*, *Clark Distribution Systems, Inc.*, 336 NLRB 747,

748 (2001); *House of Raeford Farms, Inc.*, 308 NLRB 568, 569-70 (1992), *enforced mem.*, 7 F.3d 223 (4th Cir. 1993).

The Company contends (Br 28) that Chen's speeches cannot be viewed as promising benefits because he said in the first speech that he could not promise that he would *always* agree to the employees' suggestions. To give conclusive weight to "we can't promise" language would mean that, when an employer who solicits grievances adds such language, it is "engaged in a largely meaningless exchange concerning the employees' grievances and complaints . . . . [I]t is apparent that the reason for [the employees'] voicing such complaints [is] the hope that they might be remedied." *Raley's, Inc.*, 236 NLRB 971, 972 (1978), *enforced mem.*, 608 F.2d 1374 (9th Cir. 1979). Here, as in *Raley's*, the Company repeatedly solicited employee grievances after Chen's "no promises" statement, and the employees responded with numerous grievances, some of which were remedied after the Union lost the election (see below, pp. 41-43). This "indicates that [Chen's] disavowals were not tendered or taken at face value," but were "a mere formality, serving only as an all-too-transparent gloss on what [was] otherwise a clearly implied promise of benefit." *Raley's, Inc.*, 236 NLRB at 972.

The Company's contention (Br 28-29) that Chen's speeches were protected by Section 8(c) of the Act necessarily fails in light of the Board's proper findings

that the speeches promised benefits, for Section 8(c) expressly excludes such promises.

C. The Election-Day Letter Threatened Loss of Benefits and Other Reprisals

The Board found (A 1158-59) that a letter, signed by eight supervisors ─ four of whom were junior vice presidents of the Company ─ and distributed to all employees on the day of the Board election, threatened the employees with loss of benefits and other, unspecified reprisals. The Board found unlawful the following portions of the letter (A 507-08): the statement that the Company's existing policy of promotion from within "may not be possible" under a union environment; the expression of fear that the Company "will change forever for the worse if [the Union] is permitted to represent [its] employees"; and the assertion that the Company "will never be able to achieve greatness within the union atmosphere. . . . Do not settle for mediocrity. Do not give up your future." The Board was justified in finding these statements to be unlawful threats.

The reference to the "promotion from within" policy did not indicate that any change could occur only after collective bargaining. Moreover, it did not assert that any of the Union's contracts prohibit such a policy, or that the Union has ever demanded abandonment or modification of such a policy. The letter did not, as required by *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) ("*Gissel")*, "carefully phrase[ ]" the reference to a possible change in promotion

policy "on the basis of objective fact to convey [the Company's] belief as to demonstrably probable consequences beyond [its] control . . . ." The natural inference employees would draw is that the Company might "take action solely on [its] own initiative for reasons unrelated to economic necessities and known only to [it]" (*Gissel,* 395 U.S. at 618), by changing its promotion policy in retaliation for the employees' selection of the Union. The statement is not saved by its reference to such a change as a possibility rather than a certainty. *Gissel* condemns "any implication that an employer *may or may not* take [retaliatory] action . . . ." 395 U.S. at 618 (emphasis added).

Similarly, the suggestion that the Company would "change forever for the worse" if the Union represented its employees did not indicate that such change would result from collective bargaining. It did not mention any action by the Union, other than its mere presence, which would result in "change . . . for the worse." The natural inference is that the Company, in a knee-jerk reaction to the employees' selection of the Union, would punish them by changing their employment for the worse. The statement that the adverse changes would last "forever" ─ not merely for the term of any collective-bargaining agreement ─ strengthened the inference that unilateral action by the Company, not collective bargaining, would produce the change.

The statement that unionization would make greatness impossible for the Company, and the implication that by voting for the Union the employees would "settle for mediocrity" and "give up [their] future," likewise portrayed the reduction of the Company from greatness to mediocrity, and the loss of the employees' future, not as possible results of the collective-bargaining process, but as flowing automatically from an election victory for the Union. No objective basis was stated for this assertion of inevitability. The employees would logically conclude that deliberate action by the Company, not circumstances beyond its control, would make the loss of their future inevitable if they voted for the Union.

If the letter were otherwise ambiguous, the Board's uncontested findings (see above, p. 21) that the Company's supervisors unlawfully threatened plant closure or job loss on 8 prior occasions establish a context in which employees would read the letter as yet another threat of reprisal. The Company, however, contends (Br 31, 33) that President Chen's July 16 speech, by stating that the Company would not retaliate against employees for union activities (A 742) and apologizing for any prior "misspoken words" (A 743), both cured the prior threats of reprisal and rendered unreasonable any interpretation of the subsequent letter as containing such threats.

The Company cites no authority for the proposition that an apology for prior threats, even when combined with assurances against reprisal, can confer a blanket

immunity from liability for otherwise threatening remarks made thereafter. To the contrary, subsequent unlawful conduct has consistently been held to render ineffective any repudiation of prior violations. *See, e.g., Farm Fresh, Inc.*, 305 NLRB 887, 887 n.1 (1991); *Facet Enterprises, Inc.*, 290 NLRB 152, 152-53, 175 (1988), *enforced in pertinent part*, 907 F.2d 963, 978 (10th Cir. 1990). The Board properly found (A 1134) that the threats in the July 17 letter negated any ameliorative effect of Chen's prior speech, rather than vice-versa.[8]

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY GRANTING UNPRECEDENTED LARGE WAGE INCREASES, AN UNUSUAL NUMBER OF PROMOTIONS, AND OTHER BENEFITS, TO DISCOURAGE EMPLOYEES FROM SUPPORTING THE UNION

On July 1, 2002, approximately 2 weeks before the Board election, the Company granted all the unit employees a wage increase far in excess of the increases granted in previous years, and granted it across the board, whereas prior increases had been largely performance-based. At the same time, the Company

[8] While Chen's speech promised that individual employees would not suffer reprisals for union activity, the threats in the July 17 letter were directed to employees as a group. This lack of parallelism is an additional reason for finding that the speech did not render the subsequent letter innocuous.

promoted 20 bargaining-unit employees, thereby giving them an additional wage increase, whereas in prior years, it had promoted no more than 5 unit employees at once. After the election, the Company granted the unit employees several additional benefits, most of which the employees had requested in response to the Company's unlawful solicitation of grievances. The Board found that these actions were designed to discourage support for the Union and therefore violated Section 8(a)(3) and (1) of the Act.

A. Applicable Principles

An employer violates the Act by conferring benefits while a representation election is pending, for the purpose of inducing employees to vote against the union, because such action carries "the suggestion of a fist inside the velvet glove" and "the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). *Accord Overnite Transportation Co. v. NLRB*, 280 F.3d 417, 429 (4th Cir. 2002) (en banc).

Not all grants of benefits during an election campaign are unlawful. "'[A]n employer's legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide that question precisely as it would if the Union were not on the scene.'" *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 836 (D.C. Cir. 1998) (citation omitted). When a new benefit is granted or announced shortly

before a scheduled election, the Board will infer that the timing is intended to influence the election. *See, e.g., Lake Development Management Co.*, 259 NLRB 791, 792 (1981); *Grandee Beer Distributors, Inc. v. NLRB*, 630 F.2d 928, 932 (2d Cir. 1980). This inference can be avoided by showing that the employer's action is in accord with its past practice, was decided upon before any union activity, or was prompted by business justifications. *See, e.g., Marine World USA*, 236 NLRB 89, 90 (1978), *remanded on other grounds*, 611 F.2d 1274, 1276-77 (9th Cir. 1980). The employer has the burden of establishing a legitimate explanation for the timing and amount of the benefit. *See, e.g., STAR, Inc.*, 337 NLRB 962, 962-63 (2002).

B. The Wage Increase Was Unlawful

The Board found (A 1190) that the *timing* of the wage increase was consistent with the Company's past practice and was therefore lawful. However, the Board further found that the *amount* of the increase was far in excess of those granted in prior years and that the Company had failed to justify this departure from practice. (A 1190-92.) Even where the timing of a benefit is justified, the benefit may be found unlawful if the amount is abnormally large and the employer fails to justify the abnormality. *See, e.g., Comcast Cablevision*, 313 NLRB 220, 248-50 (1993) (unexplained wage increase 2 to 3 times the previous year's increase), *enforced mem. in pertinent part*, 48 F.3d 562 (D.C. Cir. 1995).

Every unit employee received the same pay raise ─ $400 per month – in July 2002, except for the 20 who were promoted, who received an additional $150 per month. (A 469-79, 796-801.) The $400 represented an average increase of 9.4 percent. (*Id.*) The Company concedes (Br 17-18) that the average increase was 2.6 percent in 2001, 4.46 percent in 2000, and zero in 1999.[9] Thus, the total increase for the years 1999-2001 for the average employee was slightly more than 7 percent. For almost all individual employees, the 2002 increase likewise exceeded the total increase for the previous 3 years. (A 469-79, 572-687.) The Board was therefore warranted in concluding (A 1190-91) that the 2002 increase represented a substantial departure from the Company's past practice.

The Company contends (Br 18-19) that the amount of the 2002 increase was consistent with its past practice, because in 1998 it had granted a (corporatewide) average increase of 9.03 percent, almost the same as the 2002 increase. It relies on *Virginia Concrete Corp.*, 338 NLRB 1182, 1184-85 (2003), where the Board found a wage increase of 50 cents per hour not objectionable because it was consistent with the "overall pattern and range [of increases] over . . . several years." 338 NLRB at 1184 n. 6. There, however, the employer, while it had granted a 50-cent

---

[9] The figures for 2000 and 2001 were corporatewide averages. The Company does not contend that the average increase for unit employees in either year was significantly different.

increase only once before, had granted at least a 25-cent increase every year. Given the narrow range of past increases, an amount at the top of the range did not represent the radical departure from practice that an increase approximately 4 times the annual average for the past 3 years, and substantially in excess of the total increase for those years, does.

Moreover, the Board's decision in *Virginia Concrete* rested on additional factors not present here. *Virginia Concrete* was a decertification proceeding; the employer, in negotiations with the union, had proposed the same wage increase it later granted. In addition, the increase was announced 5 months before the election. Finally, prior wage increases, like the one at issue, had been given to all unit employees. 333 NLRB at 1184-85.

Here, as the Board noted (A 1191), the granting of the increase to all unit employees was a further departure from past practice. In previous years, when a wage increase was granted, the amount depended in part on the individual employee's performance. In 2000, three unit employees with low performance ratings received no performance increase, while employees with the highest rating received a performance increase of $125 per month. (A 773-79.) In 2001, six unit employees failed to receive any increase because of low performance ratings. (A 784-90.) However, in 2002, all unit employees received the same increase, regardless of their performance. (A 253-54.) The Board has previously held that

the granting of across-the-board wage increases, contrary to a past practice of basing such increases on performance, is strong evidence of unlawful intent. *See Village Thrift Store*, 272 NLRB 572, 572 (1983); *Tower Enterprises, Inc.*, 182 NLRB 382, 386 (1970), *enforced*, 79 LRRM 2736 (9th Cir. 1972).

The Company (Br 16-17) asserts, as legitimate business reasons for the size and scope of its wage increase, the need to reduce employee turnover and keep up with its competitors, as well as its improved financial situation. However, it disclosed none of these reasons to the employees. To the contrary, several employees were told, during the first half of 2002, that business was not good and that the Company needed to cut its costs. (A 24-25, 58, 80-81, 113-14, 178, 201-03.) In early July, a vice-president told an employee that, although the Company was not doing well, the employees would get a $400 per month raise (A 181-82.) Such statements can only have reinforced the impression that the Company's generosity in the face of apparent economic adversity was in response to the Union's organizational campaign. *See Comcast Cablevision*, 313 NLRB 220, 250 (1993), *enforced mem. in pertinent part,* 48 F.3d 562 (D.C. Cir. 1995).

Moreover, the Company did not show that the factors on which it relies were the motivating force behind the large wage increases. Concern about employee turnover and keeping pace with competitors' wages was not new in 2002. The pay-raise recommendations for both 2000 and 2001 (A 780-82, 791-94)

specifically referred both to turnover (the rate of which, in each year from 1999 to 2001, was more than twice the rate for 2002 (A 804)), and to the necessity of matching the increases of competitors to attract and retain employees. Nevertheless, as shown above, p. 33, the total increase the Company granted in 2000 and 2001 was less, in percentage terms, than the single increase in July 2002, and in each year the Company knew that its percentage increase was less than the private sector average. (A 791.) Thus, in 2000 and 2001, the Company not only tolerated the gap between its pay rates and those of its competitors, but allowed the gap to widen. It failed to explain why the gap suddenly became intolerable in 2002. The Board reasonably inferred (A 1191) that it was because, for the first time, the Company found itself faced with the prospect of unionization. *See Skaggs Drug Centers*, 197 NLRB 1240, 1244 (1972), *enforced*, 84 LRRM 2384 (9th Cir. 1973).

Nor does the record support the Company's contention that, as of July 2002, its financial situation had improved so dramatically as to justify an unusually large wage increase. Although the Company introduced evidence that its volume of business had increased, it failed to show an increase in revenue or profits. Indeed, President Chen, on cross-examination, expressly disclaimed asserting that revenue or profits, as distinguished from volume of business, had increased during the first half of 2002. (A 315.)

The Company's consolidated statements of income (A 760, 763, 765-66) indicate that its total revenue for all of 2002 was only 3.1 percent higher than in 2001 and was 2.1 percent lower than in 2000. Moreover, the increase in revenue in 2002 was entirely in the second half of the year; in the first half of 2002, revenue from imports was down more than 10 percent, and revenue from exports down 5 percent, compared to the first half of 2001. (A 364-65.)

The consolidated statements of income (A 760, 763, 765-66) do show that the Company's net income more than doubled in 2002. However, this increase was entirely due to tax refunds received in November 2002 (A 1127-30). Moreover, as the Board noted (A 1192), the Company offered no evidence that it considered the anticipated tax refunds in deciding to grant the wage increase.

Thus, the Company, which had the burden of showing a legitimate reason for the unusually large wage increases in July 2002, failed to show that revenues or profits were increasing at that time, or that its decision-makers believed that they were.[10] The Board found (A 1192-93) that the Company anticipated such an

---

[10] The Company contends (Br 22-23) that the Board improperly drew an adverse inference from the failure to call Vice President Kuo to testify concerning the Company's revenues and profits during the period in question, because his testimony would have been cumulative of President Chen's. However, the adverse inference was based not only on the failure of Kuo to testify, but also on the failure to produce documents which Chen asserted showed the alleged increase in profits and revenues. (A 1192.) There is nothing improper about drawing an adverse

increase in the future, but this did not explain a wage increase averaging more than double that of 2000. Accordingly, the Board reasonably concluded that the Company had failed to prove a legitimate reason for either the size or the across-the-board nature of the 2002 wage increase.

C. The Promotions Were Unlawful

Of 62 GS employees in the bargaining unit, 20 ─ nearly one-third ─ were promoted to AM in July 2002, and thus automatically received an additional wage increase of $150 per month. The 20 promotions constituted 44 percent of the companywide total of 45 promotions from GS to AM at that time. (A 299-300, 366-67, 469-79.)

The foregoing number of promotions within the bargaining unit, like the amount and nature of the wage increases, represented a radical departure from the Company's prior policy. No unit employee had been promoted from GS to AM in 1999 or January 2002, only 1 was promoted in 2000, and only 5 were promoted in 2001. (A 572-686.) Thus, the 20 promotions in July 2002 were more than 3 times the total number of promotions in the unit ─ 6 ─ during the preceding 3 years. In

---

inference against a party that relies on oral testimony when documents in its possession are available to prove the facts in issue, and it fails to produce such documents. *See, e.g., Auto Workers v. NLRB,* 459 F.2d 1329, 1342, 1345-46 (D.C. Cir. 1972)*; Dorothy Shamrock Co.,* 279 NLRB 1298, 1299, 1305 & n.19 (1986), *enforced*, 833 F.2d 1263, 1269 (7th Cir. 1987).

addition, companywide, there were 10 promotions from GS to AM in January 2000 and 6 or 7 in July 2000. (A 244.) Thus, the 1 promotion within the bargaining unit in 2000 represented 6 percent of the 16 or 17 promotions companywide. In 2001, companywide, there were 25 promotions in January and 6 or 7 in July. (A 249.) The 5 promotions in the bargaining unit were 16 percent of that year's companywide total of 31 or 32. No employees were promoted in 1999 and only 2 or 3 (not in the bargaining unit) in January 2002. Thus, in the 3 years prior to July 2002, the Company promoted approximately 50 employees from GS to AM, of whom 6, or about 12 percent, were in the bargaining unit. The unit employees' share of promotions in July 2002, 44 percent, was more than 3 times their share in the previous 3 years.

An examination of the individual promotions further illustrates their aberrational nature. Of the 20 unit employees promoted, 6 had received ratings of 2 or lower in 2001, placing them in the bottom third of GS employees in the New York area. (A 572-686, 784-90.)[11] In prior cycles, performance evaluations had been specifically listed as a factor to be considered in determining who should be promoted. (A 807-08.) As shown above, p. 11 & n. 3, at least one of the promoted

[11] The Company offered no evidence as to the performance ratings of any employees in 2002.

low-rated employees, Chris Yu, was subjected to unlawful antiunion remarks when notified of her promotion. As shown above, pp. 11-12 & n. 4, so was employee Sherry Yao, who was promoted after complaining, in response to an unlawful solicitation of grievances, that she had not been promoted for 13 years.

The foregoing facts justify the Board's inference (A 1198) that the Company unlawfully manipulated the promotion process to influence employees to reject the Union in the coming election. The burden therefore shifted to the Company to show a legitimate reason for the massive increase in promotions of unit employees. The Company failed to meet this burden.

The Company attempts (Br 21-26) to justify the increased promotions by pointing to the increase in its business and the alleged difference in philosophy between President Chen and his predecessor, with Chen more favorable toward promotions. We have shown above, pp. 36-38, that the increased business had not, by July 2002, produced an increase in revenue, which would be necessary to meet the added cost of so many promotions. The Company does not explain how Chen's alleged belief in promoting more GS employees to AM resulted in promoting 20 unit employees on the eve of the election, when only 5 had been promoted during his presidency the previous year, and when only 4 were promoted during his presidency the following year (A 572-686), when the increase in revenue was far more apparent than in July 2002.

In addition, all of the factors cited by the Company ─ the increase in business, the alleged change in philosophy, and the desire to increase the pool of potential managers ─ were applicable to all of the Company's facilities. However, outside the bargaining unit, they resulted in no increase in promotions from GS to AM. In 2001, 26 or 27 employees outside the New York area received such promotions. In 2002, 27 or 28 did – 25 in July and 2 or 3 (in Salt Lake City) in January. The Company does not explain how the factors it cites could lead to a quadrupling of the number of promotions in the New York area, yet fail to increase promotions elsewhere. The Board was warranted in concluding (A 1198) that promotions were increased in the New York area to influence the imminent election, but were not increased at other locations, where there was no election to influence.

D. The Post-Election Grants of Benefits Were Unlawful

The Company does not contest the Board's findings (A 1176-77) that three additional pre-election grants of benefits ─ posting job vacancies on the electronic bulletin board, allowing employees to make up 10 minutes of lateness at the end of the day, and establishing a flextime policy ─ were unlawful.

The Company does contend (Br 43-49) that five other grants of benefits, which occurred after the Board election, should not have been found unlawful. These grants of benefits occurred between late August and Christmas 2002, while

the Union's objections to the election, filed July 23, 2002 (A 344) were pending, and a rerun election was a possibility. A grant of benefits under these circumstances, if designed to erode union support in any likely rerun election, is no less unlawful than a grant of benefits designed to erode union support in a scheduled initial election. *See NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 525-26 (7th Cir. 1997).

The Board did not infer unlawful motivation solely from the timing of the benefits. It also noted (A 1178, 1179, 1181-82) that three of the benefits granted (year-round casual dress, improved sick-leave benefits, and the right to bring spouses to the Christmas party) had been requested by employees in response to the Company's unlawful solicitation of grievances; that three (casual dress, sick leave, and the option of taking Good Friday as a holiday instead of Martin Luther King's birthday) were mentioned in a memo as among those changes most demanded by employees (A 1178-80); that the voluntary separation program was changed at the request of an employee, but no prior changes in the program had been based on employees' wishes (A 1181); that employees had previously requested year-round casual dress and the Good Friday holiday, and the Company had rejected these requests before the Union's organizational campaign, but granted them shortly after the Board election (A 1178, 1180-81); and that President

Chen had said in his pre-election speech that, if the Union lost the election, failure to address employee concerns would invite a renewal of union activity. (A 1181).

The foregoing facts strongly suggest that the numerous new or improved benefits granted after the election were designed to ensure that any rerun election would produce a vote against the Union. The Company could have rebutted this inference by showing that legitimate considerations would have led it to grant some or all of the benefits even if the Union were not in the picture. The Company failed to make such a showing. It offered no evidence of a legitimate motive for several of the benefits (the Good Friday holiday, the $400 gift card at Christmas for all employees, and allowing spouses to attend the Christmas party). (A 1180, 1182.) The Board found (A 1179) that the Company's explanation for improved sick leave benefits (a change in state law which occurred 3 years earlier) was "clearly pretextual." With respect to casual dress and sick-leave benefits, the Company allegedly relied on a survey of its competitors. However, as the Board pointed out (A 1178, 1179-80), the survey was limited to nonunion competitors, and, in any event, showed that no more than half the competitors offered the benefits which the Company subsequently granted. The falsity of the reasons suggested by the Company strengthens the inference that the real reason for its sudden generosity was a desire to prevent any resurgence by the Union in a rerun election. *Cf. Neptune Water Meter Co. v. NLRB,* 551 F.2d 568, 570 (4th Cir. 1977)

(absence of valid reason for discharge supports conclusion that actual motive is unlawful).

IV. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE COMPANY TO BARGAIN WITH THE UNION AS A REMEDY FOR ITS NUMEROUS, SERIOUS, AND EXTENSIVE UNFAIR LABOR PRACTICES

A. Applicable Principles

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) ("*Gissel*"), the Supreme Court upheld the Board's authority to issue a bargaining order when a union achieves an authorization card majority, but loses an election after the employer engages in unlawful conduct. The Board's authority to issue bargaining orders is not limited to "exceptional" cases involving "outrageous" or "pervasive" unfair labor practices; it extends to "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes . . . . If the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." *Gissel*, 395 U.S. at 613-15. In making this determination, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *Id*. at 612 n.32.

The Board found that this case fell into the second category described in *Gissel* (A 1133); that the Union had authorization cards from a majority of the unit employees (A 1132-33); that the Company's numerous, extensive, and serious unfair labor practices, many of which directly affected or were disseminated to most or all unit employees, would have a lasting coercive effect, which traditional remedies were unlikely to dissipate (A 1133-34); and that the Company had not effectively repudiated the unlawful conduct or shown changed circumstances rendering a bargaining order unnecessary (A 1134-35).

B. The Union Had an Authorization Card Majority

The Board found (A 1133) that, on June 15, 2002, the Union possessed signed authorization cards from 62 of the 115 unit employees. The Company challenges 6 cards ─ those signed by employees Michael Biscocho (A 374-75), Katelin Li (A 384-85), Virginia Huang (A 403), Marina Peda (A 410, 412), Michael Kelly (A 413, 415), and Paresha Shah (A 422, 424). Since 56 cards are uncontested, the Board's finding of majority status must be upheld if it properly counted any 2 contested cards.

The Board found (A 1132, 1149) that the Biscocho and Li cards were valid on the basis of the credited testimony of Union President Robert Levy (A 7-8) that, at a union meeting on April 15, 2002, he distributed authorization cards to employees and, at the end of the meeting, 6 to 10 employees returned signed cards.

He specifically identified the signed cards of Biscocho and Li (A 374-75, 384-85) as among those returned to him. "It is well settled that absent exceptional circumstances, the ALJ's credibility findings, 'when adopted by the Board are to be accepted by the [reviewing] court.'" *NLRB v. Air Products & Chemicals, Inc.*, 717 F.2d 141, 145 (4th Cir. 1983) (citation omitted).

Contrary to the Company's contention (Br 11), neither Levy's failure to witness the signing of the cards nor his lack of personal acquaintance with Biscocho or Li precludes his authentication of their cards. The Board has long held that it will accept as authentic any authorization card returned by the signer to the solicitor. *See McEwen Mfg. Co.*, 172 NLRB 990, 992, 993 (1968) (cards of Palk and Black), *enforced sub nom. Clothing Workers v. NLRB*, 419 F.2d 1207, 1209 (D.C. Cir. 1969). *Accord NLRB v. General Wood Preserving Co.*, 905 F.2d 803, 812 (4th Cir. 1990). This is true even when the solicitor is confused about who returned the cards. *See Photo Drive Up,* 267 NLRB 329, 363 (1983) (Sweeney card); *Stride Rite Corp.,* 228 NLRB 224, 235 (1977) (cards of Jones and Michel). The cards of Biscocho and Li were properly counted.

The other four contested cards were solicited by employee Maria Magbanua, who gave each employee a card in an envelope. All four employees returned the envelopes to her a few minutes later, saying, "Here." (A 60-61, 63-68.) Magbanua did not open the envelopes, but gave them to her husband, employee Paolo

Magbanua, who opened them and found signed authorization cards, which he passed on to the Union's leading employee organizer. (A 63, 66, 96-98, 103-04.)

The Board found (A 1132, 1145) that these cards were valid under a "chain of custody" theory. The short time between the distribution of the cards in envelopes and their return in the same envelopes, along with the employees' comment "Here," strongly suggests that the employees had signed the cards and were returning them to the solicitor. When Paolo Magbanua opened the envelopes, he found signed cards in them. This strengthens the inference that the signed cards had been in the envelopes when they were returned to Maria. In addition, Huang had asked for a card and said she wanted to join the Union (A 44-45), Peda had called Maria and said she wanted to join the Union (A 46), and Kelly and Shah had said they wanted union representation in telephone conversations with the Magbanuas (A 47-48). The Board was warranted in concluding (A 1132, 1145) that their cards were like the one, solicited by one brother and returned to another, which was found valid in *Sheraton Hotel Waterbury*, 312 NLRB 304, 346 (1993), *enforcement of bargaining order denied on other grounds*, 31 F.3d 79, 83-85 (2d Cir. 1994).[12] Accordingly, these four cards were properly counted.

---

[12] Contrary to the Company's contention (Br 13), the situation here is not "directly analogous" to that of the Lepore card, found invalid in *Sheraton Waterbury*. Lepore returned his card to *his own* wife, who had not solicited his card. Here, the

C. The Company's Unfair Labor Practices Made a Fair Election Unlikely

In issuing a bargaining order, the Board relied (A 1133-34) on the following factors: The Company committed three types of "hallmark" violations; its other violations were numerous and serious; many of the violations directly affected, or were disseminated to, the entire bargaining unit, and others affected a substantial number of unit employees; many of the violations were committed by high management officials, including the Company's president; and the Company persisted in its unlawful conduct even after the Union lost the election.

It has long been recognized that "[c]ertain violations, commonly called 'hallmark' violations, are so coercive that their presence 'will support the issuance of a bargaining order unless some significant mitigating circumstance exists. . . . In such cases the seriousness of the conduct . . . justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the workforce. . . .'" *NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 126 (4th Cir. 1992) (citation omitted). Among these "hallmark" violations are the granting of significant benefits and threats of plant closure, which occurred here.

---

cards were returned to the same person who had solicited them, and she passed them on to *her* husband, who also solicited cards.

The Company granted unlawful wage increases to all 115 unit employees and unlawful promotions to 20 of them. Because wage increases regularly appear in paychecks, they are a continuing reminder of the employer's unlawful conduct and its power to give employees benefits or take them away. *See Holly Farms Corp.*, 311 NLRB 273, 282 (1993), *enforced*, 48 F.3d 1360 (4th Cir. 1995), *affirmed on another issue*, 517 U.S. 392 (1996). Their impact cannot be cured by traditional remedies, which do not include rescission of the unlawful benefits. *See Holly Farms Corp.*, 311 NLRB at 282; *Capitol EMI Music, Inc.*, 311 NLRB 997, 1018 (1993), *enforced mem.*, 23 F.3d 399 (4th Cir. 1994). Where, as here, unlawful promotions automatically result in a significant wage increase, they are as destructive of the election process as a direct wage increase. *See, e.g., Parts Depot, Inc.*, 332 NLRB 670, 675 (2000).

The Company's unfair labor practices also included 8 unlawful threats of plant closure or job loss. Such threats are likely to have an adverse effect on the election process for an extended period of time, for they "serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). Moreover, their impact cannot be cured by the traditional remedy, the posting of a notice promising not to repeat the unlawful threat, which often prolongs the impact by reminding

every employee that the threat was made. *See Hedstrom Co.,* 235 NLRB 1193, 1196 n.12 (1978), *enforced*, 629 F.2d 305, 311 (3d Cir. 1980) (en banc). Recognizing the especially lasting impact of threats of plant closure, the Supreme Court, in *Gissel*, 395 U.S. at 611 n.31, 615, upheld a bargaining order based solely on such threats.

Lesser violations can also justify a bargaining order if they are "numerous or . . . coupled with some other factor intensifying their effect . . ." *NLRB v. Jamaica Towing, Inc.,* 632 F.2d 208, 213 (2d Cir. 1980). The violations here were numerous. The Board (A 1133) enumerated 39 instances of 5 different types of nonhallmark violations, not including the 8 grants of benefits other than wage increases or promotions. Thus, in addition to the "hallmark" violations described above, the Company committed 47 separate nonhallmark violations. The cumulative effect of so many violations on the election process cannot be dismissed as negligible. Moreover, other factors intensified the effect of the violations.

Many violations affected all or a significant portion of the bargaining unit. Every employee received the $400 per month wage increase. The 8 lesser benefits were also applicable to every unit employee. Similarly, the election-day letter (see above, pp. 27-30), which contained unlawful threats of reprisal, was distributed to all employees. Chen's speeches, in which he solicited grievances and implicitly

promised to remedy them, were likewise addressed to all employees. Other solicitations of grievances and promises of benefit, even if not made to all unit employees, directly affected all of them. At least 27 employees were threatened with job loss and plant closure. Finally, the Board found (A 1134) that, although only 20 of 115 unit employees were promoted, the Company notified all unit employees of the promotions by e-mail. Dissemination of unlawful conduct can extend its coercive impact to employees not directly affected. *See, e.g., Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 827 (D.C. Cir. 2001).

President Chen, the Company's highest-ranking official, approved the unlawful wage increases and promotions, as well as the new casual dress policy and the $400 holiday gift certificates, and unlawfully solicited grievances and promised benefits in two speeches to all unit employees. At least six vice presidents, including two executive vice presidents, also participated in the unlawful conduct. Executive Vice President Raymond Lin threatened plant closure (A 154, 159, 171), told employees not to attend union meetings and to throw away union literature (A 145, 156, 171, 190), and solicited and promised to remedy grievances (Tr 1992). So did another Executive Vice President, Jimmy Kuo, on 3 different occasions (A 1170, incidents 9-11), and Junior Vice President Dan Grogg, in several meetings with employees. (A 1162.) Grogg and three other

junior vice presidents (Jay Buckley, Charles Yeh, and Eddie Lou) signed the election-day letter to all employees (A 507-08), which contained unlawful threats.

The participation of high-ranking management officials in unlawful conduct has long been viewed as enhancing its adverse effect. *See, e.g., Consec Security*, 325 NLRB 453, 454-55 (1998), *enforced mem.*, 185 F.3d 862 (3d Cir. 1999). Threats or promises are likely to be taken seriously when made by top management, which has the power to carry them out. *See, e.g., Bakers of Paris, Inc.*, 288 NLRB 991, 992 (1988), *enforced*, 929 F.2d 1427, 1450 (9th Cir. 1991). Moreover, the extensive participation of high-ranking officials leads employees to believe that the unlawful conduct represents official company policy, not the rogue actions of minor supervisors. *See Bakers of Paris*, 288 NLRB at 992.

The fact that the Company, after the election, continued to engage in unlawful conduct by granting five new benefits is also highly significant. Post-election unfair labor practices "'are always relevant because they demonstrate that the employer is still opposed to unionization.'" *Hedstrom Co. v. NLRB*, 629 F.2d 305, 311 (3d Cir. 1980) (en banc) (citation omitted). Indeed, they demonstrate that the employer is still willing to oppose unionization by unlawful means, and is therefore likely to engage in further unlawful conduct in the event of a rerun election. *See M.J. Metal Products, Inc.*, 328 NLRB 1184, 1185 (1999), *enforced*, 267 F.3d 1059, 1067-68 (10th Cir. 2001). Such a showing clearly strengthens the

justification for a bargaining order. *See, e.g., Eddyleon Chocolate Co.*, 301 NLRB 887, 891 (1991).

Contrary to the Company's contention (Br 49), the post-election grants of benefits were not "so minimal that they cannot be considered coercive." Their effect on a future election cannot be considered in isolation; the cumulative effect of all of the Company's unlawful conduct must be considered. *See NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981) (en banc). Here, the benefits granted after the election included many of those requested by employees in response to the prior unlawful solicitations of grievances, and thus enhanced the impact of those solicitations and the accompanying promises of benefits. The granting of the benefits showed that the earlier promises were not "mere ploys, never to be fulfilled without union bargaining pressures" (*NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2d Cir. 1980)), but that Company President Chen meant what he said when he told the employees that the Company would always listen to employee suggestions, and implied that it would accept some of them. The grant of benefits thus showed the "velvet glove" referred to in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), and simultaneously suggested the fist inside.

The foregoing factors "justif[y] a *Gissel* order unless a very strong showing negates the inference of lasting effects." *Standard-Coosa-Thatcher Carpet Yarn*

Div. v. NLRB, 691 F.2d 1133, 1144 (4th Cir. 1982). The Company has not made such a showing.

D. The Company's Defenses Are Without Merit

The Company contends that the following mitigating factors render a bargaining order inappropriate: its unfair labor practices did not cause the Union's loss of majority status (Br 36, 39-40, 49-51, 55); President Chen effectively repudiated the unlawful threats (Br 41-43); passage of time has dissipated the adverse effects of the unlawful conduct (Br 53-55); and the negotiation of a contract, when the Company bargained with the Union under a court order, has dissipated any such effects (Br 54-55).

In *Overnite Transportation Co. v. NLRB*, 280 F.3d 417, 436 (4th Cir. 2002) (en banc), this Court held that the Board had properly considered the causal relationship between the employer's unfair labor practices and the dissipation of the union's majority status. The Board there stated: "It is the objective tendency of the unfair labor practices to undermine union support that is critical, not the actual effect of the unfair labor practices." *Overnite Transportation Co.*, 329 NLRB 990, 995 n.26 (1999). This analysis is consistent with *Gissel*, which requires only that Category II violations "have the *tendency* to undermine majority strength . . .," 395 U.S. at 614 (emphasis added), and rejects any probe of

employees' subjective motivations as "involving an endless and unreliable inquiry." *Id*. at 608.

The Board's findings (A 1133) that "hallmark" violations affected all or significant portions of the unit necessarily imply that the violations tended to undermine the Union's majority. *See NLRB v. So-Lo Foods, Inc.*, 985 F.2d 123, 126 (4th Cir. 1992). Since the Union, which had received signed authorization cards from 62 employees, received only 52 votes in the election, it is clear that at least 10 card signers did not vote for the Union. If 5 of them changed their minds because of the Company's unlawful conduct, that conduct caused the Union's election defeat. Given the nature of the violations, the Board could reasonably conclude that they probably affected at least that many votes.

The Company contends, however, that the Union lost its majority solely because of a written guarantee signed by President Chen (A 482), found lawful by the Board (A 1174), that it would not move its headquarters or retaliate against employees. The Company relies (Br 39) on the testimony of employee Colton Huang that "many people believed in the [C]ompany, what the [C]ompany guaranteed, so the [U]nion is going to lose." (A 166). Another employee, Andy Chien, testified that "[s]ome people . . . intended to vote for [the] [U]nion [but] change[d] their mind[s] because they got raises and . . . promotion[s]. . . . They change[d] their mind[s] to vote for [the] [C]ompany." (A 179). The Board

properly disregarded both statements, which are hearsay testimony as to the subjective reactions of an unknown number of unnamed employees. Both are exactly the sort of subjective evidence condemned in *Gissel*. In any event, there is clearly no basis for concluding, as the Company implicitly urges, that the Board was compelled to accept Huang's testimony and reject Chien's.

The Company also contends that President Chen, in his July 16 speech, effectively neutralized the prior unlawful threats of plant closure by promising not to retaliate against employees for union activity (A 742) and apologizing for "misspoken words" by managers (A 743). The Board has held that, to be effective, a repudiation of prior unlawful conduct "must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other . . . 'illegal conduct,'" and that "there must be no proscribed conduct on the employer's part after the [repudiation]." *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (citations omitted).

Chen's speech was not "free from other illegal conduct." It unlawfully solicited grievances and promised benefits. The Company engaged in further illegal conduct thereafter, by threatening reprisals in an election-day letter and granting several benefits after the election. Moreover, an apology for unspecified "misspoken words" is not "specific in nature to the coercive conduct" of threats of

plant closure. Accordingly, Chen's speech fell far short of meeting the requirements for an effective repudiation of those threats.

The Board specifically considered the passage of time (slightly over 4 years from the election to the issuance of the Board's bargaining order) and found it insufficient to produce a fair election. (A 1135.) This Court and others have enforced bargaining orders despite comparable passage of time. *See, e.g.*, *NLRB v. General Wood Preserving Co.,* 905 F.2d 803, 805 n.3, 807-10, 816-18 (4th Cir. 1990) (4 years from unfair labor practices to issuance of bargaining order); *Garvey Marine, Inc.*, 328 NLRB 991, 997 (1999) (4 to 4 ½ years between violations and issuance of bargaining order; 3 years and 4 months between ALJ and Board decisions), *enforced*, 245 F.3d 819, 826-29 (D.C. Cir. 2001).

An additional changed circumstance relied on by the Company actually supports the Board's issuance of a bargaining order. The Board noted (A 1135) that a United States District Court had issued an injunction under Section 10(j) of the Act (29 U.S.C. § 160(j)) ordering the Company to bargain with the Union. *See Kendellen v. Evergreen America Corp.*, 428 F. Supp. 2d 243, 251-52 (D.N.J. 2006). As the Board pointed out (A 1135), this created a new status quo, which its bargaining order preserves.

The Company, however, contends (Br 54) that its negotiation of a contract with the Union pursuant to this injunction would enable employees to vote freely

in any rerun election. This contention is without merit. The injunction automatically expired when the Board issued its decision, and the Company states (Br 54 n.37) that the contract, by its terms, will be nullified if this Court rejects the bargaining order. The Company will then be free once again to alter employee benefits at will. It does not explain how either its having bargained under court order or its having entered into a contract will enable employees to vote freely in a rerun election that would be conducted when neither the court order nor the contract is still in effect.

CONCLUSION

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

_____
DAVID A. FLEISCHER
Senior Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570
(202) 273-2987

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

ROBERT J. ENGLEHART
Supervisory Attorney

National Labor Relations Board

April 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2183 **Caption:** EVERGREEN AMERICA CORP. v. NLRB

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

☑ this brief contains 13,612 [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]

☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 [*state name and version of word processing program*] in 14-point Times New Roman [*state font size and name of the type style*]; *or*

☐ this brief has been prepared in a monospaced typeface using _____ [*state name and version of word processing program*] with _____ [*state number of characters per inch and name of type style*].

(s) _____

Attorney for National Labor Relations Board

Dated: 4/18/2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EVERGREEN AMERICA CORPORATION	*	
	*	
Petitioner/Cross-Respondent	*	
	*	Nos. 06-2105,
v.	*	06-2183
	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case Nos.
	*	22-CA-25295,
Respondent/Cross-Petitioner	*	22-CA-26087
	*	
and	*	
	*	
LOCAL 1964, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO	*	
	*	
Intervenor	*	

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:

Francis X. Dee, Esq.
McElroy, Deutsch, Mulvaney &
Carpenter, LLP
3 Gateway Center
100 Mulberry Street
Newark, NJ 07102-4082

Herzl S. Eisenstadt, Esq.
Gleason, Marrinan &
Mazzola Mardon, P.C.
26 Broadway
17th Floor
New York, NY 10004

_____

Aileen A. Armstrong
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 18th day of April, 2007