Nos. 09-2187 and 09-2289

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOPAREX LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

The jurisdictional statement of Loparex LLC ("the Company") is correct, but incomplete. This case is before the Court on the Company's petition for review, and the National Labor Relations Board's ("the Board's") cross-application for enforcement, of the Board's Order against the Company. The Board's Order is

final with respect to all parties.[1] The Board's Decision and Order issued on March 31, 2009, and is reported at 353 NLRB No. 126. (D&O 1.)[2]

Pursuant to Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. §§ 151, 160(a)), the Board had jurisdiction over the underlying unfair labor practice proceeding. Teamsters Local 662 ("the Union") initiated that proceeding by filing unfair labor practice charges against the Company. (GX 1(a)-(h).) This Court has appellate jurisdiction over the unfair labor practice proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Hammond, Wisconsin.

The Company's May 4, 2009 petition for review and the Board's May 14, 2009 cross-application for enforcement were timely filed, because there is no time limit in the Act for seeking enforcement or review of Board orders.

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[1] The Board's Order was 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)). *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *petition for cert. filed*, 77 U.S.L.W. 3670 (U.S. May 27, 2009).

[2] "D&O" refers to the Board's Decision and Order, contained in the Company's Required Short Appendix. References to the remainder of the record are as follows: "Tr" refers to the transcript of proceedings before the administrative law judge and "GX" refers to the General Counsel's exhibits in that proceeding. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested finding that the Company violated Section 8(a)(1) of the Act by prohibiting employees from discussing the Union during working time while allowing other nonwork-related subjects to be discussed during the same time.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discriminatorily promulgating a new rule restricting employees' use of company bulletin boards because of union activity.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by prohibiting employees from distributing union materials in the parking lot and in other nonworking areas of the facility during nonwork time.

4. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by informing employees classified as shift leaders that they were supervisors and prohibiting them from engaging in union activity.

STATEMENT OF THE CASE

Based on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. §§ 158(a)(3) and (1)). (GX 1 (i).) After a hearing, the administrative law judge found that the Company engaged in most, but not all, of the alleged unfair labor practices. On review, the Board affirmed the judge's findings and order as modified. (D&O 1-4.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company treats paper and films with silicone and plastic coatings to use as peel-away backing for such items as band-aids and roofing shingles. (D&O 3; Tr 165.) It operates multiple facilities, including the Hammond, Wisconsin, location involved here. (D&O 3; Tr 96, 165-66.) As discussed below, the Hammond facility was previously owned and operated by Douglas-Hanson. (D&O 3; Tr 96.)

1. Employees of former owner Douglas-Hanson, including Jody Schillinger, commence union activity at the Hammond facility shortly before the Company acquires it from Douglas-Hanson

Shortly before the Company acquired the Hammond facility in June 2006, production employee Jody Schillinger and other Douglas-Hanson employees became active in a union campaign at the Hammond facility. (D&O 3; Tr 96, GX 14.) During the union campaign, Douglas-Hanson terminated Schillinger, and the Union filed unfair labor practice charges. (*Id*.) Schillinger obtained reinstatement and backpay after Douglas-Hanson signed a Board-approved settlement of the charge. (*Id*.)

2. The Company takes over the facility and retains some Douglas-Hanson management officials and employees, including Schillinger

When the Company took over the Hammond facility, it retained some of the Douglas-Hanson officials, including Production Manager Todd Bloom, Technical Director Pete Riehle, Supervisor/Team Leader Rich Larsen, and Plant Supervisor/Team Manager Jason Carlson. (D&O 3; Tr 96-98.) It also retained other Douglas-Hanson employees, including Schillinger. (D&O 3; Tr 96.) Although the previous unfair labor practice charge involving Schillinger had been filed against and settled with Douglas-Hanson, the Company took over operation of the Hammond facility before the Board secured full compliance with the settlement. (D&O 3; GX 14.)

3. The Company's structure at the Hammond facility: employees, shift leaders, and higher management officials

In early 2007, the Company had approximately 200 production employees at its Hammond facility. (D&O 3; Tr 178.) These employees operated the machines that cut rolls of paper or film and apply silicone or plastic coatings. (D&O 6; Tr 22-23.) The production employees were divided into four teams based on their shift schedules, and further divided into smaller units referred to as "crews." (D&O 6; Tr 14.)

A shift leader was a member of a crew who led the crew's work during its shift. (D&O 6; Tr 21, 24.) The shift leaders were generally supervised by team managers, and the team managers reported to one of two production managers. (D&O 7; Tr 21-24.) During the relevant time period, those production managers were Todd Dennison and former Douglas-Hanson official Bloom. (D&O 7; Tr 97, 165.)

B. Production Employee Schillinger Engages in Protected Activity; Company Officials Press Him for Information About It and Tell Him Not to Talk About the Union; Schillinger Calls a Union Organizer and Begins Openly Wearing Union Insignia

In January or February 2007, about 8 months after the Company acquired the Hammond facility, Schillinger spoke with Randy Risler, who was an assistant in the Human Resources Department, about the Company's new attendance policy. (D&O 3; Tr 104-05.) According to Schillinger, the policy had "infuriated a lot of

the employees." (D&O 3; Tr 104-05, 147.) About a week after that conversation, the Company called Schillinger into Production Manager Bloom's office. (D&O 3; Tr 106.) Bloom and Team Manager Carlson, who, like Bloom and Schillinger, had previously worked for Douglas-Hanson, were there. (*Id*.) Bloom asked Schillinger what he had said to Risler about the attendance policy. (*Id*.) Schillinger replied that he could not remember. (*Id*.)

Bloom then brought Lisa Koats—the Hammond facility's human resources manager—and Risler into the meeting. (*Id*.) Like Bloom, Koats asked Schillinger what he had said to Risler about the attendance policy. (*Id*.) Schillinger stated that he did not remember, and Koats challenged him, stating that Schillinger remembered "everything in detail." (D&O 3; Tr 106-07.) Schillinger stated that he believed the Company was questioning him because of his prior union activity. (*Id*.) Koats replied, "That's all water under the bridge," but when Schillinger asked what he should do if someone asked him about union organizing, Koats told him "to just work and not talk about the Union." (D&O 3; Tr 109.)

In early February 2007, on the same day as the meeting with Bloom and Koats, or shortly thereafter, Schillinger contacted a representative of the Union about organizing the facility. (D&O 3; Tr 107.) Around the same time, Schillinger openly displayed his support for the Union by wearing union buttons and union hats whenever he was at work. (*Id*.) On about half of his workdays, he also wore a

union t-shirt. (D&O 3; Tr 122.)

C. Schillinger and Coworker Thomas Meeker Post Union Literature on Company Bulletin Boards; the Union Postings Are Repeatedly Removed; the Company Promulgates a New Rule Requiring Employees to Obtain Approval before Posting Information on Bulletin Boards

On March 9, Schillinger, along with coworker Thomas Meeker, posted a union organizing flyer on one or more company bulletin boards at the Hammond facility. (D&O 4; Tr 108-11.) Prior to then, employees had used the bulletin boards to post nonwork information, such as sports schedules and for-sale announcements. (*Id*.)

Schillinger and Meeker subsequently discovered that someone had removed the organizing flyer. (D&O 4; Tr 111-12.) They reposted the flyer, but someone again removed it. (*Id.*) This cycle of posting and removal was repeated several times. (*Id*.) At the same time that the union flyer was being removed, other nonwork employee postings remained on the bulletin boards. (D&O 4; Tr 109-12.)

On April 16, 2007—approximately 5 weeks after Schillinger and Meeker had first posted union material—the Company announced a new rule that prohibited employees from posting anything on the company bulletin boards without the Company's prior approval. (D&O 4; Tr 112, GX 8.)

D. The Company Prohibits Employees from Distributing Union Flyers in the Company Parking Lot

During their nonwork hours, Schillinger, Meeker, and two other employees—Rick Toufar and Harlan Rott—distributed prounion flyers in the Hammond facility's parking lot. (D&O 4; Tr 50.) Specifically, in late May or early June 2007, these employees handed union flyers to employees they encountered in the parking lot and placed some flyers on the windshields of cars. (D&O 4-5; Tr 50-52.)

As Meeker walked through the parking lot, Production Manager Todd Dennison approached him in a car. (*Id*.) Dennison asked Meeker what he was doing. (*Id.*) Meeker replied that he was "putting out flyers." (*Id*.) Dennison told Meeker that he "couldn't do that on company property." (*Id*.) Meeker responded, "I [am] well within my rights" to "hand out the flyers." (D&O 5; Tr 50, 51.) Dennison said that Meeker "could" do that, "just not on company property." (D&O 5; Tr 50.)

After the exchange with Dennison, Meeker joined Schillinger and the other employees who had been distributing the flyers. (D&O 5; Tr 118.) Technical Director Riehle approached Schillinger with one of the flyers in his hand and said: "You know you can't be doing this. This is what you got fired for before." (D&O 5; Tr 119.) Schillinger replied that he was within his rights to handbill. (*Id*.)

Riehle left, and returned with Human Resources Director Koats. Koats told the employees that what they were doing "violated company policy." (D&O 5; Tr 119.) Koats told Schillinger, "You can't do it on company property . . . .You have to do it out on the street." (*Id*.) When Schillinger disputed this, Koats stated, "No. I want you to stop right now." (*Id*.)

E. The Company Prohibits Employees From Distributing Union Buttons In the Workplace and From Having Conversations About the Union

On approximately June 22, the Company called Meeker, Schillinger, and Toufar to a meeting with Dennison and Koats in the Hammond facility's packing room. (D&O 5; Tr 45-46, GX 2(c).) Dennison showed the employees some prounion buttons that had been found near the time clock, and stated: "That is not acceptable . . . . [Y]ou're not allowed to pass them out while you're here."[3] (*Id*.) Dennison continued:

> I don't want to catch you passing them out . . . I don't want to see them laying around . . . . [Y]ou can pass them out when you're outside, on your own time, but when you're here working . . . you need to be working . . . . (*Id*.)

Dennison further admonished the employees, "[D]on't organize during working hours." (*Id*.) He also told them that although they could "stand at the door" and pass out buttons, "[d]on't pass out buttons while you're working." (*Id*.)

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[3] Schillinger taped this conversation and both the tape, and a transcript of the tape, were entered into evidence. (D&O 5, n.3; GX 2(a) & (c).)

In this same conversation, Dennison stated that any employees' "organizing conversations . . . can't take place while you're in here working." (*Id*.) Schillinger then asked whether Dennison meant that "we can't talk about anything." (*Id*.) Dennison answered: "No, I didn't say that. While you guys are working, in idle conversation, you can, whatever, but you can't be conducting organizing meetings." (*Id*.)

About a month after this conversation, in July 2007, a stack of discount coupons for a fast food restaurant was left at the ordering counter in the Company's main lunchroom. (D&O 5; Tr 53.) These coupons remained in the lunchroom for several days. (D&O 5; Tr 54.)

F. The Company Prohibits Shift Leaders From Engaging In Union Activities

In late June or early July 2007, company officials told all individuals designated as "shift leaders" at the Hammond facility that they were "supervisors" and were not allowed to sign union cards or engage in other prounion activities. (D&O 11; Tr 8.) Later, in October 2007, the Company communicated the same prohibition to Meeker when it promoted him to shift leader. (D&O 11; Tr 16, 19-21.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that the Company committed numerous violations of Section 8(a)(1) of the Act. Specifically, the Board found (D&O 1-2) that the Company violated Section 8(a)(1) of the Act by prohibiting employees from talking about union organizing while allowing them to discuss other subjects unrelated to work; promulgating a restriction on employees' use of bulletin boards for the purpose of interfering with union activities; prohibiting off-duty employees from distributing union literature in the company parking lot or elsewhere on company property; prohibiting employees from distributing union buttons and materials during nonworking time and in nonworking areas of the plant; and informing shift leaders that they were supervisors and prohibiting them from engaging in union activity.[4] (D&O 1, 17.)

In agreeing with the judge's finding (D&O 11-15) that the Company violated the Act by prohibiting shift leaders from engaging in union activity, the Board upheld (D&O 1-2, nn.4, 6) the judge's findings (D&O 11-15) that the

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[4] The Board also affirmed (D&O 1, n.1) the judge's dismissal of allegations that the Company unlawfully disciplined Schillinger in violation of Section 8(a)(1) and (3) of the Act. No party filed exceptions to this dismissal, or to the judge's dismissal of two other Section 8(a)(1) allegations involving another bulletin board rule and threats to employees. Therefore, these dismissals are not before this Court.

Company failed to demonstrate that the shift leaders were supervisors. Specifically, the Board found (D&O 1, 1 n.4, 6) that the Company failed to show that the shift leaders had the requisite supervisory authority to responsibly direct employees or to assign work to employees using independent judgment. [5]

In upholding the judge's finding that the Company failed to demonstrate the authority to responsibly direct employees, the Board relied (D&O 1 n.4) solely on the judge's findings that shift leaders did not have the authority to take corrective action. The Board also upheld (D&O 1-2) the judge's finding that the Company failed to demonstrate the authority to assign work, stating that the Board "assumed, *arguendo*, that shift leaders assign work to their crew members," but found that the Company "failed to prove that the shift leaders at issue exercise[d] such authority with independent judgment."

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 2, 17.) Affirmatively, the Order requires the Company to rescind its unlawful

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[5] The Board also agreed (D&O 1, nn.3, 5) with the judge that the shift leaders lacked supervisory authority in the areas of transferring employees and recommending awards and discipline. However, these findings are not before this Court because the Company (Br 20-23) only challenges the Board's finding that the shift leaders do not have the requisite authority to "responsibly direct" or "assign."

bulletin board restriction, inform all shift leaders at the Hammond facility that they are not supervisors and are entitled as employees under the Act to engage in protected activity if they so choose, and to post a remedial notice. (D&O 2, 17.)

SUMMARY OF ARGUMENT

Soon after learning of Schillinger's renewed union activity at the facility, the Company, as the new owner, cracked down on all forms of employee communication regarding the Union. This included an uncontested, unlawful prohibition on employee discussion of union activity. The Company also promulgated a discriminatorily-motivated restriction on employee bulletin board postings, prohibited employees from soliciting and distributing union literature, and prohibited employee shift leaders from engaging in union activities.

The Company's defenses to the contested unfair labor practices are without merit. It simply cannot escape the ample evidence of its antiunion motivation for adopting the bulletin board rule only after the union campaign began, and without any explanation. Moreover, the Company's attempt to justify its prohibitions on solicitation and distribution by claiming a concern for "littering" is wholly unsupported by any record evidence. Finally, the Company failed to carry its burden of proof that the shift leaders were supervisors and therefore not "employees" entitled to the Act's protection.

ARGUMENT

I. SUMMARY ENFORCEMENT SHOULD BE GRANTED TO THE BOARD'S UNCONTESTED FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEES FROM DISCUSSING THE UNION DURING WORKING TIME WHILE ALLOWING OTHER NONWORK-RELATED SUBJECTS TO BE DISCUSSED DURING THE SAME TIME

The Company has not contested (Br 3, n.1)— either before the Board or this Court—the Board's finding (D&O 1, n.1) that the Company violated Section 8(a)(1) of the Act by discriminatorily forbidding employees from talking about the Union.[6] The Board is accordingly entitled to summary enforcement of this uncontested violation. *NLRB v. Alwin Mfg. Co*., 78 F.3d 1159, 1162 (7th Cir. 1996) (summary enforcement appropriate when party fails to present argument challenging finding before the Board or the Court); *see also* Section 10(e) of the Act (29 U.S.C. § 160(e)) (party waives argument by failing to file exceptions before the Board); Fed. R. App. P. 28(a)(9)(A) (argument in brief before the Court must contain party's contentions with citation to authorities and record). Moreover, this "uncontested violation[ ] 'do[es] not disappear by not being mentioned in a brief. [It] remain[s], lending [its] aroma to the context in which the

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[6] As discussed above (p. 11), in June 2007, Production Manager Dennison told employees that although they could engage in idle conversation while they were working, they could not have conversations about union organizing. Such a discriminatory restriction violates Section 8(a)(1) of the Act. *Brandeis Machinery & Supply Co. v. NLRB*, 412 F.3d 822, 833 (7th Cir. 2005).

[remaining] issues are considered.'" *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc) (quoting *NLRB v. Clark Manor Nursing Home Corp*., 671 F.2d 657, 660 (1st Cir. 1982)). Thus, this Court should consider the Board's contested findings "against the backdrop of [an] acknowledged violation [ ]." *Torrington Extend-A-Care Employee Ass'n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

The aroma of this uncontested violation is particularly foul in the instant case. Indeed, like this unlawful prohibition on union talk, all of the Company's remaining actions—prohibitions on union postings, solicitation and distribution, and restrictions on other union activity—similarly restricted the employees' protected right "to communicate [effectively] with one another regarding self-organization at the jobsite." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491-92 (1978).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A NEW RULE RESTRICTING EMPLOYEES' USE OF COMPANY BULLETIN BOARDS BECAUSE OF UNION ACTIVITY

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) grants employees the "right to self-organization . . . and to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1))

implements that right by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights . . . ."

Consistent with the above principles, an employer may not restrict the use of its property, such as a bulletin board, if its restriction is motivated by union animus. *Register Guard*, 351 NLRB 1110, 1118 n.18 (2007) (if "employer's motive for the [action] was antiunion, then the action would be unlawful"), *enforced in part and remanded on other grounds*, *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *accord Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995) (recognizing employer may not adopt rule for the purpose of restricting union activity).

To establish that an employer acted with an unlawful antiunion motive, the Board's General Counsel must show: (1) that the employee engaged in a protected activity; (2) that the employer had knowledge of the employee's activity; and (3) that the employer acted with union animus. *See Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 278 (1994). In reviewing the Board's resolution of that issue, the Court applies a well-established analytical framework: Under *Wright Line, a Div. of Wright Line, Inc*., 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), if substantial evidence supports the Board's finding that union activity motivated the employer's action,

then the Board's finding that the action was unlawful must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer's affirmative defense that it would have taken the same action even absent the union activity. *See NLRB v. Transportation Mgmt. Corp*., 462 U.S. 393, 401-03 (1983).

The employer's motive is a "question of fact to be determined by the Board from consideration of all the evidence.'" *NLRB v. So-White Freight Lines, Inc*., 969 F.2d 401, 408 (7th Cir. 1992) (citation omitted). Further, in determining motive, the Board is "'free to rely on circumstantial, as well as direct evidence.'" (*Id*.)

In order to uphold the Board's determination, this Court need only find that the decision is supported by substantial evidence in the record considered as a whole. *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1051 (7th Cir.1998). Under this standard, a court may not "dabble in factfinding . . . [or] displace reasonable determinations simply because [it] would have come to a different conclusion if [it] reviewed the case *de novo*." *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1471 (7th Cir.1992).

B. The Board Reasonably Found That the Company Unlawfully Acted With Antiunion Motivation When It Promulgated Its New Restriction on Employee Bulletin Board Postings

The Board found (D&O 9) that the Company violated the Act because it "had an antiunion motivation when, on April 16, it announced a new rule that

prohibited employees from posting anything on company bulletin boards unless the Company approved [it] in advance." As we now show, the record amply supports this finding.

To begin, the Board recognized (D&O 10) that the Company was well aware of, and harbored animus toward, Schillinger's union activity in the months and weeks prior to instituting its brand-new rule restricting the use of its bulletin boards. Indeed, in a February 2007 conversation in Production Manager Bloom's office, company officials admonished Schillinger for his recent complaints to a member of its human resources staff, Risler, about the new attendance policy. In this conversation, company officials, including Production Manager Bloom and Team Manager Carlson—who had worked with Schillinger for Douglas-Hanson when he previously engaged in union activity there—went so far as to voice their displeasure by instructing Schillinger not to talk about the Union. [7] Accordingly, as the Board found (D&O 10), the Company's "statement that Schillinger was not to talk about the Union, and its reaction to his discussions about the attendance policy, reveal the [Company's] knowledge of, and hostility towards, such activity."

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[7] The Company's protest (Br 16) that Risler was on the Human Resources staff, and thus not a fellow bargaining unit employee, is of no import. It is uncontested (D&O 10) that Schillinger's discussion of the attendance policy with Risler—whatever Risler's status—concerned the working conditions of Schillinger and his coworkers and, as such, constituted "protected activity." Moreover, it is uncontested that after this conversation, the Company pressed Schillinger on what he said and told him "not to talk about the Union," evincing specific animus toward union activity.

Indeed, as the Board also found (D&O 10), the Company "clearly was aware" that Schillinger began openly wearing union buttons and t-shirts on a daily basis after the February 2007 conversation. Moreover, it was only shortly thereafter, on March 9, that Schillinger and Meeker posted union literature—which was repeatedly removed—on company bulletin boards, and only about a month after that, on April 16, that the Company promulgated its new rule.

As the Board reasonably found, the Company "initiated the restriction in the wake of employees' repeated postings of prounion material" and "[t]his timing is suspicious and supports an inference of unlawful motivation." *See Jordan Marsh Stores Corp*., 317 NLRB 460, 462 (1995) (Section 8(a)(1) violation where employer promulgated a rule requiring employee to obtain approval for personal postings on bulletin boards after advent of union campaign when such approval was not required prior to union campaign).

In the face of such evidence, as the Board recognized (D&O 9-10), the Company "has not offered, much less substantiated, any lawful explanation for its decision to restrict employees' use of the bulletin boards after the union activity started, even though the [C]ompany had not found it necessary to restrict such usage prior to the union activity." Thus, the Board reasonably found that, "[u]nder these circumstances, it is evident that the [Company's] promulgation of the new restriction on employee use of bulletin boards was motivated by employees'

protected union activity." *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983) (once antiunion motivation is established, employer's action is unlawful if employer does not show that it would have taken the same action even in the absence of protected activity).

The Company's primary defense (Br 13-15)—that substantial evidence does not demonstrate the requisite unlawful motivation—ignores both the facts and the Board's findings. Indeed, the Company begins (Br 13) by falsely asserting that "[t]he only evidence in the record of any organizing activity prior to April 16, 2007 consists of [the March 9, 2007 posting]." To the contrary, as shown above, Schillinger's open display of union support began in February 2007. Moreover, the Company turns a blind eye to the Board's uncontested finding that in February 2007, the Company directly told Schillinger "not to talk about the Union," which further undermines its assertion (Br 14) that "there is no evidence in the record supporting any claim that the Company was antagonistic to unionization." Accordingly, the Company's claim (Br 14-15) that it was not required to give a lawful explanation for its new bulletin board restriction because of an "absen[ce] [of] evidence of discrimination" is unfounded.

Moreover, the Company's related protest (Br 15, 16) that there was "no basis for any finding that the Company was even aware of the posting" ignores the Board's finding (D&O 9) that such a contention "is contrary to the weight of the

evidence." As the judge reasonably inferred (D&O 9) from all of the circumstances, it was "probable that the [Company] was aware of the prounion literature that had been repeatedly posted and removed." *See Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995) (finding of knowledge may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn, including the timing of the allegedly discriminatory action, the employer's general knowledge of union activities, and animus), *enforced Montgomery Ward & Co. v. NLRB*, 97 F.3d 1448 (4th Cir. 1996). In any event, the Board reasonably found (D&O 9-10) that "[e]ven assuming that [the postings] had escaped the [Company's] notice, the record demonstrated other prounion and protected activity of which the [Company] clearly was aware," and the Company has cited no cases impugning an unlawful motivation finding based on such evidence.

Finally, the Company's reliance (Br 15-16) on *Faurecia Exhaust Sys., Inc.*, 353 NLRB No. 34 (2008), is wholly without merit. Unlike here, the employer in *Faurecia* had already been operating under a rule restricting employee postings before the union campaign. 353 NLRB No. 34, slip. op at 1. Moreover, although the Board rejected the judge's reliance on the timing of the announcement to demonstrate antiunion motivation in *Faurecia*, such timing was the only evidence of antiunion motivation for that violation in that case. 353 NLRB No. 34, slip. op. at 1, 9. Here, however, the Board's finding of antiunion motivation is strongly

buttressed by the Company's admonishment to Schillinger not to talk about the Union, that it made shortly before it promulgated its new rule in the wake of his union postings.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING EMPLOYEES FROM DISTRIBUTING UNION MATERIALS IN THE COMPANY PARKING LOT AND IN NONWORKING AREAS OF THE FACILITY DURING NONWORK TIME

A. Applicable Principles and Standard of Review

As demonstrated above, an employer violates Section 8(a)(1) of the Act when it acts with antiunion motivation. An employer also violates Section 8(a)(1) of the Act, even without a showing of antiunion motivation, if its conduct "may reasonably be said [to] tend[ ] to interfere with the free exercise of employee rights." *Brandeis Machinery & Supply Co. v. NLRB*, 412 F.3d 822, 830 (7th Cir. 2005).

Recognizing the importance of employee communication about union organizing at the workplace, the Board, with court approval, has determined that prohibiting employee solicitation and distribution of literature during nonwork time and in nonwork areas is presumptively unlawful. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 & n. 21 (1978) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). That presumption is overcome only by showing that such a

prohibition is necessary for management to maintain plant discipline or production. *See Republic Aviation Corp.*, 324 U.S. at 797-98; *NLRB v. General Thermodynamics, Inc*., 670 F.2d 719, 721 (7th Cir. 1982); *Our Way, Inc.*, 268 NLRB 394, 394-95 (1983).

Where the Board engages in the "'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (quoting *NLRB v. Truck Drivers Local 449*, 353 US. 87, 97 (1957)). In order to uphold the Board's determination, the Court need only find that it is supported by substantial evidence on the record as a whole. *Beverly Farm Found., Inc. v. NLRB*, 144 F.3d at 1051.

B. The Board Reasonably Found That the Company Unlawfully Prohibited Off-Duty Employees From Distributing Union Flyers in the Company Parking Lot

It is virtually undisputed (Br 17-18) that in late May or early June 2007, company officials Dennison, Riehle, and Koats told off-duty employees Schillinger, Meeker, Toufar and Rott that they could not distribute union literature in the parking lot. As the Board found (D&O 10), this prohibition, which restricted distribution on nonwork time in a nonwork area, violated Section 8(a)(1) of the Act because the Company failed to demonstrate a business justification. *See St. Luke's Hospital*, 300 NLRB 836, 837 (1990) (distribution by off-duty employees in

company parking lots is clearly protected by Section 7 of the Act and an employer violates the Act by prohibiting such activity unless it is justified by business reasons).

The Company's claim (Br 17-18) that a concern for littering justified the restriction is frivolous. Indeed, as the Board found (D&O 10), the Company's "purported concern with wholesale littering . . . appears to be wholly the invention of counsel." The Company has provided no evidence to indict the Board's observation that "[n]o official of the [Company] testified that concern about litter had anything to do with the decision to prohibit distribution in the parking lot . . . . [n]or did the [Company] establish that its officials had reason to believe that employees' placement of literature on car windows had resulted in 'wholesale littering' in the past, or would do so in this instance." In *St. Luke's Hospital*, 300 NLRB at 837, as the Board noted (D&O 10), the littering defense was rejected "despite the testimony of a company official that such concerns were the reason for the prohibition." Thus, the "defense is even weaker in the instant case since the [Company] . . . failed to present testimony that company officials were motivated by concerns about littering." (D&O 10.)[8]

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[8] The Company's attempt (Br 18) to distinguish *St. Luke's* on the grounds that the employee in that case knew he was placing the literature on employee cars (rather than on nonemployee cars) is without merit. Such employee knowledge was not dispositive in *St. Luke's*, nor does the lack of such knowledge by the employees

Moreover, the Board reasonably rejected (D&O 10) the Company's repeated false assertion (Br 17) that its prohibition was narrowly restricted to the placement of literature on car windshields. As the Board observed (D&O 10), this assertion "misrepresents the facts" because Dennison directed his prohibition against Meeker's "handing out flyers" in the parking lot and not just against his putting them on car windshields.

Besides, as the Board noted (D&O 10), even assuming that the Company's instructions to the employees were ambiguous, such ambiguity itself invalidates the prohibition because an employer must clearly communicate the scope of its prohibition. *Bigg's Foods*, 347 NLRB 425, 427, n.7 (2006) (ambiguously overbroad rule is a violation). *See also Ichikoh Mfg*., 312 NLRB 1022, 1022 (1993) (when ambiguous rule is found presumptively unlawful, employer bears burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of the literature in nonworking areas during nonworking time), *enforced NLRB v. Ichikoh Mfg*., 41 F.3d 1507 (table) (6th Cir. 1994). *Accord Chicago Magnesium Castings Co.*, 240 NLRB 400, 404 (1979), *enforced Chicago Magnesium Castings Co. v. NLRB*, 612 F.2d 1028 (7th Cir.

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here relieve the Company of its unmet burden to demonstrate a business justification for its parking lot prohibition. *St. Luke's*, 300 NLRB 836, 837, 837 n.6.

1980).[9] The Company has not come close to shouldering its burden to justify its prohibition on distributing literature, and, accordingly, it violated the Act.

C. The Board Reasonably Found That the Company Unlawfully Prohibited Off-Duty Employees From Distributing Union Buttons and Other Materials During Nonworking Time and In Nonworking Areas

It is undisputed that in late June, Production Manager Dennison and Human Resources Director Koats told employees Meeker, Schillinger, and Toufar that they could not pass out union buttons "while [they] are here." The Board reasonably found (D&O 11) that this and other similar statements made by Dennison and Koats (see above p. 24-26) were presumptively invalid under the principles set forth above.

The Company primarily defends (Br 18) its prohibition on the distribution of union buttons on the same faulty grounds as its defense of its parking lot restrictions. For the reasons discussed above at p. 25-26, the Company's attempt

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[9] The Company fails to rescue its prohibition (Br 7, 17 n.15) by claiming that "two days" after the parking lot incident, employees "were allowed" to hand out union literature on company property outside the plant and "were advised" or "told" by an unidentified individual that doing so was permissible. As the Board explained (D&O 5, n.3), "the record does not show that [the individual who spoke to employees, Ryan] Murtha was a supervisor or Company agent." Because the Company cannot attribute these statements to a company official—as its repeated use of the passive voice in its brief (Br 7, 17 n. 15) highlights—these statements cannot save the prohibition. Indeed, such ambiguous comments, two days after an established violation, could not, in any event, cure the violation.

to present a legitimate business justification for these prohibitions is no more successful.[10]

All that remains is a specious argument (Br 19)—not properly before this Court—that the Board's finding here is at odds with its holding in *Register Guard*, 351 NLRB 1110, 1118 n.18 (2007), *enforced in part and remanded on other grounds*, *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The Company did not raise this argument in its exceptions before the Board, as required for this Court to review the argument on appeal. *See* Section 10(e) of the Act; *Production Workers Union of Chicago v. NLRB*, 161 F.3d 1047, 1054 (7th Cir. 1998) (court cannot consider objection unraised before the Board unless party is excused by "extraordinary circumstances"). Therefore, this argument is jurisdictionally barred. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1982) (holding that courts of appeal "lack [] jurisdiction to review objections that were not urged before the Board").

To be sure, the Company belatedly raised this argument for the first time in its Reply Brief to the General Counsel's Answering Brief to the Company's

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[10] The Company's quibble (Br 18) with who put the fast food coupons in the lunchroom—employees or management—misses the point. Tolerance of such "litter," but not union buttons, further undermines the Company's purported "littering" business justification.

Exceptions. (Rep Br at 4.)[11] However, Board regulations prohibit raising new arguments in a reply brief. Board Rule and Regulation 102.46(h) (29 C.F.R. Sec.102.46(h)) (reply brief to answering brief exceptions "shall be limited to matters raised in the brief to which it is replying"); *see also United States v. L.A. Trucker Lines, Inc*., 344 U.S. 33, 37 (1952) (party must make objections "at the time appropriate under [an administrative body's] practice"). The General Counsel's answering brief did not provide an opening for the Company's late argument.

In any event, the Company's argument is meritless. In *Register Guard*, the Board held that the *Republic Aviation* balancing test does not apply to an analysis of an employer's restrictions on employee use of its personal property, such as bulletin boards or e-mail. *Register Guard*, 351 NLRB at 1115. But where, as here, the employer restricted the distribution of union material in a nonwork area, such as the lunchroom, the concern is not about the use of an employer's personal property. That buttons may have been left on a table or a timeclock as a result of company employees' lawful distribution in a nonwork area does not convert this into the personal property case addressed in *Register Guard*.

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[11] Because the Company's reply brief in support of its exceptions is not part of the official record of the case, the Board has filed a motion to lodge that document with the Court.

IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) BY INFORMING EMPLOYEES CLASSIFIED AS SHIFT LEADERS THAT THEY WERE SUPERVISORS AND PROHIBITING THEM FROM ENGAGING IN UNION ACTIVITY

The Company does not dispute (Br 19) that it told shift leaders that they were supervisors and could not engage in union activities. It also does not dispute (Br 19-20) that making such statements to employees violates Section 8(a)(1) of the Act. *See Shelby Memorial Home*, 305 NLRB 910, 910 n.2 and 918-18 (1991), *enforced NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 561 (7th Cir. 1993). As we now show, the Board reasonably rejected (D&O 1, 1 n.4, 2, 13) the Company's sole defense (Br 20-23) — that the shift leaders were supervisors, not employees, under Section 2(11) of the Act — and therefore were not entitled to the Act's protection.

A. Applicable Supervisory Principles and Standard of Review

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes "any individual employed as a supervisor" from the definition of "employee" protected under the Act. Section 2(11) of the Act (29 U.S.C. § 152(11)) defines a "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In accordance with this definition, the Board and the Courts consider individuals to be statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712-13 (2001) (citation omitted). *Accord NLRB v. GranCare, Inc.*, 170 F.3d 662, 665 (7th Cir. 1999); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The burden to prove supervisory authority is on the party asserting it. *Kentucky River Community Care*, 532 U.S. at 711-12.

Despite Section 2(11)'s rather detailed definition of "supervisor," "the exact boundaries of the definition are not precise." *American Diversified Foods, Inc. v. NLRB*, 640 F.2d 893, 894 (7th Cir. 1981). This Court has recognized that it is for the Board, in its substantial and informed discretion, to address the boundaries of the definition, filling in the statutory "gaps" where necessary. *Id.* *See NLRB v. Adam & Eve Cosmetics, Inc.*, 567 F.2d 723, 726 (7th Cir. 1977) (referring to the Board's "'informed discretion'" to determine who is a supervisor under the Act (citation omitted)). *See also Kentucky River Community Care*, 532 U.S. at 713 (recognizing that it falls "clearly within the Board's discretion" to determine, for example, what scope of individual discretion qualifies as "independent judgment"

for purposes of Section 2(11)). The Board's supervisory determination will be upheld as long as it is supported by substantial evidence. *Beverly Ents.-Mass. v. NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999).

Before this Court, the Company bases its defense entirely on the claims that the shift leaders exercise the requisite authority to responsibly direct and assign work to employees. The Company has failed to prove both claims.

B. The Shift Leaders Do Not Responsibly Direct Employees Because They Do Not Have Authority to Take Corrective Action

As the Board recognized (D&O 1, 1 n.3, 13), its *Oakwood* decision states that for "direction" to be "responsible," the one who directs an employee "must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." 348 NLRB at 692. The Board in *Oakwood* continued:

> [T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id.

In the present case, the Board thoroughly examined all of the evidence and reasonably found (D&O 1, 1 n.3, 13) that the Company failed to show that the shift

leaders "had the requisite authority to take corrective action, if necessary." Rather, as the Board found (D&O 8, 13; Tr 89-91), "in the event a crew member refuses a direction, the shift leader's only demonstrated recourse is to make a factual report of what occurred to the team manager," which "does not include a recommendation regarding consequences and does not constitute corrective action."

The Company (Br 20-22) points to no evidence in the record to counter the Board's finding that the Company failed to prove that the shift leaders take the requisite corrective action. Instead, the Company (Br 20-21)—for the first time in this litigation, and contrary to its earlier claims— critiques *Oakwood* itself, asserting that "[t]he requirement that responsible direction must include the authority to take corrective action makes little sense . . . ." This late claim is not properly before the Court.

Indeed, it is settled that objections not properly urged before the Board are not open to consideration on review unless the failure to urge the objection is excused because of extraordinary circumstances. 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Production Workers Union of Chicago v. NLRB*, 161 F.3d 1047, 1054 (7th Cir. 1998); *NLRB v. Monson Trucking, Inc.*, 204 F.3d 822, 825-26, 827 (8th Cir. 2000). For the Court to

consider a party's objection, the party must have apprised the Board that it intended to pursue the issue. *See Monson Trucking, Inc.*, 204 F.3d at 825-26.

Before the Board, the Company never claimed that *Oakwood* was incorrectly decided and legally deficient, but limited itself to factually distinguishing that case. (Brief in Support of Exceptions at 11 ("[t]he interpretation of [the Board's Section 2(11)] standards is governed by the principles set forth in *Oakwood*).[12] Thus, it may not now challenge *Oakwood*.

In any event, the Company's claim that *Oakwood* is flawed is without merit. As the judge noted (D&O 13), the *Oakwood* Board explained that the concept of accountability creates "a clear distinction" between those employees whose interest in directing other employees aligns with management, and those whose interest in directing other employees "is simply the completion of a certain task." *Oakwood*, 348 NLRB at 687. Determining whether an employee possesses the authority to take corrective action vis-à-vis other employees is a reasonable way of making such a distinction. Moreover, the Company's argument (Br 21-22) that the shift leaders may suffer adverse consequences is beside the point, for that is a separate requirement from the corrective action authority missing in this case.[13]

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[12] The Board has filed a motion to lodge that document with the Court.

[13] Nor does the Company's reference (Br 20) to another Section 2(11) supervisory factor—the authority to discipline employees—in any way impugn the Board's analysis of what is required to responsibly direct employees.

C. The Shift Leaders Do Not Assign Work to Others with the Requisite Independent Authority

The Board "[a]ssume[d], arguendo, that the shift leaders assign work to their crew members," but reasonably determined (D&O 1-2) that the Company failed to prove that they exercised such authority with independent judgment. The Company's only challenge (Br 22-23) to this finding—that the Board "ignored" the testimony of its witness, Tim Monicken—is flat wrong.

The only shift leaders who testified (Tr 13-95, 196-225) were Meeker and Monicken, and each testified only as to his own authority. The Board found (D&O 2) that Meeker's testimony did not establish that he exercised independent judgment in assigning work. Therefore, the Board found that Meeker was not a supervisor, and that the Company's statements to him violated the Act. Far from ignoring Monicken's testimony, the Board found (D&O 2) that although Monicken's testimony showed that he may have exercised independent judgment, he was no longer a shift leader by the time of the hearing. Accordingly, the Board did not have to pass on his individual status.[14]

Thus, in the absence of additional evidence about the remaining shift leaders' authority to assign work with independent judgment, the Board reasonably

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[14] The Board explained (D&O 2) that any such finding "would not materially affect the remedy."

found (D&O 2) that the Company did not meet its burden of proving that they were supervisors. Therefore, the Company's statements that they could not engage in union activity violated the Act. The Company (Br 22-23) provides no reason to overturn these eminently reasonable findings.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and grant the Board's cross-application for enforcement.

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September 2009

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LOPAREX LLC	*
	*
Petitioner/Cross-Respondent	*
	* Nos. 09-2187 and
v.	* 09-2289
	*
NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 18-CA-18436
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 8,082 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003. The Board further certifies, pursuant to Circuit Rule 31(e), that the PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (9/16/2009 rev. 3), and found free of viruses.

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Dated at Washington, DC
this 17th day of September, 2009

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD	* Board Case No.
	* 18-CA-18436
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief and a PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov and by first-class mail upon the following counsel at the address listed below:

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