

Nos. 08-1297 and 08-1336

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

POST TENSION OF NEVADA, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**DISTRICT COUNCIL OF IRONWORKERS OF THE
STATE OF CALIFORNIA AND VICINITY**

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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BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of Post Tension of Nevada, Inc.
("the Company") to review a decision and order of the National Labor Relations

Board (“the Board”) issued August 29, 2008, and reported at 352 NLRB 1153 (2008). (JA 540-53)¹ The Board has filed a cross-application for enforcement. The District Council of Ironworkers of the State of California and Vicinity (“the Union”), the charging party below, has intervened in this proceeding on the Board’s side.

The Board had subject matter jurisdiction over the unfair labor practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review and cross-applications for enforcement may be filed in this Court. The Board’s order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).²

¹ “JA” references are to the joint appendix. “Br” refers to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

² In 2003, the Board sought an opinion from the United States Department of Justice’s Office of Legal Counsel (“the OLC”) concerning the Board’s authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See *Quorum Requirements*, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). This issue is currently before this Court in *Laurel Baye Healthcare of*

The Company filed its petition for review on September 10, 2008, and the Board filed its cross-application for enforcement on October 30, 2008. Both filings were timely, as the Act places no time limitations on either filing.

STATEMENT OF THE ISSUES

1. Whether substantial evidence on the record as a whole supports the Board's findings that the Company violated Section 8(a)(1) of the Act by:
 - a. announcing and maintaining an overly broad and discriminatory work rule against morning trips to the nearby Chevron station to prevent employees from meeting with a union representative;
 - b. telling employees that paychecks would not be issued on Friday mornings to prevent them from meeting with the union representative;
 - c. threatening employees with discharge if they engaged in a strike; and
 - d. refusing to give an employment application to Brady Bratcher because of his union affiliation.

2. Whether substantial evidence supports the Board's finding that employees struck in part to protest the first three unfair labor practices described above and, therefore, that the Company violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate the former strikers upon their unconditional offer to return to work.

RELEVANT STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are contained in the Addendum at the end of this brief.

STATEMENT OF THE CASE

Acting on the unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) and 8(a)(3) of the Act. (JA 1-13.) After a hearing, an administrative law judge issued a decision finding in relevant part that the Company violated Section 8(a)(1) of the Act by announcing and maintaining an overly broad and discriminatory work rule to prohibit employees from meeting with a union representative at a local gas station; by announcing a change in paycheck distribution in order to interfere with that protected concerted activity; by threatening to discharge employees if they engaged in a strike; and by failing to provide an employment application because of the requestor's union affiliation. (JA 540, 551.) The judge also found that the employees struck in part to protest the unlawful announcements and threat, and therefore that the Company violated Section 8(a)(3) and (1) of the Act by failing to reinstate them immediately upon their unconditional offer to return to work. (JA 551.) On review, the Board substantially adopted the judge's rulings, findings, and conclusions and his recommended order, amending the remedy in only minor respects. (JA 540.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Company's Business and Its Practice of Allowing Daily Stops at the Chevron Station

The Company, which installs stress cables used in the construction industry, has a facility in Phoenix, Arizona that is managed by Company Vice-President John Hohman with the help of Superintendent Matt Pickens, Assistant Superintendent Javier Loya Bando, and Manager Ken Saffin. (JA 543; 312, 314, 365, 390-91.) There are seven field foremen who supervise the employees working as laborers on their field crews: Roberto Arce Salazar, Jesus Guerrero, Ezequiel Ordonez, Juan Quintero, Juan Delgado, Rosalio Gastelum, and Jaime Fernandez. (JA 543; 329, 331.)

For years, the Company's consistent practice was to have field crews report in the early mornings to the Phoenix facility for the day's work assignments and then ride to jobsites in the crew foremen's personal vehicles. (JA 543; 136-38, 188, 217-18, 247-48.) Before driving to the job sites, the crews typically gathered at a local Chevron gas station/mini-market where they purchased food, socialized, and talked about work for 20 to 30 minutes while the foremen fueled their vehicles. (JA 543; 138-43, 153-55, 189-90, 217-20, 248-49.) Weekly paychecks were usually distributed on Friday mornings, and many crew members cashed their

paychecks at the Chevron during the morning stop because they had established check-cashing privileges there. (JA 543; 57, 143-44, 190-91, 220-21, 249-50.)

B. The Union's Efforts To Organize the Company's Employees

In 2005, Brady Bratcher, an organizer for the Union, unsuccessfully sought a pre-hire agreement covering the Phoenix facility. (JA 543; 68-69.) Later that year, Bratcher met with workers at the local Chevron station and organized a short economic strike of the Phoenix field employees, resulting in a meeting between the Company and the workers to resolve certain work issues. (JA 543-44; 69-70, 315.)

In early 2007, Bratcher resumed his visits to the Chevron station and met with workers in a renewed attempt to organize them. (JA 544; 75-76, 144-45, 192, 220-21, 250-51.) Several employees spoke with Bratcher and expressed dissatisfaction with the Company's failures to fulfill promises made after the 2005 strike. During the summer, Bratcher met with the employees more frequently. (JA 544; 73-76.) In early August, he approached Manager Saffin about entering into a prehire agreement with the Union, but Saffin declined to discuss the matter. (JA 544; 85-88, 365-67.) The Company's owners did not want a union at the Phoenix facility. (JA 398-99.)

C. Superintendent Pickens Meets with the Foremen and Announces a New Rule Against Taking Employees to the Chevron and a Change in Paycheck Distribution To Prevent Employees from Speaking with Union Organizer Bratcher

On August 24, 2007, in response to the employees' union activity, Superintendent Matt Pickens, Assistant Superintendent Loya, and Manager Acosta met with the Company's seven foremen to discuss the union campaign. (JA 544; 32, 346-49, 443.) With Loya serving as an interpreter, Pickens specified that the foremen were not to take employees to speak with Bratcher or any union representative at the Chevron. (JA 544; 37, 54.) Pickens also told the foremen that the Company would not distribute paychecks on Friday mornings in order to discourage the crews from going to the Chevron to cash checks because Bratcher was there. (JA 544; 54-56.)

Immediately after the meeting, Foremen Ordonez and Salazar relayed to their respective crews that Pickens had forbidden them from taking employees to the Chevron or from going there to cash paychecks because Pickens did not want employees talking to Bratcher. (JA 544; 36-38, 54-55, 149-50, 152, 193-94, 223, 253-55.) The workers complained and disagreed with the rule. (JA 544; 38, 55.) They also discussed the possibility of striking both because the new rule would keep them from buying food and drink for the workday and because they disliked being prohibited from speaking to whomever they wished. (JA 544; 154-55, 255-56.)

In the end, the new rule against stopping at the Chevron was minimally enforced, and most of the foremen continued to take crews to the Chevron as before. (JA 544; 178, 210, 211, 215, 269.) Foreman Ordonez only took his crew to the Chevron occasionally after the meeting, and when he did he was confronted by an upset Pickens, who told him to leave. (JA 544; 59-60.) On August 29, Foreman Guerrero stopped at the Chevron to fuel his vehicle while Bratcher spoke to the crew. Pickens soon appeared, telling Guerrero that he needed to get to work. (JA 545; 77-78.)

D. The Company Refuses To Provide an Employment Application to Bratcher Because of His Union Affiliation

On September 7, Bratcher visited the Company's Phoenix office to see about getting a job with the Company. (JA 547; 81.) Bratcher, who was wearing a cap with union insignia, asked Maria Perez, a clerical employee, for an application. (JA 547; 81-82, 315-19.) The Company's office typically provides applications to people who come into the office to request them. (JA 547; 315-21.) Bratcher explained that he wanted to work for the Company, adding that he also worked for the Union and wanted to organize the employees. (JA 547; 82-83.) Perez left the room and called Pickens, who instructed Perez to tell Bratcher to leave or the police would be called. (JA 547; 83, 488.) Following Pickens' directive, Perez refused to provide Bratcher with an application and told him to leave or she would call the police. (JA 547; 83-84, 488.)

E. The Company Tells Employees that Paychecks Will Be Delayed To Prevent Them from Meeting with Bratcher, and Threatens Them with Termination If They Unload Tools and Refuse To Work; Employees Begin an Unfair Labor Practice Strike

On one or two occasions in late August or early September, the Company did not distribute employees' paychecks. Superintendent Pickens said that the paychecks were being delayed until Friday afternoon because he did not want to see crews at the Chevron, and the foremen relayed this to their crews. (JA 544-45; 56-57, 62-63.)

When employees arrived at work on Thursday, September 20, Salazar informed his crew that Assistant Superintendent Loya had said that paychecks would be distributed on Friday afternoon instead of Friday morning that week because the Company did not want them to go to the Chevron to cash the checks and see Bratcher. (JA 545; 156-57.) The employees were upset, but when Superintendent Pickens arrived, he refused to meet with them. Instead, Pickens met with the five foremen, who asked him to explain the Company's pay system for field crew workers, to provide water and ice machines, and to reimburse them for the cost of their hand tools. (JA 545; 158, 195-96, 224-25, 256-57, 269-70, 480-82.) Pickens promised to discuss the requests with the Company and asked the foremen to leave for their jobsites, agreeing to meet again after work. (JA 545; 482-83.)

Afterwards, only Foreman Guerrero and his crew went to work. (JA 545; 483.) The other foremen met with their crews to relate what Pickens had said. Foreman Salazar told his crew members that Pickens would not turn over checks until Friday afternoon so that crews would not see Bratcher and “hook up” with him at the Chevron. (JA 545; 158-59.) Pickens then came out of his office and met with the employees, who said that they were unhappy about the lack of equipment and the Company’s failure to supply an ice machine and water. (JA 545; 159-60, 196-97, 225-26.) The foremen translated between Pickens, who spoke English, and the Spanish-speaking employees. (JA 545 n.5; 58, 159, 197-98, 234, 236-37, 270.)

With the foremen acting as translators, the employees asked Pickens if they were allowed to go to the Chevron in order to cash checks. (JA 545; 160, 227, 257-58.) Pickens replied that he would not distribute paychecks until Friday afternoon because he did not want them to go to the Chevron. (JA 545; 160-61, 225-27.) The employees responded that they wanted their paychecks on Friday mornings, and that if they were not going to get them the next morning, they would unload their tools. (JA 545; 160-61, 227, 483.) Pickens countered that if they unloaded their tools, he would assume they were quitting or giving up their jobs. (JA 545; 161, 198, 227, 258, 483-84.) The employees denied that they were

quitting, insisting that they were striking as they unloaded their tools and left. (JA 545; 161, 197-98, 227-28, 258-59.)

Later that day, the employees delivered a notice to the Company stating that they were on an unfair labor practice strike. (JA 546; 334-35, 501.) They went on strike in part because the foremen had told them that they were not supposed to go to the Chevron to talk with Bratcher, and that their paychecks were being delayed to discourage them from meeting with Bratcher at the Chevron. In addition, the employees decided to strike because Pickens had said that if they unloaded their tools, he would assume they were giving up their jobs. (JA 550; 155, 161, 165, 179-81, 192, 201, 255-56.)

F. The Company Fails To Reinstate Employees After They Make an Unconditional Offer To Return to Work

During the strike, employees picketed the Company's facility, and the Company hired eight workers as permanent replacements. (JA 556; 170, 203-04, 231, 97-101, 403-09, 492-93, 506-15.) On the sixth day of the strike, the employees suspended their picketing to speak with Vice-President Hohman and deliver an unconditional offer to return to work, signed by all of them. (JA 546; 107-09, 171-73, 204, 231, 443-45, 502.) Hohman told them that they had been permanently replaced, but that they could be placed on a "Preferred Hire List." (JA 546; 107-09, 445, 503.) Each former striker signed the list that day or the next, but the Company failed to reinstate any of them immediately. (JA 546; 334-

36, 445-46, 456, 503.) On December 11, 2007, the Company rehired five former strikers. (JA 546; 338, 205, 436, 516-28.) As of the date of the unfair labor practice hearing, however, the Company had not yet reinstated the nine remaining former strikers. (JA 547; 337.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Schaumber and Member Liebman) found, in agreement with the judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) in the following ways: (1) orally promulgating and maintaining an overly broad and discriminatory rule prohibiting employees from meeting with a union representative and from assembling at the local Chevron; (2) informing employees of a change in paycheck distribution in order to interfere with their protected activity of meeting with a union representative; (3) threatening employees with discharge for engaging in a strike; and (4) refusing to proffer an employment application to Bratcher because of his union affiliation. (JA 540, 551.) The Board also found, in agreement with the judge, that the September 20 strike was motivated in part by the first three violations, and was therefore an unfair labor practice strike. (JA 551.) Accordingly, the Board found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to reinstate striking employees immediately upon their unconditional offer to return to work. (JA 540, 551.)

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related matter interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (JA 541.) Affirmatively, the Board's order directs the Company to rescind its prohibition against employee meetings at the Chevron. The Board's order also requires the Company to offer the former strikers full and immediate reinstatement to their former positions or to substantially equivalent ones; to make them whole for any loss of earnings or benefits; to preserve and produce the information necessary to compute backpay upon request; and to post a remedial notice. (JA 540.)

SUMMARY OF THE ARGUMENT

This case involves an employer's unlawful response to its employees' protected, concerted activities. For a number of years, the Company had permitted employees to make early morning stops with their foremen at a local Chevron station to purchase snacks, cash paychecks, and converse with each other before heading to their jobsites. When the Company learned that employees were also talking with a union representative during those morning stops, Superintendent Pickens announced a new work rule: employees would no longer be permitted to stop at the Chevron so that they would not see the union representative there. Pickens further announced that to keep employees from

seeing the union representative at the Chevron in the morning, the Company would delay distribution of their paychecks until the afternoon.

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by announcing and maintaining new work rule—and by announcing that the employees' paychecks would be delayed—in order to prevent the employees from seeing the union representative at the Chevron station. On review, the Company primarily challenges the Board's finding by contending that it is not liable for the announcements because they were mostly made by the foremen rather than by Superintendent Pickens directly. That contention is meritless. After all, the Company stipulated to the supervisory status of its foremen, and it is settled that an employer is liable for the statements and actions of its supervisors. Moreover, it is undisputed that Superintendent Pickens expressly instructed the foremen not to let the employees stop at the Chevron. By repeating and translating into Spanish the directives that Pickens had announced, the foremen plainly were acting as the Company's agents. Accordingly, contrary to the Company's further claim, the testimony by foremen and employee witnesses about the directives that the foremen relayed was not hearsay. Rather, as the Board reasonably found, that testimony constituted admissions by a party opponent. The Board therefore appropriately relied on that testimony as evidence of the Company's unlawful directives.

Substantial evidence also supports the Board's further finding that the Company again violated Section 8(a)(1) of the Act when Superintendent Pickens told the employees, who were upset about his unlawful directives as well as several minor economic issues, that he would assume they were quitting if they did not go to work. Contrary to the Company, it is immaterial that the Board dismissed the Section 8(a)(3) complaint allegation that Pickens, by his statements, in fact discharged the employees. A statement can constitute an unlawful threat without also amounting to an unlawful action. Furthermore, the Company's halfhearted assertion that Pickens' threat was only directed at the foremen is contradicted by credited employee testimony.

The Company does not dispute that it refused to provide an employment application to the union representative because of his union affiliation. Instead, the Company contends, contrary to the credited evidence, that its application form was a worthless piece of paper. The Company also errs in suggesting that its refusal was lawful because the Board dismissed a separate Section 8(a)(3) complaint allegation that it refused to consider the union representative for hire. The Section 8(a)(1) violation found by the Board here turns on the tendency of the Company's hostile treatment of a person requesting a job application to have a coercive effect on union activity. Because the two complaint allegations are distinct, the

Company is mistaken in arguing that the dismissal of one allegation necessarily disposes of the other.

Finally, substantial evidence supports the Board's finding that the employees' strike was an unfair labor practice strike, and therefore that the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the former strikers immediately upon their unconditional offer to return to work. The Company does not seriously dispute the consistent and mutually corroborative testimony of employee witnesses who explained that they decided to strike in part because they were upset by the Company's announcements of restrictions on stopping at the Chevron to talk to the union representative and to cash their paychecks, and by Superintendent Pickens' threat of discharge. Further, it is uncontested that the Company refused to reinstate the former strikers immediately after they unconditionally offered to return to work. Accordingly, the Court should uphold the Board's reasonable finding that the Company violated Section 8(a)(3) and (1) of the Act by failing to reinstate the former unfair labor practice strikers.

STANDARD OF REVIEW

This Court's review of the Board's unfair labor practice determinations is "quite narrow." *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Board's fact findings are conclusive so long as they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e);

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Review under the substantial evidence standard is limited and “highly deferential.” *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1004 (D.C. Cir. 1998). A reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. 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.*, 160 F.3d 24, 28 (D.C. Cir. 1998) (quoting *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d at 1004). *Accord Elastic Stop Nut Div. of Harvard Indus., Inc. v. NLRB*, 921 F.2d 1275, 1281 (D.C. Cir. 1990).

The Board’s interpretation of the Act is given great deference because of its “special competence in the field of labor relations.” *Pattern Makers’ League of N. Am. v. NLRB*, 473 U.S. 95, 100 (1985). The Board’s judgments will be affirmed unless the Board “acted arbitrarily or otherwise erred in applying established law.” *International Union of Electronic, Elec., Salaried, Mach. & Furniture Workers v. NLRB*, 41 F.3d 1532, 1536 (D.C. Cir.1994) (internal quotations and citations omitted).

ARGUMENT**I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY ANNOUNCING AND MAINTAINING AN OVERLY BROAD AND DISCRIMINATORY RULE TO PREVENT EMPLOYEES FROM MEETING WITH A UNION REPRESENTATIVE; INFORMING EMPLOYEES OF A CHANGE IN PAYCHECK DISTRIBUTION IN ORDER TO INTERFERE WITH THAT PROTECTED ACTIVITY; THREATENING THEM WITH DISCHARGE IF THEY ENGAGED IN A STRIKE; AND REFUSING TO PROFFER AN EMPLOYMENT APPLICATION BECAUSE OF THE REQUESTOR'S UNION AFFILIATION****A. An Employer Violates Section 8(a)(1) of the Act by Interfering with, Restraining, or Coercing Protected Activity**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements this guarantee by making it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise” of Section 7 rights.

The Board will find unlawful conduct that, “it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *Miller Electric Pump and Plumbing*, 334 NLRB 824, 824 (2001) (emphasis added); *accord American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959). This Court recognizes that an employer’s statements or actions are unlawful if they have the

“tendency to coerce,” whether or not they are “coercive in actual fact.” *United Services Auto Ass’n v. NLRB*, 387 F.3d 908, 913 (D.C. Cir. 2004) (internal citations omitted). Recognizing the difficulty of parsing intended meaning and effect of statements, the Supreme Court has admonished that “a reviewing court must recognize the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

As shown below, substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by announcing and maintaining a rule that prohibited employees from gathering or meeting with a union representative; telling them that they would no longer receive their paychecks on Friday mornings so that they would not talk to the union representative while cashing their checks; threatening them with discharge if they went on strike; and refusing to supply an employment application because of the requestor’s union affiliation.

B. The Company Promulgated an Overly Broad and Discriminatory Rule and Announced a Change in Paycheck Distribution in Order To Prevent Employees from Assembling and Meeting with a Union Representative

1. The Company unlawfully announced and maintained a prohibition against stopping at the Chevron to keep employees from meeting with Union Representative Bratcher

The Board reasonably found that the Company violated Section 8(a)(1) of the Act when it departed from its longstanding practice by announcing a new prohibition against employees stopping at the nearby Chevron station in the mornings. (JA 540-48; 37, 54, 149-50, 152, 193-94, 223, 253, 255.) The credited and mutually corroborative testimony of Foremen Salazar and Ordonez establishes that Superintendent Pickens announced this change in order to prevent employees from meeting with Union Representative Bratcher at the Chevron, where they discussed working conditions. (JA 544; 36-38, 56.) It is undisputed that Section 7 of the Act protects the right of employees to communicate with one another and with union representatives regarding self-organization. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972); *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002) (citing *Beth Israel Hosp. v. NLRB*, 437 US 483, 491 (1978)); *Technology Services Solutions*, 324 NLRB 298, 301-02 (1989). Indeed, these were the very rights that employees had exercised routinely during their morning stops at the Chevron before the Company got wind of the union campaign and Pickens

announced that such stops would henceforth be prohibited. (JA 85-88, 153-55, 189-91, 219-21, 248-50, 365-67, 348-49.)

The Board's finding (JA 540, 548) that this new rule unlawfully tended to interfere with the employees' ability to discuss working conditions and organizing among themselves and with Union Representative Bratcher is consistent with this Court's precedent. It is settled that an employer violates Section 8(a)(1) of the Act by promulgating discriminatory work rules that "would reasonably tend to chill employees" in exercising Section 7 rights. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007)(internal citation omitted); *accord Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). Here, the Company's announcement of its new rule would tend to discourage employees from exercising their Section 7 rights by suddenly limiting their opportunity to assemble and meet with a union representative. (JA 136, 153, 188-92, 217-19, 221.)

The Board further reasoned (JA 540 n.1, 548) that the new rule was discriminatory because the Company announced it only after realizing that employees were talking to Union Representative Bratcher at the Chevron. Such a work rule "promulgated in response to union activity" impermissibly restrains or coerces employees in the exercise of statutory rights. *Guardsmark*, 475 F.3d at 374 (D.C. Cir. 2007). Foremen Ordonez and Salazar credibly testified (JA 544) that on August 24, Superintendent Pickens directed them not to take their crews to

the Chevron because he did not want to see employees talking with Bratcher. (JA 33, 56.) Accordingly, the foremen told employees that Pickens had announced the new prohibition because he “did not want [them] speaking with Brady,” and that they “were prohibited from speaking to the representative of the union.” (JA 544; 149, 254.) Further, Pickens scolded Foremen Salazar, Ordonez, and Guerrero for stopping with their crews at the Chevron, which shows that the Company was maintaining its new rule. (JA 59-60, 77-78.) On these facts, the Board properly characterized the new rule maintained by the Company as discriminatory and an “overt attempt to prevent its employees from speaking with the union organizer” in violation of Section 8(a)(1) of the Act. (JA 548.)

There is no merit to the Company’s argument (Br 10) that it did not violate the Act because Superintendent Pickens purportedly prohibited only the foremen from stopping at the Chevron, and not the employees. It is undisputed that the employees always rode to the jobsites in their foremen’s vehicles. (JA 137, 188, 217, 247.) By directing the foremen to halt their customary practice of stopping at the Chevron on their way to the jobsites, Pickens was necessarily and obviously imposing his directive on the employees as well. The Company also does not help itself by cryptically suggesting (Br 10) that Foreman Ordonez’ use of the term “us” in describing Pickens’ August 24 meeting with the foremen (JA 54) shows that the prohibition only applied to them. To begin with, the credited testimony of

Foremen Ordonez and Salazar establishes that Pickens explicitly told the foremen at that meeting not to take the employees to the Chevron. (JA 54). Moreover, the Company forgets that the violation occurred when the foremen subsequently relayed Pickens' directives to the employees. As shown, the credited, mutually corroborative, and undisputed testimony of all four employee witnesses establishes that the foremen relayed Pickens' announcement of the new prohibition against stopping at the Chevron. (JA 544; 150, 194, 223, 254.)

There is likewise no merit to the Company's suggestion (Br 9-10) that it had to tell its supervisors not to take employees to the Chevron in order to avoid violating Section 8(a)(2) of the Act (29 U.S.C. § 158(a)(2)). Here, the Company had permitted daily stops at the Chevron to gas up and buy food for years before the Union came on the scene. (JA 187-89, 134-38, 217-18, 246-48.) The Board reasonably found (JA 548) that the Company had less drastic options for controlling its foremen's activities than announcing an "oversweeping" ban on this longstanding neutral practice. Further, the Company errs in relying (Br 9) on *District 65, Distributive Workers of America v. NLRB*, 593 F.2d 1155, 1160 (D.C. Cir. 1978), which involved the completely different issue of supervisory solicitation of union membership cards.

2. The Company unlawfully announced a change in paycheck distribution in order to prevent employees from meeting with Union Representative Bratcher

The Board also reasonably found (JA 549) that the Company further violated Section 8(a)(1) of the Act when Superintendent Pickens and Assistant Superintendent Loya told employees, through the foremen, that their paychecks were being delayed to prevent them from visiting the Chevron where they would see Bratcher. As the Board explained (JA 549), simply by telling employees that it was changing its practice to prevent employees from meeting with a union representative, the Company violated the Act, even if it never carried out the threat. *See, e.g., Success Village Apartments, Inc.*, 350 NLRB 908, 911 (2007) (telling co-op employees that their union status was a factor in denying their housing applications was unlawful because the statement interfered with their exercise of Section 7 rights). The Board recognizes that a statement that is a “wholly gratuitous attempt to convey . . . disapproval” of union activity by suggesting discriminatory treatment tends to coerce and discourage that activity. *K-Mart Corp.*, 336 NLRB 455, 455 (2000) (employer violated Section 8(a)(1) by telling employee that her association with a union organizer was a factor in denying her a position, even though the position had already been filled); *accord R.L. White Co., Inc.*, 262 NLRB 575, 585 (1982).

The record shows that for several years, employees regularly received paychecks on Friday mornings that they immediately cashed at the Chevron during their morning stop. (JA 543; 143-44, 248, 190-91.) Uncontroverted evidence establishes that on Thursday, September 20, Pickens and Loya announced to employees, through their foremen, that they would not receive their paychecks on Friday morning because the Company did not want them to go to the Chevron where they would see Bratcher. (JA 545 & n.12; 157-58, 160-61.)

There is no merit to the Company's contention (Br 21-22) that Pickens was only speaking to the foremen during the meeting outside of his office on September 20 where he made the announcement. The credited and mutually corroborative testimony of all four employees supports the administrative law judge's finding that Pickens was addressing the group as a whole, including the employees who were assembled there, and that the foremen were translating Pickens' announcement for the employees. (JA 159, 196-97, 226-27, 257.) It is also clear from the context that Pickens, who spoke little or no Spanish, was relying on the foremen to translate his announcements for the Spanish-speaking employees who had gathered around him. (JA 58, 197-98, 236-37, 270.)

In sum, the evidence establishes that the Company announced that it would delay distribution of employees' paychecks in order to deter them from meeting with Union Representative Bratcher at the Chevron. On this record, the Board

reasonably found (JA 549) that the Company's statements had a tendency to coerce employees and discourage union activity in violation of Section 8(a)(1) of the Act.

3. The Company is liable for the supervisory statements made by the foremen, who were stipulated supervisors

Before this Court, the Company primarily defends its unlawful directives by asserting (Br 10-11) that its foremen were not its agents, and therefore that it is not liable for the unlawful statements that they relayed to the employees at Superintendent Pickens' behest. Taking this meritless contention one step further, the Company also asserts (Br 11) that because it was primarily the foremen who announced Pickens' unlawful directives to the employees, the testimony about those announcements constituted inadmissible hearsay. As we now show, however, the Board properly found (JA 548) that the foremen—whose supervisory status is uncontroverted, and who were also acting at Pickens' express instructions—were the Company's agents. Accordingly, the Board reasonably (JA 544 n.7) treated the testimony of Foremen Ordonez and Salazar and employees Ayala, Garcia, Arce-Salazar, and Rivera about the foremen's announcements of the unlawful directives as admissions of a party opponent, and thus not hearsay.

Before the Board, the Company stipulated that its foremen were supervisors under Section 2(11) of the Act (29 U.S.C. § 152(11)). (JA 543; 127.) The Board has repeatedly held, with judicial approval, that supervisors' statements are binding on an employer. *Garvey Marine, Inc.*, 328 NLRB 991, 1017 (1999), *enforced*, 245

F.3d 819, 824 (D.C. Cir. 2001); *3E Co., Inc.*, 313 NLRB 12, 12 n.1 (1993), *enforced*, 26 F.3d 1, 3 (1st Cir. 1994); *Ideal Elevator Corp.*, 295 NLRB 347, 347 n.2 (1989). As this Court recognizes, “[i]f they are supervisors, the Company is responsible for their conduct.” *Amalg. Clothing Workers v. NLRB*, 365 F.2d 898, 899 (D.C. Cir. 1966). Further, it is settled that an employer is liable for its supervisors’ statements and actions if “employees would have just cause to believe that [they are] acting for and on behalf of” the employer. *Oil, Chemical, and Atomic Workers Int’l Union v. NLRB*, 547 F.2d 575, 585 (D.C. Cir. 1976); *accord 3-E Co.*, 26 F.3d at 4.³

The Board reasonably held the Company responsible for statements that its foremen relayed from Superintendent Pickens and Assistant Superintendent Loya to the employees. (JA 545 n.13, 548, 549.) Not only did the Company stipulate to its foremen’s supervisory status (JA 127), but its principal, Pickens, directly instructed the foremen on August 24 to stop taking employees to the Chevron because Union Representative Bratcher was there. (JA 33, 54.) The foremen then relayed Pickens’ directive to the employees. (JA 36-37, 54-55, 149-50, 152, 193-

³ Indeed, under Section 2(13) of the Act (29 U.S.C. § 152(13)), the Board is not bound to apply strict agency principles, and may properly hold an employer responsible for supervisory statements and actions even if they were not expressly authorized or ratified by the employer. *Local 636 of United Ass’n of Journeymen (Pipefitters) v. NLRB*, 287 F.2d 354, 359-60 (D.C. Cir. 1961), citing *International Ass’n of Machinists v. NLRB*, 311 U.S. 72, 80 (1940), and *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 521 (1941).

94, 223, 253-55.) Similarly, on September 20, after the employees saw Foreman Salazar confer with Assistant Superintendent Loya, Salazar told them that their paychecks would be delayed so that they would not stop at the Chevron to cash them. (JA 156-57.) Later that day, after Pickens arrived and met with the foremen in his office, Foreman Salazar again told his crew that Pickens had said he would delay their paychecks so they would not “hook up” with Bratcher at the Chevron. (JA 158-59.) Then, when the employees were gathered around Pickens, the foremen translated his announcement that paychecks would be delayed so that the employees would not go to the Chevron and see Bratcher. (JA 160-61, 225-26.)

On this record, there is ample evidence to support the Board’s finding that the Company is answerable for the statements that the foremen relayed to the employees directly on Pickens’ behalf. Because the foremen made the announcements in accordance with Pickens’ directives, the Board properly attributed them to the Company. *See, e.g., Wal-Mart Stores, Inc.*, 350 NLRB 879, 884 (2007) (employer was liable for unlawful actions taken by management trainees in furtherance of employer’s directive to report union activity).

The Company attempts to avoid liability by claiming (Br 13) that Pickens merely instructed the foremen to curtail their own union activity. Contrary to the Company’s contention, however, the testimony credited by the Board (JA 544) shows that Pickens expressly instructed the foremen to stop going to the Chevron

to prevent the employees from speaking to Bratcher. (JA 33, 54.) The Company's further claim (Br 14-15) that its rule was really "more of a suggestion" must also be rejected; the Company bases its claim solely on Pickens' discredited testimony, which was controverted by the foremen's mutually corroborative testimony. (JA 544.) In sum, given the credited testimony that Pickens told the foremen not to stop at the Chevron, the Board reasonably attributed to the Company the directives that the foremen relayed to their crews on Pickens' behalf.

There is also no merit to the Company's assertion (Br 12-13) that it is not responsible for the statements of its admitted supervisors because they were sympathetic to the union organizing drive. The Company errs (Br 12-13) in relying on *Albertsons, Inc.-Southco Division*, 289 NLRB 177 (1988), a distinguishable case involving a supervisor who had solicited for the union and who had allegedly interrogated employees unlawfully. Under those very different circumstances, the Board found that the interrogations were not chargeable to the employer. *Id.* at 189. By contrast, here the foremen relayed to the employees Superintendent Pickens' antiunion statements, consistent with his directives. For similar reasons, the Company (Br 13) errs in relying on *Paintsville Hospital Company, Inc.*, 278 NLRB 724, 725 (1986), where the supervisors took action against their employer's interests and "in accordance with their own [pro-union] sympathies." On those different facts, the Board declined to attribute the

supervisors' actions to their employer. By contrast, in the instant case, the foremen were speaking against their personal sympathies and on behalf of their superior, Superintendent Pickens, when they announced the Company's new rule against convening at the Chevron and its plan to delay paycheck distribution. (JA 73-74, 144-45, 161-66, 250, 501.)⁴

In these circumstances, the Board reasonably found (JA 544 n.7) that the testimony of the two foremen and four employees about the foremen's statements constituted party admissions under Rule 801(d)(2) of the Federal Rules of Evidence. The Company (Br 12, 22) fails to make any persuasive arguments for disturbing the Board's evidentiary ruling. Contrary to the Company's insistence (Br 12), the Board properly relied on *U.S. Ecology Corp.*, 331 NLRB 223, 225 (2000), which recognizes that statements by "individuals who are clearly agents of the [employer]" about matters "within the scope of [their] agency or employment" constitute party admissions. *Accord In re Sunset Bay Assoc.*, 944 F.2d 1503, 1517-19 (9th Cir. 1991); *Ware v. Howard Univ., Inc.*, 816 F. Supp. 737, 741 (D.D.C. 1993). As demonstrated above (pp. 27-29), the foremen, whose supervisory status

⁴ Indeed, the foremen's pro-union sympathies reinforce the Board's finding that they were speaking with the authority of the Company and in the scope of their employment, not in their own interests. As the Board has recognized, with this Court's approval, a supervisor's known union sympathies may give greater credence to testimony about his announcement of an employer's unlawful restrictions on union activity. *Garvey Marine, Inc.*, 328 NLRB 991, 1017 (1999), *enforced*, 245 F.3d 819, 824 (D.C. Cir. 2001).

was stipulated to by the Company, were its agents. Accordingly, the Board reasonably admitted the testimony by employees and foremen about the foremen's announcements to their crews, which they made at the behest of Superintendent Pickens. The Board's evidentiary ruling in this case was "reasonable under the circumstances" and should, therefore, be upheld. *Conley v. NLRB*, 520 F.3d 629, 640 (6th Cir. 2008).

4. The Company errs in relying on its failure to follow through on its announcements of unlawful changes

The Company wastes much ink contending (Br 13-21) that it did not violate the Act because its employees "openly violated" the unlawful rules that it announced in an effort to prevent them from meeting and talking with a union representative. It is settled that the "mere maintenance" of a rule that tends to chill Section 7 activity constitutes an unfair labor practice, "even absent evidence of enforcement." *Guardsmark, LLC. v. NLRB*, 475 F.3d 369, 375 (D.C. Cir. 2007), citing *Lafayette Park*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). The very announcement of overly broad and discriminatory work rules unlawfully inhibits and threatens employees who wish to engage in protected activity but "refrain from doing so rather than risk discipline." *Beverly Health and Rehabilitation Services*, 332 NLRB 347, 349 (2000), *enforced*, 297 F.3d 468, 478 (6th Cir. 2002); *accord Mercury Marine of Brunswick*, 282 NLRB 794, 795 (1987). Thus, even if employees continued to visit the Chevron after the

Company announced its new rule, they knew that the Company did not want them going there to see Bratcher. The Company misses the mark when it contends (Br 18) that employee testimony is inconsistent about whether they continued to stop at the Chevron. The important point is that after announcing its overbroad and discriminatory work rule to the foremen, who then relayed it to the employees, the Company never disclaimed the rule's existence or limited its scope.

Because the existence of an unlawful rule and its enforcement are two separate questions, the Company also cannot defend its announcements by arguing (Br 20-21) that it did not discipline employees for disobeying its unlawful prohibition against stopping at the Chevron. Furthermore, any willingness on the foremen's part to ignore the rule does not negate its tendency to have a chilling effect on employees' protected activity. The Board was therefore reasonable in disregarding evidence that the rule was not uniformly followed by the foremen or enforced by the Company.⁵ Likewise, even though, as the Board found, the Company did not carry out its plan to delay paycheck distribution, the Company nevertheless violated Section 8(a)(1) of the Act by announcing that it would.

⁵ In any event, the Company, in attempting to show (Br 18) that its rules were flouted, inadvertently weakens its own position. The Company relies on Foreman Ordonez' testimony that Superintendent Pickens scolded Foremen Salazar and Ordonez, and told them to leave "now" when they took their crews to the Chevron. (JA 59-60.) This evidence, however, actually shows that Pickens was maintaining his unlawful rule against stopping at the Chevron.

C. The Company Unlawfully Threatened Employees with Discharge If They Engaged in a Strike

It is settled that an employer violates Section 8(a)(1) of the Act by making “coercive statements that threaten retaliation against employees” for exercising their Section 7 rights. *Tasty Baking Co.*, 254 F.3d 114, 124 (D.C. Cir. 2001) (citing *Southwire Co. v. NLRB*, 820 F.2d 453, 457 (D.C. Cir.1987)). Accordingly, threatening employees with termination for engaging in protected strikes plainly violates the Act. *Vic Tanny Intern., Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980).

The Board found (JA 549) that Superintendent Pickens, by informing employees that he would assume they were quitting or giving up their jobs if they unloaded their tools and refused to work, threatened them with discharge in violation of Section 8(a)(1) of the Act. Pickens was speaking with a large group including both foremen and employees when, by his own admission, he said, “there’s work to be done. If you don’t want to do it, I’m going to—I’m assuming that you quit.” (JA 455; 484.) At the time, workers had been “milling around,” talking all at once, “weren’t happy” about various work matters, and had gathered around Pickens when he began speaking. (JA 483.) All four employee witnesses who testified remembered hearing Pickens say they were quitting, giving up their jobs, or would be fired if they unloaded their tools. (JA 161, 198, 227, 258.)

The Board, with this Court's approval, has found that similar language, essentially threatening to treat a protected work stoppage as if workers were quitting, constituted an unlawful threat. *See Accurate Wire Harness*, 335 NLRB 1096, 1096-97 (2001) (strikers were told that if they did not return, the employer was going to "accept that as their resignation"); *Conair Corp.*, 261 NLRB 1189, 1190 (1982) (telling strikers that they would be "deemed to have voluntarily quit" unless they returned to work in two days was a threat in violation of 8(a)(1)), *enforced in relevant part*, 722 F.3d 1355, 1371 (D.C. Cir. 1983). Such statements are unlawful because they put pressure on employees to choose between abandoning their protected activity and giving up their jobs. Given the testimony here, the Board reasonably found (JA 548-49) that Superintendent Pickens unlawfully threatened the employees with discharge.

The cases cited by the Company (Br 27-28) do not help it here. As noted above, *Accurate Wire Harness*, 335 NLRB 1096, 1096-97 (1980), actually supports the Board's finding here that statements implying that strikers will be treated as though they have quit are unlawful. *Pink Supply Corp.*, 249 NLRB 674 (1980), is even less helpful to the Company. There, the Board was not called upon to determine, and made no finding, whether the employer's statement constituted an unlawful threat; instead, the Board held only that the statement was ambiguous

enough to create uncertainty about the employees' continued employment status.

Id. at 674.

There is no more merit to the Company's reiteration of its claim (Br 26) that Pickens' threat was "directed only at foremen." The administrative law judge reasonably credited employee Ayala's testimony that Superintendent Pickens was addressing the entire group of foremen and employees gathered outside of his office. (JA 545 n.16; 159, 197-98, 237, 270.) Thus, the Company is essentially asking this Court (Br 26) to overturn the administrative law judge's reasonable determination (JA 545 n.16) to discredit Pickens' testimony that he was only speaking to the foremen, and not to the employees gathered around him. The Company utterly fails to meet its heavy burden of showing that these credibility determinations were "hopelessly incredible" or "patently unsupportable." *Cadbury Beverages*, 160 F.3d 24, 28 (D.C.Cir. 1998).⁶

The Company also does not help itself by noting (Br 28) that the Board dismissed the complaint allegation that Superintendent Pickens, by his statements, in fact discharged the employees. (JA 540 n.1, 549.) Statements can constitute unlawful threats without also amounting to unlawful actions. Contrary to the

⁶ The Company also errs in relying (Br 26-27) on the employees' protestations that they were not quitting, which they made in response to Pickens' unlawful threat. Their subsequent protestations hardly establish that Pickens did not utter his threat in the first place.

Company's assertion (Br 28), the test that the Board used here to analyze whether Pickens' statements were tantamount to actually discharging the employees (*see* JA 540 n.1) is not the same as the test for determining whether his statements tended to coerce employees in violation of Section 8(a)(1) of the Act. *See* cases cited above pp. 19, 33-34. As shown above, the Board properly considered (JA 548-49) the coercive tendency of Pickens' statements, and reasonably found that they constituted an unlawful threat, even if they did not accomplish the actual discharge of the employees.

D. The Board Reasonably Found that the Company Violated the Act by Refusing To Provide Bratcher with an Application Because of His Union Affiliation

On September 7, Union Representative Bratcher visited the Company's offices and requested a job application, stating that he wanted to work for the Company and to organize its employees. (JA 81-83.) Acting on Pickens' instructions, a clerical employee, Perez, refused to provide Bratcher with an application and told him that she would call the police if he did not leave. (JA 83-84, 488.) The Board reasonably found (JA 550-51) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when it refused, in such a manner, to give him an application because of his union status. An employer violates Section 8(a)(1) of the Act by making disparaging remarks that discourage potential applicants or imply the futility of pursuing a job search because of the

requestor's union involvement. *Tradesmen International, Inc.*, 351 NLRB 399, 399 n.4 (2007).

The Company errs in contending (Br 30) that its statements were not coercive because its application form was a "worthless piece of paper." The Company also misses the mark in suggesting (Br 30) that its refusal was lawful because the Board dismissed a separate complaint allegation that its failure to consider Bratcher for hire violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)). (JA 540 n.1.) These contentions misrepresent the evidence and misdirect the legal inquiry. By the Company's own admission, its application form must be completed by new hires, and is used to gather information for their personnel files. (JA 400-01, 467.) Moreover, although the Board appropriately considered the limited purpose of the application form in dismissing the Section 8(a)(3) complaint allegation, the Board's analysis of the Section 8(a)(1) issue properly focused on whether the Company's hostile treatment of Bratcher because of his union affiliation had a tendency to chill Section 7 activity. (JA 550-51.)

Here, the Board reasonably found that the Company treated a union-affiliated requestor differently than it treated other requestors. Rather than simply providing the requestor with an application, as it normally does (JA 548; 315-16), the Company refused Bratcher's request and threatened to call the police (JA 547; 383-84, 488). The Board was reasonable in determining (JA 550-51) that by

denying Bratcher an application under these circumstances, the Company was attempting to discourage his union activities, in violation of Section 8(a)(1) of the Act.

There is no merit to the Company's contention (Br 29) that this case is controlled by *Toering Electric Co.* 351 NLRB 225 (2007). The cited case involved the different issue of an employer's refusal to consider or hire a union salt in violation of Section 8(a)(3) of the Act. By contrast, in the instant case, the Board did not find that the Company unlawfully refused to consider or hire Bratcher. As the Company recognizes (Br 30), the Board dismissed that complaint allegation. Accordingly, the Board did not need to determine whether Bratcher was entitled to statutory protection against hiring discrimination. Instead, the Board reasonably determined (JA 550-51) that the Company's hostile rebuff of Bratcher's request for an application because of his union affiliation was coercive in violation of Section 8(a)(1).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE STRIKE WAS AN UNFAIR LABOR PRACTICE STRIKE AND, THEREFORE, THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO REINSTATE FORMER STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. An Employer Violates Section 8(a)(3) and (1) of the Act by Failing To Immediately Reinstating Unfair Labor Practice Strikers once They Make an Unconditional Offer To Return to Work

It is settled that unfair labor practice strikers, unlike economic strikers, are entitled to immediate reinstatement upon their unconditional offer to return to work, even if the employer has permanently replaced them. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972); *Mastro Plastics Corp. v. NLRB*, 350 US 270, 278 (1956); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1363 n.26 (D.C. Cir. 1983); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 394 (D.C. Cir 1981). Therefore, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to immediately and fully reinstate former unfair labor practice strikers once they have made an unconditional offer to return to work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Alwin Mfg. Co., Inc. v. NLRB*, 192 F.3d 133, 141 (D.C. Cir. 1999).

As shown below, substantial evidence supports the Board's finding (JA 550) that the employees went on strike in part to protest the Company's unlawful maintenance of an overly broad and discriminatory work rule against stopping at the Chevron, its announcement of a delay in paycheck distribution, and its threat to

terminate employees if they went on strike. Contrary to the Company's contention (Br 29), the Board properly relied on the considerable evidence of the employees' motives to find (JA 550) that they struck at least in part because of those unfair labor practices. Therefore, the Board reasonably determined (JA 540) that the employees were unfair labor practice strikers, and that the Company violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate them upon their unconditional offer to return to work. (JA 550.)

B. The Employees Struck at Least in Part To Protest the Company's Unfair Labor Practices

It is settled that "if the employers' violations of the labor laws are a 'contributing cause' of the strike," then it is an unfair labor practice strike. *General Indus. Employees' Union, Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991); accord *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990). Under this well-established standard, when strikers are motivated by both economic concerns and labor law violations, the strike is an unfair labor practice strike if the Company's unlawful acts had "anything to do with causing the strike." *General Drivers and Helpers Union, Local 662*, 302 F.2d 908, 911 (D.C. Cir. 1962). Because the "Board's findings regarding the causes of a strike are factual," this Court "must uphold them if they are supported by substantial evidence in the record as a whole." *General Indus. Employees*, 951 F.2d at 1312 (citations omitted). The Board's finding of a "causal connection" between the unfair labor

practices and the decision to strike focuses on the employees' subjective motivations. *Golden Stevedoring Co., Inc.*, 335 NLRB 410, 411 (2001); *C-Line Express*, 292 NLRB 638, 639 (1989).

On review, the Company (Br 28-29) does not seriously challenge the Board's finding of a causal connection between the unfair labor practices and the strike. Instead, the Company primarily asserts (Br 28) that "there were no unfair labor practices" and, therefore, that there was no unfair labor practice strike. We have already shown, however, that the Board reasonably found that the Company violated the Act by announcing and maintaining an unlawful work rule prohibiting stops at the Chevron, by announcing a change in paycheck distribution, and by threatening to discharge employees if they went on strike. *See pp. 18-38 above.* Moreover, substantial evidence supports the Board's finding that employees went on strike at least in part to protest those unfair labor practices. Although employees were also concerned about economic issues such as paycheck calculations and the provision of tools, safety equipment, ice, and water (JA 153, 155, 165, 180, 201, 239), the credited and uncontroverted evidence described below establishes that the employees were upset by the Company's unfair labor practices.

First of all, employees testified that they did not like being restricted from the Chevron and from speaking with union representatives. (JA 155, 179-81.)

They were likewise unhappy about the Company's announcement that their paychecks would be delayed and resented being told by Superintendent Pickens on September 20 that he would assume they were quitting if they left. (JA 161,165, 255.) Furthermore, the employees complained to their foremen and discussed striking because of the prohibitions limiting their access to Bratcher. (JA 55, 155, 255.) The employees then told Bratcher at the beginning of the strike that they were upset about the Company's announcement that their paychecks would be delayed, and about Pickens' statement that he would assume that they were quitting if they unloaded their tools. (JA 92, 201, 229.) Based on this uncontroverted testimony, the Board reasonably found (JA 550) that the employees struck at least in part because of the Company's unfair labor practices. *Accord Child Development Council*, 316 NLRB 1145 (1995) (inference was reasonable when unlawful conduct was "specifically discussed" and "a matter of consternation" among employees before they voted to strike).

There is no merit to the Company's bald assertion (Br 29) that its rules against stopping at the Chevron "certainly would not cause any employee to go out on strike." This claim cannot stand in light of the employees' credited and uncontroverted testimony that they did go on strike to protest the Company's overly broad and discriminatory work rule, as well as the Company's announcement of paycheck delays and Pickens' unlawful threat of discharge. The

Company also errs in its reliance (Br 29) on *C-Line Express*, 292 NLRB 638 (1989). In the cited case, the Board noted that where the search for a causal link between an employer's unlawful conduct and its employees' decision to strike is "problematic," the Board "may consider the probable impact" of violations on "reasonable strikers." *Id.* at 638. Here, however, the causal link was directly established by employee testimony. In sum, given the substantial, uncontroverted evidence that employees were motivated to strike at least in part by the Company's unfair labor practices, the Board reasonably determined (JA 550) that they were unfair labor practice strikers.

C. The Company Unlawfully Refused To Reinstate the Former Strikers Immediately After Their Unconditional Offer To Return to Work

On review, the Company does not challenge the Board's further finding (JA 550) that it failed to reinstate the former strikers immediately after they made an unconditional offer to return to work. The Company stipulated that it received the unconditional offer on September 26. (JA 58-59, 502.) The Company's own witness, Vice President Hohman, testified that when he received the offer, he told strikers that they had been permanently replaced. (JA 444-45.) Although the Company belatedly returned five former strikers to work on December 11, the Company stipulated that the nine remaining former strikers have not yet been reinstated. (JA 337.)

It is settled that failing to reinstate unfair labor practice strikers upon their unconditional offer to return to work constitutes discrimination in violation of Section 8(a)(3) and (1) of the Act because it discourages them from exercising their protected rights to organize and to strike. *Mastro Plastics Corp. v. NLRB*, 350 US 270, 278 (1956). Although the Company had hired permanent replacements, it was under an obligation to discharge them, if necessary, to reinstate the former strikers immediately after they offered unconditionally to return to work. *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). Given the uncontested evidence that the Company failed to fully and immediately reinstate the former strikers, whose unqualified right to immediate reinstatement is undisputed, the Board reasonably found (JA 550) that the Company violated Section 8(a)(3) and (1) of the Act.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that Court enter a judgment denying the Company's petition for review and granting the Board's cross-application for enforcement in full.

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	* 08-1336
v.	*
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	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
DISTRICT COUNCIL OF IRONWORKERS OF THE STATE OF CALIFORNIA AND VICINITY	* * *
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,114 words of 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 2nd day of February 2009

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	*
Intervenor	*

CERTIFICATE OF SERVICE

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

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