

No. 10-73624

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

**SAN LUIS TRUCKING, INC; FACTOR SALES, INC;
SERVICIOS ESPECIALIAZADOS DEL COLORADO, S.A. DE C.V.**

Respondents

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Decision and Order finding that San Luis Trucking, Inc. (“SLT”), Factor Sales, Inc. (“Factor”), and Servicios Especializados Del Colorado, S.A. De C.V. (“SEC”) committed numerous unfair labor practices. It is undisputed that SLT, Factor, and SEC constituted a single

employer; they will be collectively referred to as “the Company” in this brief. The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended¹ (“the Act”). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act.² The unfair labor practices occurred in Arizona.

A two-member panel of the Board issued a Decision and Order in this case (352 NLRB No. 34, also reported at 352 NLRB 211) on February 29, 2008. SLT and Factor petitioned the D.C. Circuit for review, and the Board applied for enforcement. On February 13, 2009, the D.C. Circuit placed the case in abeyance pending the outcome of litigation regarding the two-member Board’s authority. On June 17, 2010, the Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB* holding that a Board delegee group must maintain at least three members to exercise the delegated authority of the Board.³ On the Board’s motion, the D.C. Circuit remanded the case to the Board pursuant to *New Process* on September 20, 2010.

On November 22, 2010, a three-member panel of the Board issued the Decision and Order (356 NLRB No. 36) that is now before the Court, which

¹ 29 U.S.C. §§ 151, 160(a).

² 29 U.S.C. § 160(e).

³ 130 S. Ct. 2635, 2640-42 (2010).

adopted and incorporated by reference the February 29, 2008 Decision and Order with some modifications (D&O1-30).⁴ That Order is final with respect to all parties. The Board filed its application for enforcement on November 24, 2010; it was timely, as the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings and the corresponding uncontested portions of its order.

2. Whether the Board properly rejected the Company's claims that the administrative law judge was biased.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3), (5), and (1) by transferring SLT's bargaining-unit work to another company.

4. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3), (5), and (1) of the Act by closing SLT and

⁴ Record references in this brief are to the original record. "D&O" refers to the Board's 2008 Decision and Order, 352 NLRB No. 34, which is included in the administrative record at Tab 55 of Volume IV, Pleadings ("Vol.IV"). "Tr." refers to the transcript of the hearing below. "GCX" and "RX" refer to the exhibits introduced at the hearing by, respectively, the Board's General Counsel and the Company (respondents before the Board). "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.

violated Section 8(a)(5) and (1) by refusing to provide information requested by the Union regarding the closure.

5. Whether the Board acted within its broad remedial discretion in ordering the Company to restore SLT's operations and to reinstate its employees.

STATEMENT OF THE CASE

This case involves unfair-labor-practice charges filed by United Food and Commercial Workers Union, Local 99 ("the Union") concerning the Company's conduct surrounding a union organizing campaign. Following an investigation, the Board's General Counsel issued a complaint. After conducting a hearing, an administrative law judge issued a decision and recommended order, finding that the Company had violated Section 8(a)(1), (3), and (5) of the Act.⁵ (D&O1-30.) Finding no merit to the Company's exceptions, the Board issued a decision affirming most of the administrative law judge's findings and conclusions. (D&O1.)

⁵ 29 U.S.C. §158(a)(5), (3) and (1).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Entities Involved

Factor operates 9 grocery stores in the Yuma, Arizona area, employing about 500 employees. (D&O4; Tr.58-59.) Victor Salcido is the majority shareholder of Factor. The other shareholders are his brother-in-law Jose Luis Mendoza and sister-in-law Rosa Maria Valencia. (D&O4; Tr.58, 73, 148-49, 892-93.)

SLT was a trucking company and wholly owned subsidiary of Factor. Salcido created SLT in 1993 to transport merchandise within the United States for Factor and other companies. (D&O5; Tr.59, 362, 892, 1097.) SLT's office was located on property Factor leased about a mile away from Factor's main office in San Luis, Arizona. SLT did not pay rent to Factor. (Tr.903-05, 1096-97.)

In the few years before its February 2006 closure, SLT derived about 80% of its business from Factor. (D&O5 & n.3; Tr.299, 1405, 1410, GCX25 p. 1.)

Salcido was SLT's president with control over its affairs. Rosendo Valencia—who is married to one of the three Factor shareholders—was SLT's manager and handled its day-to-day affairs, consulting with Salcido on important decisions.

Valencia also was in charge of maintaining Factor's vehicles. (D&O5; Tr.100, 146-47, 149, 888-94, 1187-89.) Factor's human resources and accounting

departments handled those duties for SLT. Factor provided SLT with interest-free,

collateral-free loans without any written agreements. (D&O5-7; Tr.208-13, 357-61, 375-83, 442-44, 528-31, 648, 784-93, 861-62, 905-07, 980-83, GCX14, GCX55, GCX55(a), GCX56.)⁶

SEC was a Mexican trucking company based across the border from San Luis, Arizona. It initially transported goods between cities in Mexico and to the United States border. Eventually, SEC was permitted to transport goods to locations within the United States, including Factor's stores. SEC ceased operations around November 2006. (D&O8; Tr.187-88, 364, 891, 1288-93.) Salcido was the majority shareholder of SEC. (D&O8; Tr.100-03, 192.) Valencia was SEC's general manager and a shareholder. (D&O8; Tr.145, 192, 847-48, 891.) Factor, SLT, and SEC had a common company newsletter featuring information for the employees of all three entities. (D&O7; GCX18, GCX19, GCX20.)

B. In Response to Employees' Union Organizing, the Company Interrogated and Repeatedly Threatened Employees and Began To Issue Disciplinary and Attendance Reports to Employees

In early 2004, the SLT and Factor employees began union organizing campaigns. When Salcido learned of the organizing campaigns, he hired consultants to help him formulate a response. The Union filed election petitions with the Board in late June. (D&O9; Tr.112-15, GCX60.)

⁶ Spanish-language exhibits are translated at the cited transcript pages.

In July, the Union lost the Board-conducted election at SLT. (D&O9; Tr.445, 512, GCX60.) Before the election, including the day before, the Company held meetings with the SLT and Factor employees. Salcido told the employees to be careful in deciding how to vote because, if the Union came in to SLT, he would close down SLT the same way he had closed down Maxi, a store formerly owned and operated by Factor. (D&O9; Tr.652-54.) At another preelection meeting, Salcido told employees that he was going to close another Factor store, B-Mart. Salcido said he regretted it, but it was not producing. (D&O9; Tr.594-95.)

The day before the election, SLT manager Valencia took SLT driver Ignacio Sandoval to meet with one of the Company's campaign consultants, Michael Penn. Penn told him that the Union was no good and did not help anyone and that Salcido had "a lot of money" and "could just pick up his marbles and go and rest." (D&O9; Tr.512-15.) That same day, Salcido sent SLT employees a letter in which he promised to improve working conditions and encouraged employees to vote against the Union. (D&O9; Tr.697-99, GCX47.) At the trial, Salcido insisted that his position during the campaign was that whatever the employees decided was fine with him. (D&O9; Tr.120.)

The SLT election was rerun in January 2005, which the Union won, resulting in its certification as the SLT employees' bargaining representative. In March, the Union lost the election at Factor. The Union objected to the conduct of

the Factor election. After a hearing, the Board's regional office issued a decision overturning the Factor election and ordering a rerun election. (D&O9; Tr.445, 512, GCX60.) In July 2006, the Board reversed and certified the results of that election.⁷

In response to the union campaign and elections, the Company began to issue disciplinary and attendance reports to SLT employees. While claiming that it issued such reports in the past, the Company failed to produce any such documents in response to a subpoena. (D&O9-10; Tr.952-53, GCX3, GCX5, GCX7, all ¶¶ 84 & 85.) The first documented report issued on May 25, 2004, about two months before the first SLT election. (D&O9; RX18.) SLT issued four more reports in September and October 2004. (D&O10; RX18.) Then, after the Union was certified as the SLT employees' bargaining representative, the Company increased the number and frequency of the reports, with a total of 22 from March through November 2005 given to 7 SLT employees. (D&O10; Tr.466, 555-56, 616, 705, 949-51, 952-53, GCX34, GCX39, GCX44, GCX48, GCX49, GCX69, GCX70, GCX71.)

⁷ *Factor Sales, Inc.*, 347 NLRB 747 (2006).

C. After the Union's Election Victory at SLT, Company Owner and President Salcido Threatened To Close SLT; the Company Interrogated Employees and Prohibited Them from Talking to Each Other

About a month after the Union won the January 2005 rerun election, SLT driver Jose Quezada told dispatcher Raimundo Salcido that, before the election, SLT manager Valencia scolded the workers and that his attitude may have pushed the employees toward the Union. Shortly afterwards, Valencia called Quezada at home and told him that Company Owner and President Salcido wanted to speak to him. Salcido picked up Quezada at his home and they spoke in Salcido's car. Salcido asked what Quezada had said about Valencia's attitude. Quezada repeated his views about Valencia pushing the employees toward the Union by scolding them. Salcido said that he agreed with Quezada. Salcido then said that, although the Union was already at SLT, he would not allow the Union to remain there. He said he would rather close down the business and shut down the trucks. Quezada said he already knew Salcido felt that way. (D&O12; Tr.590-93.)

Also after the Union's election victory, Valencia asked Quezada what he thought about the Union and what he was going to do. Quezada replied that he just wanted to keep his job and move forward. Valencia subjected Quezada to similar questioning on an approximately weekly basis until Quezada's employment ended in July 2005. (D&O10; Tr.595-96.)

In June 2005, SLT driver Jesus Aguilera spoke to mechanic Jose Marquez regarding problems that Aguilera had with a truck. After the conversation, Valencia told Marquez not to speak to drivers unless the other mechanic, Jose Vera, was present. Similarly, Valencia told Aguilera that he was not allowed to speak to Marquez and that if he had a problem with any of the trucks, he should tell Valencia, who would, in turn, tell the mechanics. Around August, Valencia also told driver Eduardo Siqueiros not to talk to Marquez. Prior to these incidents, the Company never had any rules about drivers and mechanics speaking to each other. (D&O10-11; Tr.448-51, 648-50, 656-57, 668-69.)

D. The Union and Company Met To Negotiate a Collective-Bargaining Agreement for SLT; the Company Claimed, Without Proof, that SLT Was Losing Money

From March through May 2005, the Union and Company, including Factor's representatives, met three times to negotiate a collective-bargaining agreement for the SLT bargaining unit. At the April session, company attorney Barry Olsen stated that SLT was losing a lot of money, which he blamed on competition from Mexico and an unidentified Supreme Court decision. Union secretary-treasurer Paul Rubin asked Olsen if SLT would open its books. Olsen replied "possibly." (D&O11; Tr.295-301, 320-30, 340, GCX25.)

On May 26, the parties met for what ended up being the last time. Olsen repeated his claim regarding SLT's poor financial condition. Rubin questioned

whether Olsen's financial data was accurate. He also noted that Factor owned SLT and could structure their dealings to assign the profits to Factor and leave SLT with a loss. Olsen did not reply to those statements. He stated that he did not think SLT would survive the summer of 2005 and that he did not want to meet again until certain financial figures were available. (D&O11; Tr.300-08, 1380-83, GCX26.)

E. The Company Transferred SLT's Work to Another Company Without Notice to, or Bargaining with, the Union; SLT Employees Lost Work and Income and Were Forced To Resign; the Company Refused To Provide the Union's Requested Information; SLT Closed

1. In July 2005, the Company transferred the bulk of SLT's work of transporting Factor's goods to Unified, accepting the same subcontracting offer it had rejected before the election

Unified Western Grocers is a cooperative supplier of various merchandise and goods that is owned by its member grocery stores, including Factor. SLT transported most of the goods Factor purchased from Unified from Unified's warehouse to Factor's stores. Factor had used Unified's transportation services only for refrigerated goods for a few stores. Before March 2004, Unified had made various proposals to expand Factor's use of its transportation services, but Factor had always rebuffed them. (D&O12; Tr.130-36, 399-400, 413-16, 1101, 1139.)

Around March 2004, Unified promoted its transportation services to its members in Arizona, including Factor, with an offer of special pricing that

assumed Unified's warehouse was located in Phoenix instead of its actual location in Los Angeles. Unified sales representatives met with Salcido to pitch their offer. As in the past, Salcido did not accept Unified's proposal. (D&O12; Tr.401-16, 829.)

In early 2005, around the time of the SLT union election, Salcido met with Unified representatives again. Unified made the same offer as in March 2004. This time, however, the Company accepted the proposal for Unified to transport goods for all of Factor's stores. The Company implemented its decision on July 1, 2005. (D&O12; Tr.129-30, 1101-04, 1108-09, RX8.) The Company never notified the Union of this change that affected the SLT employees.

In September 2005, Salcido requested a meeting with Unified because Unified charged more for deliveries to Factor than SLT had charged. Salcido was concerned that the difference in pricing could give the impression that he selected Unified to avoid using SLT after it was unionized. Unified's representatives explained to Salcido the various benefits of Unified's services to differentiate them from those provided by SLT. (D&O14; Tr.416-21, 426-28, 430-39.)

2. With most of their work transferred to Unified, SLT's drivers lost hours and income; three employees left because they could not survive on the reduced income

After the Company transferred to Unified the work of transporting goods to Factor's stores—which had comprised about 80% of SLT's business—SLT

drivers' hours and income dropped. Driver Jose Quezada resigned in July 2005 because he saw how the drivers were suffering and realized that he would not be able to support his family on the reduced income. (D&O23; Tr.299, 589-90, 601-02, 1405, 1410, GCX62.) As described above (p. 9), around February 2005 after the Union won the election, Company owner Salcido told Quezada that he would close SLT, rather than allow it to remain a union shop. Similarly, driver Jorge Gonzalez resigned in July because he was not getting enough trips to pay his bills and support his family. (D&O23; Tr.605-06, GCX42, GCX43, GCX62.) Another driver, Ignacio Sandoval, resigned in November for the same reason—he was suffering financially because his workload and income decreased. (D&O23; Tr.507-11, GCX35, GCX36, GCX62.)

3. SLT closed in February 2006; the Company never provided the Union with information it requested regarding the decision to close SLT

In October 2005, about three months after the Company transferred the Factor transportation work from SLT to Unified, Salcido decided to close SLT. On October 19, the Company sent a letter to the Union stating that SLT was closing. In November, the Company and Union exchanged letters regarding the possibility of an agreement concerning SLT's closing but never reached one. (D&O14; Tr.312-19, 1386, GCX29, GCX30, GCX31.)

On December 22, the Union sent the Company a letter requesting information regarding SLT's finances and details about SLT's closing, including what would happen to the equipment and its customers and whether it would make payments to its shareholders and officers. The Company did not respond or turn over any of the information. (D&O16; Tr.318-19, GCX32.)

On February 6, 2006, SLT ceased operating and the remaining employees lost their jobs. SLT's vehicles and equipment remained at its facility, as of the closing of the administrative record in January 2007. (D&O14, 16; Tr.898-902, 957-58, GCX62.)

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Liebman and Members Pearce and Hayes) found, in agreement with the administrative law judge, that the Company committed numerous violations of Sections 8(a)(5), (3), and (1) of the Act,⁸ including:

- interrogating an employee about his union support;
- instituting work rules preventing employees from speaking with each other and doing so without bargaining with the Union;
- enforcing work rules more strictly against employees and doing so without bargaining with the Union;
- transferring or subcontracting SLT's transportation business because of the employees' union activity and doing so without bargaining with the Union;

⁸ 29 U.S.C. §158(a)(5), (3), and (1).

- constructively discharging three employees;
- closing SLT in order to influence employees in their support for a union at any of the Company's businesses and doing so without bargaining with the Union; and
- refusing to provide the Union with information requested by the Union regarding SLT's closure. (D&O27.)

The Board's order requires the Company to cease and desist from the unfair labor practices found and from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights in any like or related manner. (D&O27-30.) Affirmatively, the Board ordered the Company to reopen SLT, restore the transferred business to SLT, and reinstate and make the SLT employees whole for loss of earnings and benefits. 356 NLRB No. 36 (adopting with modifications the order described at D&O1 n.5, 27, 28.) The Company must also remove from its files any references to the SLT employees' unlawful discharges and notify them of that removal and that those discharges will not be used against them in any way. The Board further ordered the Company to rescind the work rules preventing SLT employees from speaking to one another. The Company also must remove from its files any reference to the attendance or conduct of SLT employees during the period from March 8 to November 2005. The Board's order requires that the Company provide to the Union all the information requested in the Union's December 22, 2005 letter. Finally, the Company must post, physically and electronically, copies of a remedial notice to employees in English and Spanish.

SUMMARY OF ARGUMENT

To combat its employees' attempts to organize, the Company—an admitted single employer comprised of Factor, SLT and SEC—violated the Act in increasingly severe ways through union campaigns and elections involving both SLT and Factor. Many of those violations are now uncontested. Initially, the Company threatened employees with SLT's closure during preelection meetings. Then it began to issue disciplinary reports to employees when it had not done so before.

After the Union won the rerun election among SLT's employees in January 2005, the Company interrogated employees and prohibited them from talking to each other. Then, abruptly ramping up its tactics, the Company transferred SLT's work to another company, accepting an offer that it rejected before the election. Although the Union had won the election and was the employees' bargaining representative, the Company did not bargain over the work transfer.

Due to the transfer of most of SLT's work, the employees' hours and, therefore, incomes decreased to the point that several were forced to resign, constituting constructive discharges. Through the few bargaining sessions between the Company and Union, the Company claimed that SLT was losing money and later unlawfully failed to turn over requested relevant financial documents.

Finally, the Company took the most drastic step of all: it shut down SLT and discharged all of those employees, without bargaining with the Union.

The Company does not dispute that it violated the Act by interrogating employees, prohibiting them from talking to one another, increasing enforcement of work rules, and constructively discharging employees. The Board is therefore entitled to summary enforcement of the corresponding portions of its order.

Moreover, these admitted violations provide the backdrop against which the contested violations are viewed. Those violations, and other evidence of the Company's motive—including its threats, suspicious timing, and acceptance of the same subcontracting proposal it had rejected pre-unionization—amply demonstrate that it transferred SLT's work, and then closed it, because of the employees' successful union campaign. As its actions were unlawfully motivated, they were not entrepreneurial decisions exempt from mandatory bargaining. Thus, the Company further violated the Act by admittedly failing to bargain over these decisions, and by failing to provide requested information regarding the closure.

The Company offers nothing warranting reversal of these well-supported findings. First, it clearly fails to prove its claim of judicial bias where the judge simply made reasonable credibility determinations. Next, it fails to rebut the mountain of credited evidence showing its unlawful motive for transferring SLT's

work, and then closing it, where it relies on dubious financial statements and discredited testimony.

Finally, the Board acted within its broad remedial discretion in ordering the Company to restore to SLT the business that it had unlawfully transferred, and to reopen SLT's operations, which it had unlawfully closed. This is the presumptively valid remedy for these violations, as it properly restores employees to the positions they would have occupied absent the Company's unlawful conduct.

The Company's claim that compliance with the Order would impose an "undue burden" is premature because the Board stated that can be addressed in the Board's compliance proceeding (after enforcement). Moreover, the Court is jurisdictionally barred from considering the Company's claims that SLT's bankruptcy—and other developments since the administrative record closed—prove undue burden, because the Company never raised them to the Board. In any event, those circumstances do not preclude enforcement at this stage of the proceeding where Factor and SLT were admittedly a single employer, and Factor, an ongoing enterprise, remains jointly and severally liable for compliance. The Company's other claims—that restoration requires additional findings that Factor and SLT were alter egos or a single bargaining unit—are also jurisdictionally barred because it never raised them to the Board. Finally, in any event, such

findings are unnecessary where the Board did not order Factor to comply with a contract signed by SLT (and none even existed).

STANDARDS OF REVIEW

The Company mainly challenges the Board's factual findings and remedial order. It faces a heavy burden in doing so. The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole.⁹ A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo*."¹⁰ Further, contrary to the Company's claim (Br.24) that all Board legal conclusions are reviewed *de novo*, the Board's interpretation of Act will be upheld as long as it is rational and consistent with the Act.¹¹ Finally, this Court will not reverse the Board's credibility determinations unless they are "inherently incredible or patently

⁹ 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951).

¹⁰ *Universal Camera*, 340 U.S. at 488.

¹¹ *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). *Accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979).

unreasonable.”¹² Standards for review of specific issues are explained within the Argument.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS AND THE CORRESPONDING UNCONTESTED PORTIONS OF ITS ORDER

In its opening brief, the Company does not contest the Board’s findings that:

- Factor, SLT, and SEC are a single employer and, as such, jointly and severally liable for the violations found;
- adverse inferences should be drawn from the Company’s failure to turn over subpoenaed documents (D&O2-4; *see* p. 40);
- the Company violated Section 8(a)(1) of the Act by interrogating an employee;
- the Company violated Section 8(a)(5) and (1) by prohibiting employees from talking to one another;
- the Company violated Section 8(a)(1), (3), and (5) by increasing enforcement of work rules due to the employees’ union activity; and
- the Company violated Section 8(a)(3) and (1) by constructively discharging three employees.

“Because [the Company does] not contest these findings, it waives its defense[s],” and the Board is entitled to summary affirmance of the uncontested findings and

¹² *Retlaw Broad*, 53 F.3d at 1006.

summary enforcement of its order regarding these findings.¹³

Moreover, these uncontested violations do not disappear simply because the Company has not challenged them. Rather, they remain in the case, “lending their aroma to the context in which the [challenged] issues are considered.”¹⁴ Thus, this Court should consider the Board’s contested findings “against the backdrop of acknowledged violations.”¹⁵

II. THE BOARD PROPERLY REJECTED THE COMPANY’S CLAIMS THAT THE ADMINISTRATIVE LAW JUDGE WAS BIASED

In its fact section (Br.19-21), the Company claims the judge’s decision resulted from personal bias evidenced by his “virulent dislike,” “demean[ing],” and “humiliat[ion]” of Company President Salcido, whose testimony was discredited. This is sheer hyperbole.

¹³ *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992); accord *NLRB v. Ed Chandler Ford, Inc.*, 718 F.2d 892, 894 (9th Cir. 1983). See also Fed.R.App. P. 28(a)(9)(A) (party must raise all claims in opening brief).

¹⁴ *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982); accord *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1314-15 (7th Cir. 1991) (en banc).

¹⁵ *Torrington Extend-A-Care Employee Ass’n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

The Company faces a heavy burden—with good reason—in making such a serious accusation.¹⁶ The courts have stated that a “meritorious claim may be based either upon showing a bias or prejudice that ‘stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case,’ . . . or, less commonly, upon showing a ‘favorable or unfavorable predisposition . . . so extreme as to display clear inability to render fair judgment.’”¹⁷ The Company has fallen far short of showing either kind of bias.

First, as shown (p. 19), this Court takes a dim view of arguments urging it to reverse credibility determinations on the basis of a cold record. Even if, as is not the case, the judge had discredited *all* of the Company’s witnesses, that would not show bias.¹⁸ More generally, a judge’s “expressions of impatience, dissatisfaction,

¹⁶ See *La. Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (holding that “‘courts assume administrative officials to be [persons] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances’”) (citation omitted).

¹⁷ *U-Haul of Nev., Inc. v. NLRB*, 490 F.3d 957, 965 (D.C. Cir. 2007) (citations omitted); accord *NLRB v. Anthony*, 557 F.2d 692, 695-96 (9th Cir. 1977).

¹⁸ See *NLRB v. Pittsburgh S.S. Co.*, 337 U.S. 656, 659-60 (1949) (judge’s uniform crediting of General Counsel’s witnesses and discrediting of employer witnesses did not demonstrate bias); accord *Auto Workers v. NLRB*, 455 F.2d 1357, 1368 & n.12 (D.C. Cir. 1971).

annoyance, and even anger,” do *not* establish bias or partiality.¹⁹ The Company has failed to meet its heavy burden, having shown only adverse credibility determinations and isolated statements of impatience in a long hearing.

For example, bias is not proven by the judge’s impatience (Br.19, Tr.69-70) with Salcido’s having reviewed documents at a slower than “normal” pace. Salcido testified in Spanish through an interpreter. When presented his 19-page Spanish-language affidavit, which he had for review for over 3 months, Salcido took a couple hours to indentify a handful of items he claimed were incorrect. The judge reasonably sought to determine the cause of this inordinate delay by inquiring whether Salcido has difficulty reading in Spanish. Salcido stated that he did not.

Next, the judge’s observation (D&O8) that Salcido sometimes appeared “befuddled” and “confused” was not a personal attack (Br.19-20), but part of a balanced analysis of Salcido’s credibility. The judge noted that when the General Counsel questioned Salcido, he testified so “slowly and deliberately” that he appeared “befuddled,” was “frequently evasive,” and was strangely unable to recall events that the owner of Factor and creator of SLT would know. Yet, his confusion suddenly evaporated when questioned by his own counsel. The judge

¹⁹ *Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

fairly noted that some of this could be attributed to careful trial preparation by Salcido's attorney, but reasonably found, based on the totality of what he observed, that Salcido "was not forthright and not credible." (D&O8.)

The Company's other claims fare no better. The judge did not "berate" Salcido (Br.19) for doing "nothing" to Valencia about problems at SLT. Rather, after the judge asked Salcido the same question multiple times without receiving a direct response, he appropriately admonished Salcido to answer directly. In any event, a judge's mere expression of frustration with a recalcitrant witness does not show bias. Nor did the judge "gratuitously" comment (Br.19) that photographs of damage to trucks allegedly caused by SLT drivers may have been staged by the Company. The witness testified only that he had taken them with his camera, and the judge reasonably noted that this did not necessarily prove their accuracy, as they could still have been staged. After the witness testified the photographs were accurate, the judge admitted them into evidence. (Tr.1135-36.)

Finally, particularly baseless is the Company's claim (Br.19) that the judge "threatened" Salcido for asserting the attorney-client privilege. In fact, the judge sustained company counsel's objection (Tr.142-44) to a question from the General Counsel that sought attorney-client communications. The judge made no inferences from the assertion of privilege in his written decision. Thus, this is not a

case (Br.19)²⁰ where a judge improperly drew adverse inferences from the assertion of attorney-client privilege.

In sum, the record undermines the claim (Br.20) that the judge's decision resulted from "evident bias." In fact, the judge made fair and balanced credibility determinations based on his view of Salcido's demeanor, recall, forthrightness, and other relevant considerations. Thus, contrary to the Company (Br.20-21), this case is unlike *Spentonbush/Red Star Co. v. NLRB*,²¹ where the court admonished the judge for categorically refusing to consider any probative evidence submitted by the employer. Indeed, far from being completely one-sided, the judge dismissed some allegations and made other rulings favorable to the Company. For example, he dismissed allegations (D&O21-22) regarding the subcontracting of unit work to entities other than Unified, and declined take adverse inferences from the Company's failure to provide subpoenaed documents regarding those allegations (D&O21).

²⁰ *Doe v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000) (judge may not draw adverse inferences from assertion of attorney-client privilege.)

²¹ 106 F.3d 484, 490 (2d Cir. 1997).

III. THE COMPANY VIOLATED SECTION 8(a)(3), (5), AND (1) OF THE ACT BY TRANSFERRING SLT'S BARGAINING-UNIT WORK TO ANOTHER COMPANY

A. The Company Violated Section 8(a)(3) and (1) by Transferring SLT's Work to Unified in Response to the SLT Employees' Union Campaign

1. Section 8(a)(3) Bars Employers from Taking Adverse Action Because of Its Employees' Protected Union Activities

Section 8(a)(3) of the Act bans “discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.”²² An employer violates Section 8(a)(3) and (1)²³ by taking adverse employment action against employees for engaging in protected union activity.²⁴ Whether such action violates the Act depends on the employer's motive.²⁵ Under the Board's seminal decision in *Wright Line*, the Board's General Counsel has the burden of showing that the employee's protected

²² 29 U.S.C. §158(a)(3).

²³ Section 8(a)(1) establishes that it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” under Section 7 of the Act. A violation of Section 8(a)(3) results in a “derivative violation” of Section 8(a)(1). See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

²⁴ See *NLRB v. Mike Yourek & Son, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995).

²⁵ See *Wright Line*, 251 NLRB 1083, 1089 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981). See also *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 401-03 (1983) (approving *Wright Line* test).

activity was “a motivating factor” in the employer’s decision to take adverse action against that employee. Once the General Counsel meets this initial burden, the employer can only avoid liability by proving that it would have taken the same action even in the absence of the protected activity.²⁶

Because an employer will rarely concede an unlawful motive, the Board may infer discriminatory motivation from circumstantial as well as direct evidence.²⁷ Evidence showing an unlawful motive includes the employer’s knowledge of, and threats and expressions of hostility toward, its employees’ union activities; its commission of other unfair labor practices; the questionable timing of the adverse action; the employer’s deviation from its customary practices; and its reliance on shifting or pretextual explanations for the adverse action.²⁸

On review, the Board’s finding of unlawful motive must be upheld if it is supported by substantial evidence. Moreover, the courts are particularly

²⁶ *Wright Line*, 251 NLRB at 1089; accord *Mike Yourek & Son, Inc.*, 53 F.3d at 267.

²⁷ See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 726 (9th Cir. 1980).

²⁸ See *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 920-22 (9th Cir. 2006); *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1429 (11th Cir. 1985); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

“deferential when reviewing the Board’s conclusions regarding discriminatory motive, because most evidence of motive is circumstantial.”²⁹

2. The Company Unlawfully Transferred SLT’s Unit Work

An employer violates Section 8(a)(3) and (1) of the Act by contracting out its employees’ work in retaliation for their union activity.³⁰ Here, the evidence—direct proof of the Company’s antiunion animus, suspicious timing, and the circumstances of Unified’s proposal—amply demonstrates that the Company decided to transfer the bulk of SLT’s work to Unified in response to the employees’ successful union campaign.

First, Company Owner Salcido previously made clear the Company’s antiunion hostility and the extent to which it would go to rid itself of the Union with multiple threats to shut down SLT if the Union came in. Those threats (*see* pp. 7-9) are tantamount to “outright confessions” of unlawful motivation for contracting out SLT’s work.³¹ Moreover, the transfer of work to Unified—

²⁹ *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); *accord Clear Pine Mouldings, Inc.*, 632 F.2d at 726 (the determination of motive is “particularly within the purview of the Board”).

³⁰ *Reno Hilton v. NLRB*, 196 F.3d 1275, 1282-83 (D.C. Cir. 1999); *accord Healthcare Employees Union, Local 399*, 463 F.3d at 918-19.

³¹ *See NLRB v. Globe Prods. Corp.*, 322 F.2d 694, 695, 696 (4th Cir. 1963) (employer’s statement that he was letting employees go because he did not like them “fooling around with the union,” constituted “outright confession of unlawful

unlawful in itself—also was the first step in executing Salcido’s unlawful post-election shutdown of SLT, as shown in the next section. The Company first starved SLT of the main source of its revenue by transferring most of SLT’s work and then asserted that SLT had to close because it was not profitable.

Next, the suspect timing of the Company’s decision to transfer SLT’s work to Unified bolsters the Board’s conclusion that it was motivated by the employees’ union activity and, particularly, their success in electing the Union. The Company had repeatedly rebuffed Unified’s offers to transport goods to Factor’s stores (*see* pp. 11-12). Indeed, as recently as March 2004, the Company met with Unified, but rejected its revamped offer. Yet, in 2005, the Company accepted that same offer, effective on July 1. The only difference was that in the interim—in January 2005—the SLT employees had voted in the Union, with which the Company explicitly had said it did not want to deal.

As the Board pointed out (D&O22; *see* p. 12), Salcido’s September 2005 meeting with Unified representatives further demonstrated the Company’s unlawful motive in transferring SLT’s work to Unified. Salcido requested the meeting because he realized that Unified’s high prices would reveal that the Company switched to Unified to avoid using SLT, which was now unionized.

discrimination”). *See also L’Eggs Prods., Inc. v. NLRB*, 619 F.2d 1337, 1343 (9th Cir. 1980); *NLRB v. L.C. Ferguson*, 257 F.2d 88, 89-90, 92 (5th Cir. 1958).

In any event, even if the evidence had demonstrated that the Company saved money by switching to Unified, the effectiveness of a business strategy in achieving a professed nondiscriminatory goal does not compel a finding that the strategy would have been followed even in the absence of union activity.

Robinson Furniture, Inc., 286 NLRB 1076, 1078 (1987).

Further, although the Company asserts (Br.14-17, 47-48) that the transfer was a purely economic decision, three months after the decision, Unified representatives had to explain to Salcido the differences between its services and those of SLT. It stands to reason that if Salcido had truly made his decision for legitimate business reasons, he would not have needed those reasons explained to him several months afterwards.

The record also does not support the Company's defenses (Br.9-10, 15-16, 47-48) that SLT provided deficient service and that the move to Unified was to obtain better efficiency and performance. As the Board explained (D&O22), the Company's explanations for the transfer of work to Unified were inconsistent. For example, the Company asserted that the SLT drivers damaged goods and arrived late. Yet, the Company never disciplined the drivers—at least not before the union campaign. Further, when the Company and Union met for bargaining, the Company did not mention any problems with SLT drivers' performance. (Tr.303-08, 1380-83.)

The Company's assertion (Br.15-16, 47-48) of various benefits of Unified's offer does not explain why, if Unified's offer was so much better, the Company had not accepted it before the Union was elected at SLT. The Company waited until after the Union's election victory to decide that Unified offered better services despite rejecting the same supposedly better offer a year earlier. Under those circumstances, it was reasonable for the Board to conclude that the transfer of work to Unified was prompted by the employees' union activity rather than a legitimate business decision.³²

Finally, with respect to the specific benefits the Company raises (Br.15-16, 47-48) as justifying its subcontracting of SLT's work to Unified, the Board explained (D&O12-14) at length why those claims were not credible:

- Unified assumed the risk of damage to goods in transit (Br.15): The Board found (D&O12) implausible the claim that, in its arrangement with SLT, Factor assumed responsibility for damage to goods in transit. No documentation supported that claim, such as a written agreement between Factor and SLT (although such documents were subpoenaed).
- Unified prorated fees for partial loads (Br.15-16, 29): The Board found (D&O13) no evidence that Factor attempted to arrange this pricing structure with SLT. Further, the record did not show that Factor had a significant number of partial truckload deliveries to make this benefit significant.

³² See *Healthcare Employees Union, Local 399*, 463 F.3d at 920-21 (unlawful motive shown by employer's suddenly subcontracting unit work based on decade-old problems just as union election approached).

- Unified promised more reliable deliveries (Br.15-16, 29): The Board found (D&O13) that this claim was unsupported by the record. Unified’s representative testified (Tr.437-38) that Unified did not guarantee delivery times but only “strived” to be within its delivery windows. Further, no documentation corroborated assertions that SLT deliveries were late. The Board discredited (D&O13) the claims that SLT refused to improve its services.
- Unified was a cooperative and offered special prices to members (Br.15, 29): The Board found (D&O13) that the special pricing was for Unified’s goods, not its transportation services; it did not justify the decision to subcontract trucking.
- Factor no longer wanted to purchase from a competitor (Br.15, 29): The Company claims that it no longer wished to purchase Factor’s grocery supplies from National Grocers because its Basha’s store was a competitor for Factor. Even if true, that fails to explain why the Company could not increase purchasing of Unified’s goods and retain SLT to transport them. (D&O14.)

B. The Company Violated Section 8(a)(5) and (1) by Transferring SLT’s Work to Unified Without Bargaining With the Union

By transferring or subcontracting work done by the SLT employees to Unified without bargaining with their Union, the Company violated Section 8(a)(5) and (1) of the Act. An employer violates Section 8(a)(5) by “refus[ing] to bargain collectively with the representatives of his employees.”³³ Section 8(d) of the Act defines “the duty to bargain collectively” as meeting “at reasonable times and confer[ring] in good faith with respect to wages, hours, and other terms and

³³ An employer who violates Section 8(a)(5) also commits a “derivative” violation of Section 8(a)(1). *See* n.23.

conditions of employment.”³⁴ Bargaining is mandatory for subjects falling within that statutory language,³⁵ and an employer violates the Act by changing a mandatory term and condition of employment without bargaining.³⁶

The courts have long held that “the allocation of work to a bargaining unit is a ‘term and condition of employment.’”³⁷ Accordingly, “an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.”³⁸ Specifically, the Supreme Court in *Fibreboard Paper Products v. NLRB* held that an employer’s decision to substitute an independent contractor’s employees for those of the employer required bargaining.³⁹ Following *Fibreboard*, the Board held that an employer’s decision to substitute or replace employees with a subcontractor requires bargaining with the

³⁴ 29 U.S.C. § 158(d).

³⁵ *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342, 349 (1958).

³⁶ *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743-48 (1962).

³⁷ *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1982). See also *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 209, 215 (1964) (decision to subcontract bargaining-unit work is mandatory subject of bargaining); accord *NLRB v. Johnson*, 368 F.2d 549, 551 (9th Cir. 1966).

³⁸ *Road Sprinkler Fitters*, 676 F.2d at 831. See also *Fibreboard*, 379 U.S. at 209.

³⁹ 379 U.S. at 209; see also *Mine Wrks. District 31 v. NLRB*, 879 F.2d 939, 942 (D.C. Cir. 1989) (“It is agreed that subcontracting of bargaining unit work is a mandatory subject of bargaining”).

union: “there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is.”⁴⁰

Here, it is undisputed (Br.48) that the Company did not notify the Union or bargain over the decision to transfer SLT work to Unified. Accordingly, where that decision was a mandatory subject of bargaining and the Company failed to bargain with the Union, it violated Section 8(a)(5) of the Act.

In similar circumstances, the courts have found unlawful an employer’s unilateral transfer of work outside the bargaining unit. For instance, in *Rock-Tenn Co. v. NLRB*,⁴¹ the D.C. Circuit concluded that a paper company unlawfully refused to bargain with its drivers’ union before subcontracting its trucking operations to a third party and terminating the drivers. That Court followed the same principles in other cases, holding that employers may not transfer union employees’ work to its own non-union components without bargaining.⁴²

⁴⁰ *Torrington Indus.*, 307 NLRB 809, 810 (1992); *accord Johnson*, 368 F.2d at 551.

⁴¹ 101 F.3d 1441, 1445-46 (D.C. Cir. 1996).

⁴² *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 311-12 (D.C. Cir. 2003); *Geiger Ready-Mix Co. of Kansas City, Inc. v. NLRB*, 87 F.3d 1363, 1368 (D.C. Cir. 1996).

The Company's defense (Br.47-48)—that Factor was not unionized so it was not required to bargain over the decision to subcontract unless SLT and Factor were alter egos or constituted a single bargaining unit—does not warrant reversal of the Board's decision on this issue. First, as discussed below (pp. 60-61), these arguments are jurisdictionally barred because the Company failed to make them to the Board. In any event, Factor's union status was irrelevant. It is undisputed that Factor and SLT (and SEC) constituted a single employer, meaning—as the term obviously denotes—that the three entities are treated as *one* employer, not separate employers. Because Factor and SLT were a single employer, it does not matter if Factor made the decision to transfer SLT's work. Factor and SLT are the same employer for the purposes of this case and were required to bargain over the transfer of SLT's bargaining-unit work.

It is also immaterial (Br.47-48) that Factor and SLT were not found to be alter egos or a single-bargaining unit.⁴³ The Company argues (*id.*) only that such findings must be made before the Board can find that Factor is bound by a union contract signed by SLT. This is a red herring because no such claim is presented

⁴³ See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982) (the “focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations”).

here: it was not alleged, and the Board did not find, that Factor was bound to any agreement signed by SLT. In fact, there was no such agreement. Accordingly, the cited cases (Br.43-48) addressing whether an entity may be “bound by a union contract signed by another” are irrelevant.⁴⁴ Likewise, the fact (Br.48) that Factor’s employees voted against union representation is immaterial. Simply put, Factor is not required to bargain with the Union regarding its own employees, but, because of the uncontested single-employer finding, it remains jointly and severally liable for the Company’s unlawful failure to bargain over its decision to subcontract SLT’s work. In any event, the suggestion that Factor has been completely uninvolved in SLT’s fate and dealings with the Union is particularly specious where Factor created and controlled SLT as its wholly owned subsidiary, including its human resources functions, and participated in collective bargaining over SLT’s employees.

Finally, the Company’s assertion (Br.47-48) that its decision to subcontract SLT’s work was an “entrepreneurial decision” exempt from mandatory bargaining

⁴⁴ So doing raises the significant representational concern—not presented here—whether the employees of the non-union entity will be bound by a contract with a union they have not chosen. *See, e.g., C.E.K. Indus. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350, 353-54 (1st Cir. 1990) (a finding of alter egos was prerequisite to finding non-union entity bound to agreement signed by union employer); *NLRB v. Don Burgess Constr. Corp.*, 596 F.3d 378, 386 (9th Cir. 1979) (binding two companies to union contract signed by one requires finding that employees of each constitute a single bargaining unit).

fails. As shown (pp. 32-34), the Company's decision to have Unified perform the same transportation work that had been performed by the SLT unit is a mandatory subject of bargaining under settled law. Further, antiunion animus motivated the decision and not, as the Company suggests (Br.47-48), purely economic considerations such as efficiency and better service. Accordingly, as the Seventh Circuit has held, because the decision was made for discriminatory reasons, it was not entrepreneurial.⁴⁵

IV. THE COMPANY VIOLATED SECTION 8(a)(3), (5) AND (1) OF THE ACT BY CLOSING SLT AND VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO PROVIDE INFORMATION ABOUT THE CLOSING TO THE UNION

A. The Company Violated Section 8(a)(3) and (1) by Closing SLT in Response to Employees' Union Activity

After starving SLT of work with the unlawful subcontracting to Unified, the Company took the most drastic recourse possible against the SLT employees' successful union campaign: it closed SLT and discharged all the remaining employees. Indeed, as the Board aptly described (D&O25) the Company's strategy: "SLT's closure followed its loss of business to Unified just as surely as night follows day." Because it is undisputed that SLT was part of the single employer comprised of it, Factor, and SEC, the Company's closure of SLT,

⁴⁵ *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314-16 (7th Cir. 1998) (decisions made for discriminatory reasons are not entrepreneurial decisions exempt from mandatory bargaining).

motivated by antiunion animus, was an unlawful partial closure designed to chill unionism in its remaining operations.

As the Board explained (D&O25), the Supreme Court held in *Textile Workers Union of America v. Darlington Mfg. Co.* that, while an employer may terminate its entire business for any reason, including a discriminatory one, it cannot close *part* of its business for an antiunion reason.⁴⁶ The Supreme Court reasoned that a discriminatory partial closing may discourage the remaining employees from exercising their rights under the Act.⁴⁷ Thus, a partial closing violates Section 8(a)(3) “if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect.”⁴⁸

Here, substantial evidence supports the Board’s conclusion (D&O25) that “the closure of SLT after their employees had voted for the Union would have a substantial chilling effect on the Factor Sales employees’ efforts and desire to be represented by a union, especially with the prospect of a second election at Factor Sales as there had been at SLT.” Having lost the rerun election at SLT, Salcido

⁴⁶ 380 U.S. 263, 268, 275 (1965); accord *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 918-19 (9th Cir. 2006); *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255 (9th Cir. 1978).

⁴⁷ *Darlington Mfg. Co.*, 380 U.S. at 274-75.

⁴⁸ *Id.* at 275.

certainly did not want the Union at Factor, which had many more employees than SLT. The closure of SLT unambiguously demonstrated the drastic steps the Company would take to combat unionization to the Factor employees, who, at that time, anticipated a rerun election. The Factor employees often saw and interacted with SLT's drivers at Factor's stores and knew what was happening at SLT via the common newsletter. *See* p. 6. Accordingly, it was reasonable for the Board to conclude (D&O25-26) that the Factor employees would fear that Factor would close down if they elected the Union as their SLT counterparts had.

That the Company closed SLT in response to the union activity there and to suppress further union activity at Factor is clear. Salcido's threats (pp. 7-9) that he would close in response to the Union provide direct evidence of the Company's motive.⁴⁹ Tellingly, when Salcido threatened employees, he mentioned other companies he shut down, demonstrating a penchant for citing past closures to instill anxiety in his remaining employees.⁵⁰ The Company's contemporaneous (and, in many cases, unchallenged, *see* p. 20) unfair labor practices also provide

⁴⁹ *See* n.31.

⁵⁰ Contrary to the Company (Br. 40-41), Section 8(c) of the Act (29 U.S.C. § 158(c)) does not protect employer speech containing threats of reprisal, such as the repeated threats of closure shown here. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-20 (1969).

evidence of its unlawful motive.⁵¹ Further, as described above (pp. 11-12), after the Union's election victory at SLT, the Company suddenly decided to accept the same offer from Unified that it had rejected before. That move starved SLT of work and was aimed to justify the closure of the only unionized component of the Company's operations. And, in turn, that worked to intimidate the Factor employees and therefore severely limit the union threat there. All in all, the Company's plan to rid itself of the Union at both SLT and Factor was shrewd, but clearly unlawful.

On this record, the Board reasonably rejected (D&O26) the Company's affirmative defense (Br.33-42) that it closed SLT for purely financial reasons. The Board found (D&O26) the Company failed to prove its defense where its financial statements were unreliable and it refused to produce subpoenaed documents relating to its finances, resulting in the Board drawing an (now uncontested) adverse inference that those documents would not support the Company's position. Thus, it is completely disingenuous for the Company to claim (Br.33-36, 41-42) that its purported financial reason for the closure—SLT's alleged losses—was "undisputed" (Br.35). Moreover, while the Company asserts (*id.*) that the Board's

⁵¹ *Van Vlerah Mechanical, Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997).

skepticism about its financial figures was unwarranted and inappropriate, the Board's concerns were well grounded.

First, the financial statements upon which the Company bases its defense (Br.33-36) were unreliable. As the Board explained, those statements were only a compilation of financial figures provided by the Company to the accountants that prepared them, not an audit that verified the figures with corroborating documents. (D&O15; Tr.1176-77.) The statements also included warnings from the accounting firm: "Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and cash flows. Accordingly these financial statements are not designed for those who are not informed about such matters." (D&O15; RX11 p. SLT010059, RX12 p. SLT010804.)

Next, Factor controlled SLT's accounting such that it could structure the accounting entries to assign greater income or losses to Factor or SLT. Indeed, the Company's figures showed an inverse relationship between the profits and losses of Factor and SLT, in which Factor profits grew along with SLT losses and vice versa. One example of the questionable allocation of figures between Factor and SLT involved legal expenses of \$57,154 supposedly incurred in 2004 by SLT

alone to respond to the union campaign. Yet, Factor, which was also dealing with the union campaign at the same time, did not show any legal expenses in that regard. (D&O15; Tr.992-96, 1013-17, GCX57, GCX80.)⁵² Contrary to the Company's view that this was undue "speculation" (Br.36 n.9), these facts support the Board's finding that the legal expenses charged to SLT may have included fees for Factor as well. This is particularly so given the dubious veracity of the Company's financial statements in general.

Further, the Board observed (D&O15) that Factor or SLT may have assigned some SLT trips to other companies—including SEC or Santa Fe Transport (owned by SLT manager Valencia)—which would have siphoned off more income from SLT. Such occurrences are not as unlikely as the Company suggests (Br.36). The Board noted (D&O26) that SLT's creation of false invoices relating to trips taken by SEC drivers indicated the Company's willingness to create false losses for SLT. Specifically, SLT paid SEC's drivers for trips in the United States (normally done by SLT drivers) by creating fictitious invoices to give the appearance that the trips were done by third parties. Both SLT's in-house accountant and the owner of the third-party company testified to the arrangement. (D&O6; Tr.282-91, 387-91.)

⁵² That legal expense was listed on 12/31/2004 on SLT's ledger. (GCX80.) Because the Company's fiscal year ended on June 30, that expense would have gone towards fiscal year 2005, in which SLT showed a \$260,000 loss and Factor showed a \$101,000 profit. (RX11 p. SLT010067.)

SLT's loss of some clients (Br.9-10) does not show that SLT was broke before the unlawful subcontracting. As the Board pointed out (D&O15; RX10 p. SLT010054, RX11 p. SLT010067), SLT's sales decreased by about \$137,000 from 2004 to 2005, but its expenses increased by \$242,000. Thus, the loss of clients before the subcontracting to Unified (effective on July 1, 2005—after the close of fiscal year 2005) appeared less responsible for SLT's losses than an increase in expenses—a large one of which was for legal services to combat the Union's campaigns, which SLT sustained alone, even though Factor also benefited.

In response, the Company considers the wrong timeframe, and relies on discredited evidence, in claiming (Br.17; *see* Br.9-10) that Factor constituted only 50% of SLT's business before SLT lost other clients in 2004. It appears to concede (Br. 17), however, the relevant and well-supported (D&O5 & n.3; Tr.299, 1410) finding that this number rose to about 80% before the Company unlawfully transferred this work from SLT to Unified in the summer of 2005. Moreover, the 50% claim conflicts with credited evidence (D&O5 n.3), including the testimony of SLT's bookkeeper (Tr.1405), that Factor constituted about 70% of SLT's business in 2004. Finally, the Company does not cite "unrebutted" facts (Br.9-10) regarding the effect of losing other customers on SLT, but only the discredited testimony (D&O14-15; Tr.1204-21) of Rosendo Valencia.

Thus, the record simply does not support the Company's defense (Br.37) that SLT's continuing losses were "valid and compelling reasons for closing" SLT. As shown, it bottomed that claim on unreliable financial statements and discredited testimony. Contrary to the Company (Br.38), such dubious evidence cannot "overwhelm even an abundance of compelling evidence that [SLT's] closure was motivated by antiunion considerations."

Next, unable to prove that it would have taken the same action even absent its employees' protected conduct, the Company tries to attack the mountain of credited evidence proving its antiunion animus. This attempt fails. For example, it gains no ground by attacking (Br.38) the credibility of one employee—Quezada—who clearly testified that Salcido had threatened closure (*see* p. 9, Tr.590-92). The Board's decision to credit Quezada, despite his wavering during cross-examination regarding whether a threat was made (Tr.600-01), was not "patently unreasonable."⁵³ In any event, even absent Quezada's testimony, there remains more than enough other evidence—much of which is uncontested—of antiunion motive to sustain the Board's findings.

⁵³ *Retlaw Broad.*, 53 F.3d at 1006; *see NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795, 802 (7th Cir. 2005) ("exchange on cross-examination is not an 'extraordinary circumstance' that convinces" court to overturn credibility determination where translation of Spanish testimony resulted in "stilted" transcript language).

Nor can the Company explain away (Br.39) an additional threat of closure made by Michael Penn—a consultant the Company hired to help respond to the Union’s campaigns—by claiming that Penn was not a company “decision-maker.” He was the Company’s hired messenger who delivered the threat that Salcido would close SLT rather than allow it to remain union. Specifically, the day before the election at SLT, Valencia took SLT driver Ignacio Sandoval to meet with Penn. Penn told Sandoval that the Union was no good and did not help anyone and that Salcido had “a lot of money” and “could just pick up his marbles and go and rest.” Despite the Company’s efforts to distance itself from these statements, it is clear that it made good on the multiple threats to close SLT after the Union came in.

B. The Company Violated Section 8(a)(5) and (1) by Closing SLT Without Bargaining With the Union

As described above (pp. 32-33), Section 8(a)(5) requires employers to bargain with their employees’ unions over changes to their terms and conditions of work. Here, the Company admittedly (Br.18, 25-32) failed to bargain with the Union over the closure of SLT. There is no bigger change to terms and conditions of employment than eliminating the employees’ jobs altogether. In order to overturn the Board’s finding that its actions violated Section 8(a)(5), the Company must prevail on its affirmative defenses (Br.25-32) that: (1) there is no duty to bargain over a partial closure and (2) SLT’s closure was a “basic change in operations” which eliminated its bargaining obligation. It fails on both points.

First, although *First National Maintenance Corp. v. NLRB*,⁵⁴ upon which the Company relies (Br.25-28), held that an entrepreneurial decision to close down part of a business for economic reasons is not a mandatory subject of bargaining, the Supreme Court emphasized that the employer's motivation was purely economic with no claim of antiunion animus. In that case, the employer terminated an unprofitable contract with a client and laid off the employees working there. Here, however, the Company did not simply cut its losses with a client; it set out to rid itself of an entire group of its own workers and therefore their union. Moreover, the Board explained (D&O24) that *First National Maintenance* was inapposite for three reasons: "(1) that employer [in *First National*] had no intention to move the discontinued operation elsewhere; (2) the employer was motivated solely by economic considerations involving its fee with the customer, a matter over which the union had no control; and (3) the union was not selected as the bargaining representative until well after the employer's dispute with the customer arose."⁵⁵

Thus, where the record amply supports the Board's finding that the Company closed SLT for antiunion reasons (*see* pp. 37-45), *First National*

⁵⁴ 452 U.S. 666, 684-87 (1981).

⁵⁵ *Id.* at 687-88.

Maintenance does not apply. Indeed, in a case similar to this one, the Seventh Circuit found that a recycling company that closed its transportation department and subcontracted that work for antiunion reasons violated not only Section 8(a)(3), but also Section 8(a)(5) because it did so without bargaining with the employees' union.⁵⁶ Because the employer there effected the partial closure for unlawful reasons, it was not a legitimate entrepreneurial decision, and thus, did not fall under *First National Maintenance's* exclusion from bargaining.⁵⁷

Second, as the Board explained (D&O24), the closure of SLT emanated from the unlawful subcontracting to Unified, which was not a change in the Company's basic operating procedure. The only change was the Company's choice of who would transport goods from Unified's warehouse to Factor's stores. Factor remained a chain of grocery stores. SLT remained, at the time of the violation, a trucking company—albeit one that was now starved of most of its work, which ultimately doomed it. As the Board observed (D&O24), the Company's logic is circular: Its explanation (Br.29) that, by closing SLT, it removed itself from the trucking business and therefore changed its basic

⁵⁶ *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314-16 (7th Cir. 1998).

⁵⁷ *Id.* at 1315-16. *See also Ferragon Corp.*, 318 NLRB 359, 362 (1995) (Section 8(a)(5) failure to bargain over subcontracting motivated by antiunion animus), *enforced mem.*, 88 F.3d 1278 (D.C. Cir. 1996).

operations “simply restates [its] decision, viz., the [Company] decided to close SLT, after having eliminated SLT’s business. Merely removing the employer from the operational aspects of the business is not sufficient to remove the requirement to bargain concerning the decision.”

Moreover, this violation turns on the Company’s duty to bargain *before* closing SLT in 2006. Thus, it is immaterial (Br.31) whether, in 2009-10, SLT sold its trucks, filed for bankruptcy, and was dissolved. These post-violation events cannot change the fact that the Company subcontracted SLT’s work and closed it for unlawful reasons and without bargaining. *See Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255 (9th Cir. 1978) (post-violation events cannot “alter the fact that antiunion animus motivated the closing and subcontracting when they occurred”). Even if these changed circumstances were relevant to the violations, the Company needed to file a motion for reconsideration with the Board to apprise it of that view. Since it did not, it is barred from making that claim now, as explained below, pp. 55-56.

Finally, the Company’s reliance (Br.28-32) on two cases from the Eighth Circuit to show a basic change in operations is misplaced. Both are immediately distinguishable because they did not involve, as here, a partial closure motivated by antiunion animus. Further, as the Board explained (D&O24-25), each is distinguishable on its facts. In *NLRB v. Adams Dairy, Inc.*, the Eighth Circuit

found that a dairy was not required to bargain with the union over its decision to liquidate its milk distribution operation and to use independent contractors to distribute its products instead.⁵⁸ That court distinguished the case from *Fibreboard* (which found subcontracting unlawful) in that the dairy changed its basic operating procedure and its capital structure and did not, as in *Fibreboard*, simply substitute one set of employees for another.⁵⁹ In this case, the Board observed (D&O24) that the Company did not change its basic operating procedure and did not liquidate any part of SLT's business at the time of the violation. Instead, as in *Fibreboard*, the Company simply substituted the Unified drivers for the SLT drivers for the transportation of goods between Unified's warehouse and Factor's stores.

Next, *NLRB v. Drapery Mfg. Co.*, where a linen wholesaler closed its drapery manufacturing subsidiary for purely economic reasons, and not because of antiunion motives, is also distinguishable.⁶⁰ There, unlike here, when the subsidiary closed, the employer had a "major shift in capital investment" where its equipment and machinery were dismantled and removed.⁶¹ In this case, the Company never had any formal written agreement with Unified and, as of the

⁵⁸ 350 F.2d 108 (8th Cir. 1965).

⁵⁹ *Id.* at 110-11.

⁶⁰ 425 F.2d 1026 (8th Cir. 1970).

⁶¹ *Id.* at 1028.

record's closing, had kept SLT's vehicles and equipment. Also, there, the employer did not continue paying for the same work, merely substituting one group of employees for another to do the same job, as was the case here and in *Fibreboard*. Thus, because antiunion considerations motivated the partial closing and because there was no basic change to the Company's operations, the Company's failure to bargain over the decision to close SLT was unlawful.

C. Because the Company Had a Duty To Bargain Over Its Decision to Close SLT, It Further Violated the Act By Refusing To Provide Information About the Closure that the Union Had Requested

An employer's statutory duty to bargain under Section 8(a)(5) encompasses the duty "to provide information that is needed by the bargaining representative for the proper performance of its duties."⁶² Here, on December 22, 2005, the Union sent the Company a letter requesting information regarding SLT's finances and details of SLT's closing including what would happen to the equipment and its customers and whether it would make payments to its shareholders and officers. It is undisputed that the Company did not respond or turn over any of the information. It thereby violated Section 8(a)(5) and (1) of the Act. (D&O26-27.)

The Company responds (Br.32-33) only that, if it had no duty to bargain over the closure, then it also had no duty to provide information regarding that

⁶² *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967).

decision. Accordingly, as the Court should affirm the Board’s finding that the Company had such a duty to bargain (*see* pp. 45-50), it should also affirm the finding that the Company unlawfully withheld that information.

V. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN ORDERING THE RESTORATION OF SLT’S OPERATIONS AND REINSTATEMENT OF ITS EMPLOYEES

A. Restoration and Reinstatement Are the “Presumptively Valid” Remedies for the Violations Found Here

Section 10(c) of the Act⁶³ authorizes the Board, upon finding an unfair labor practice, to order the violator to cease and desist from the unlawful conduct “and to take such affirmative action . . . as will effectuate the policies of [the] Act” Consistent with this provision, the Supreme Court has explained that the basic purpose of a Board remedial order is “a restoration . . . , as nearly as possible, to that which would have obtained but for the illegal discrimination.”⁶⁴ The Board’s power to fashion remedies is “a broad discretionary one, subject to limited judicial review.”⁶⁵ Accordingly, the Board’s choice of remedy must be enforced unless the Company shows “that the order is a patent attempt to achieve ends other than those

⁶³ 29 U.S.C. §160(c).

⁶⁴ *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

⁶⁵ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964); *accord California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (Board’s remedial order is reviewed only for “clear abuse of discretion”).

which can fairly be said to effectuate the policies of the Act.”⁶⁶

In its order, the Board directed the Company to, among other things, restore to SLT the business that it unlawfully transferred to Unified and to reopen and restore SLT’s operations, which it had unlawfully closed. (D&O28 at ¶¶ 2(d)-(e).) The Board also ordered the Company to reinstate the SLT employees and make them whole for any lost wages and benefits that they suffered as a result of the Company’s unlawful action. (D&O28 at ¶¶ 2(g)-(h).)

Restoration is the established remedy for the Company’s violations. Where an employer has unlawfully subcontracted work, the courts have recognized that a Board order requiring an employer to resume the subcontracted work “is presumptively a valid remedy.”⁶⁷ Where an employer has closed a portion of its operations for unlawful reasons, the Board acts within its broad remedial discretion in ordering the reinstatement of those operations, and a restoration of the work

⁶⁶ *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); *accord California Pac. Med.*, 87 F.3d at 308.

⁶⁷ *O’Dovero v. NLRB*, 193 F.3d 532, 537-38 (D.C. Cir. 1999) (restoration ordered for unlawful diversion of work); *Power, Inc. v. NLRB*, 40 F.3d 409, 425 (D.C. Cir. 1994) (restoration of work subcontracted without bargaining is “presumptively a valid remedy;” employer must show compliance would cause undue financial hardship).

previously performed there.⁶⁸ Accordingly, the Board properly directs restoration unless the employer demonstrates that “restoration of the status quo ante would be unduly burdensome”⁶⁹

Similarly, “[w]hen an employer violates [S]ection 8(a)(5) in unilaterally altering conditions of employment, the Board typically orders a restoration of the *status quo ante* running from the date of the violation until such time in the future as the parties negotiate in good faith to a new agreement or an impasse.”⁷⁰ Also, returning the parties to the *status quo ante* by reinstating the unlawfully laid-off employees is consistent with this well-settled principle.⁷¹

⁶⁸ *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1288 (D.C. Cir. 1993); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1314-16 (7th Cir. 1998); *see also Flamingo-Hilton Reno, Inc.*, 321 NLRB 409, 409-10 (1996), *enforced mem.*, 141 F.3d 1177, 1998 WL 84154 at *4 (9th Cir. 1998) (the Board “acted well within its traditional powers when it issued the *status quo ante* remedy that requires [the employer] to reopen the [unlawfully closed] facilities”).

⁶⁹ *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989); *accord O’Dovero*, 193 F.3d at 538.

⁷⁰ *Southwest Forest Industries, Inc. v. NLRB*, 841 F.2d 270, 274 (9th Cir. 1988); *accord California Pac. Med.*, 87 F.3d at 311 (“If an employer wrongly implements unilateral changes in employment conditions, the Board will usually order that the status quo ante be restored.”).

⁷¹ *See Rock-Tenn Co. v. NLRB*, 101 F.3d 1441, 1443, 1446 (D.C. Cir. 1996) (enforcing the Board’s order requiring the employer “to offer reinstatement” to the drivers whose work it unlawfully subcontracted).

B. The Company's Premature and Jurisdictionally-Barred Arguments Do Not Bar Enforcement of the Board's Order

Given the standard of review, the Company faces an uphill battle in challenging (Br.42-57) the Board's order requiring restoration and reinstatement, the presumptively valid remedies for the unlawful subcontracting and closure found here. The Company points to nothing that precludes enforcement of the Board's order at this stage of the proceeding. Rather, it raises claims that are premature because they would be properly addressed in a subsequent Board compliance proceeding, or barred from this Court's consideration because the Company did not raise them to the Board. In any event, even if this Court were to address the merits of these claims now, they do not bar enforcement of the Board's order.

1. The Company's Claims of Undue Burden Are Premature and Do Not Bar Enforcement of the Board's Order at this Stage of the Proceeding

The Company's claim (Br.54-56) that restoration and reinstatement would impose an "undue burden" is premature. As the Board noted (D&O1 n.5), the Company will have an opportunity in compliance proceedings to present evidence postdating the unfair-labor-practice hearing to demonstrate that restoring to SLT the business transferred to Unified and reopening SLT would be unduly

burdensome.⁷² This follows the Board’s court-approved practice of deferring the particular details of its remedial orders to the compliance stage of the case, as issues concerning the implementation of the Board’s remedy often result in additional litigation.⁷³ Indeed, the Company was fully aware of this practice, as it asserted in its brief to the Board that it “has the right to make [a] showing that restoration would be ‘unduly burdensome’ *at the compliance stage.*” (Vol.IV, Tab 43 at p. 50 (emphasis added).)

2. The Court is Jurisdictionally Barred from Considering SLT’s Changed Circumstances Because the Company Never Raised Those Claims to the Board

The Company claims (Br.49-56) that developments since the administrative record closed—SLT’s bankruptcy, sale of assets, and dissolution in 2009 through early 2010—bar enforcement of the restoration order. In addition to being premature, the Court is jurisdictionally barred from considering these claims because the Company failed to present them to the Board.

⁷² See *Coronet Foods*, 981 F.2d at 1288 (explaining that an employer “has an opportunity to show current hardship as cause for modification of the remedy at the compliance stage”); *Flamingo-Hilton Reno, Inc.*, 321 NLRB at 409, *enforced mem.*, 141 F.3d 1177, 1998 WL 84154 at *4 n.6 (Board order permitted employer to present evidence at compliance stage to demonstrate that restoration would be unduly burdensome).

⁷³ See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). See also *NLRB v. Katz’s Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 771 (2d Cir. 1996) (likening Board compliance proceedings to the damages phase of a civil proceeding).

Section 10(e) of the Act provides that “no objection that has not been urged before the Board . . . shall be considered by the Court,” absent extraordinary circumstances, which are not presented here.⁷⁴ The mandate of Section 10(e) is clear: If a particular objection has not been raised before the Board, a reviewing court is without jurisdiction to consider the issue.⁷⁵ That section embodies the bedrock principle that “courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.”⁷⁶

If the Company wished to raise changed circumstances to challenge the restoration order, then the Board’s rules required it to file a motion for reconsideration with the Board within 28 days of the order’s issuance on November 22, 2010.⁷⁷ It failed to do so. Accordingly, Section 10(e) bars the

⁷⁴ 29 U.S.C. § 160(e).

⁷⁵ *See, e.g., Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the court of appeals lacked jurisdiction to consider an issue that the parties have not raised before the Board); *accord NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1103 n.10 (9th Cir. 2008).

⁷⁶ *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

⁷⁷ *See* Board Rules & Regulations Section 102.48(d)(1)-(2) (29 C.F.R. § 102.48(d)(1)-(2)). The Board’s filing an application for enforcement on November 24, 2010 did not preclude the Company from filing a motion for reconsideration because the Board and the Court had concurrent jurisdiction under Section 10(e) until the Board filed the record on January 3, 2011.

Court from considering that claim now.⁷⁸

3. In Any Event, the Company's Claims Do Not Bar Enforcement of the Order

In any event, even if the Court had jurisdiction to address the issue now, the Company is wrong to presume (Br.49-50) that SLT's bankruptcy, dissolution, and sale of assets automatically precludes enforcement of the Board's order at this stage of the proceeding. The Company ignores the Board's undisputed finding that Factor and SLT were a single employer, such that Factor, an ongoing enterprise, remains jointly and severally liable for the unfair labor practices. Given the Company's admission that "Factor Sales made the decision to close SLT" (Br.6, 18) and given Factor's integral role in SLT's operations and demise, it is particularly appropriate to hold Factor jointly and severally liable. Contrary to the Company, there is nothing "unprecedented" (Br.49-50) about ordering a single, integrated employer to reopen the trucking operations it had unlawfully closed several years before, including by buying or leasing trucks.⁷⁹

⁷⁸ *Woelke*, 456 U.S. at 666 (failure to file motion for reconsideration with Board barred claim); *accord NLRB v. Sambo's Restaurant, Inc.*, 641 F.2d 794, 796 (9th Cir. 1981).

⁷⁹ *See, e.g., Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 759 (7th Cir. 2001) (ordering single employer to restore in-house trucking operations 8 years after unlawfully subcontracting); *accord Gold Coast Produce*, 319 NLRB 202, 213-14 (1995).

Further, the current record does not support the Company's supposition that "enormous capital outlay" (Br.54) will be required to purchase or lease trucks to restore SLT's trucking operations. Ultimately, these issues are no bar to enforcing the Board's order now where the specific contours of restoration, if any, will be determined in the compliance phase. Moreover, the record detracts from the claim (Br.54) that, as a grocery store, Factor could not assist in SLT's reopening. Factor had routinely lent SLT, its wholly owned subsidiary, money interest-free and collateral-free (*see* pp. 5-6), suggesting that such capital outlay was neither unusual nor an undue burden.

Nor has the Company supported its claim that it would be "unduly burdensome" (Br.54) for it to reinstate SLT as a corporation. After all, it was Factor (or its owners) that initially created SLT to transport its goods. Nothing in the current record shows that it cannot repeat that process. And, as the Board noted (D&O14), no contract requires Factor to continue using Unified to transport its goods.

Likewise, enforcement is not barred by the cited cases (Br.51-52) finding, in very different circumstances, that restoration would be too impractical or expensive. For example, in *R&H Masonry Supply Co., Inc. v. NLRB*,⁸⁰ this Court

⁸⁰ 627 F.2d 1013, 1014-15 (9th Cir. 1980).

refused to enforce a Board order that required a small building-materials provider, whose workforce had been reduced from six to one or two employees, to reestablish its trucking operations by buying or leasing trucks. While expressly “[r]eserving judgment on whether such an order may be appropriate in a different situation,” this Court found that restoration was unduly burdensome given “the small size of [the employer] and its minimal profit margin.”⁸¹ Of course, the Board has yet to determine in compliance whether the instant case is “a different situation,” given Factor’s much larger size (9 stores with 500 employees) and its previously demonstrated ability to finance SLT’s start-up and trucks.

Moreover, the instant order is clearly unlike those that were rejected in the other cited cases (Br.52) because they required restoration of a dismantled plant, which, the credited evidence showed, would cause significant long-term financial losses;⁸² or the purchase of expensive equipment that the employer could not possibly use.⁸³ Here, in contrast, the Company is not required to restore a

⁸¹ *Id.*

⁸² *Great Chinese Am. Sewing Co.*, 578 F.2d at 256 (approving Board’s decision not to order restoration of dismantled plant where employer would be competitively disadvantaged in industry).

⁸³ *NLRB v. G & T Terminal Pkg. Co.*, 246 F.3d 103, 121-22 (2d Cir. 2001) (resumption unduly burdensome where necessary equipment costing \$130,000-\$150,000 would not fit in employer’s facility, and credited evidence showed resumption would be unprofitable).

dismantled plant or purchase an expensive item it cannot use, as in the cited cases. And, as shown, there is no reliable proof of SLT's alleged financial losses, leaving it unproven that its restoration would be unprofitable.

Finally, given the egregious nature of the Company's violations, it is disingenuous for it to claim (Br.50) that restoration is barred because "too much time has passed" since it unlawfully closed SLT in 2006. Of course, the Company must bear the risk of the uncertainty caused by its own misconduct.⁸⁴ Moreover, the Seventh Circuit has, in similar circumstances, required an employer to reverse unlawful subcontracting to restore its in-house trucking operations after 8 years.⁸⁵

4. The Court Is Jurisdictionally Barred From Considering the Company's Claim that Restoration Requires a Finding that Factor and SLT Were Alter-Egos or Constituted a Single Bargaining Unit

The Company makes (Br.22-23, 42-48) two other arguments that it never raised to the Board. It claims there is no authority for:

⁸⁴ See *TNT USA, Inc. v. NLRB*, 208 F.3d 362, 368 & n.3 (2d Cir. 2000) (enforcing Board remedial order) (citing *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)); see also *NLRB v. L.B. Foster Co.*, 418 F.2d 1, 4-5 (9th Cir. 1969) (given employers' likely preference for "continued litigation" in the "hope that the resulting delay will produce a new set of facts," this Court has routinely enforced Board bargaining orders despite "substantial changes in the situation occurring after the election").

⁸⁵ See *Naperville Ready Mix, Inc.*, 242 F.3d at 759.

1. imposing a restoration remedy on one member of a single employer absent additional findings that the single-employer entities have either alter-ego or single-bargaining-unit status; or
2. ordering a non-union company, Factor, to pull the trucking work it unlawfully transferred to Unified to restore it a unionized company, SLT.

However, the Company never raised these claims in its exceptions to the judge's decision to the Board. Its exceptions summarily conclude that the "ALJ's proposed remedies are inappropriate" (Vol.IV, Tab 43, Exception F), and its supporting brief never mentions the need for additional findings regarding alter ego or single-bargaining unit status (Vol.IV, Tab 43, pp. 49-50). Nor do these documents claim that the Board cannot order a non-union company to restore unlawfully subcontracted work to a unionized company. (*Id.*) Thus, the Court is barred from considering those claims now. *See* pp. 55-56.

In any event, the Company's argument fails because, as shown (pp. 35-36), it is bottomed on the inapplicable issue whether a non-signatory business can be bound to a collective-bargaining agreement signed by another business. Finally, the remedy is not unprecedented (Br.49) given that the Board has, with court approval, ordered the restoration of part of a single employer without finding that the entities involved were alter egos or constituted a single bargaining unit.⁸⁶

⁸⁶ *E.g., Naperville Ready Mix, Inc.*, 242 F.3d at 759; *see Gold Coast Produce*, 319 NLRB 202, 213-14 (1995).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel are unaware of any related cases pending in this Court.

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August 2011

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