

**Nos. 11-71676 and 11-71968**

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**v.**

**HTH CORPORATION, PACIFIC BEACH CORPORATION  
AND KOA MANAGEMENT, LLC, A SINGLE EMPLOYER,  
D/B/A PACIFIC BEACH, AND HTH CORPORATION D/B/A PACIFIC BEACH  
HOTEL, AND KOA MANAGEMENT, LLC D/B/A PACIFIC BEACH HOTEL, AND  
PACIFIC BEACH CORPORATION D/B/A PACIFIC BEACH HOTEL**

**Respondents/Cross-Petitioners**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**ON APPLICATION FOR ENFORCEMENT AND  
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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and a cross-petition to review, a Board

order finding numerous unfair labor practices committed by HTH Corporation (“HTH”), Pacific Beach Corporation (“PBC”) and Koa Management, LLC (“Koa”), a single employer, d/b/a Pacific Beach Hotel, and HTH Corporation d/b/a Pacific Beach Hotel, and Koa Management, LLC d/b/a Pacific Beach Hotel, and Pacific Beach Corporation d/b/a Pacific Beach Hotel (collectively “the Company”). The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on June 14, 2011, and is reported at 356 NLRB No. 182. (ER 1-39).<sup>1</sup>

The Court has jurisdiction over these consolidated proceedings under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the Board’s Order is final with respect to all parties, and the unfair labor practices occurred in Waikiki, Hawaii. The Board’s application for enforcement filed on June 16, 2011, and the Company’s cross-petition for review filed on July 14, 2011, were timely because the Act places no time limit on the initiation of enforcement or review proceedings. On August 23, 2011, the Court consolidated the Board’s application for enforcement and the Company’s cross-petition for review.

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<sup>1</sup>“ER” refers to the Excerpts of Record filed by the Company with its opening brief. “SER” refers to the Supplemental Excerpts of Record filed with the Board’s brief. “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.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of its uncontested findings.
2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(5) and (1) of the Act by failing to bargain in good faith.
3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the International Longshore and Warehouse Union, Local 142 ("the Union").
4. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by discharging seven members of the Union's bargaining committee because of their union activities.
5. Whether the Board properly exercised its broad discretion in issuing the remedial order.

## **STATEMENT OF THE CASE**

This case represents the latest chapter in the Company's unwavering campaign to thwart the rights of a unit of employees at the Pacific Beach Hotel ("the Hotel") to be represented by the Union. The Company's efforts to impede recognition of the Union have, thus far, circumvented its employees' rights for nearly a decade, and forced the setting aside of a first election and the necessity of

holding a second election to assure that its unlawful conduct had not interfered with employee free choice. The current case involves extensive unfair labor practice charges filed by the Union after it won the second election and the Board certified it as the exclusive bargaining representative of the hotel employees.

Following an investigation of the charges, the Board's General Counsel issued a consolidated amended complaint alleging that the Company had committed numerous violations of Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). An administrative law judge conducted a 13-day hearing and issued a decision and recommended order finding that the Company committed many of the violations as alleged. (ER 13-39.) The Company filed exceptions with the Board. On review, the Board found no merit to the Company's exceptions and issued a decision both affirming, in large measure, and modifying the judge's findings and conclusions. (ER 1-12.) In its opening brief, the Company has not challenged the bulk of the Board's findings, which has greatly narrowed the issues before the Court. Thus, the remaining issues involve the Board's findings that the Company engaged in bad-faith bargaining during negotiations with the Union for a first contract, unlawfully withdrew recognition from the Union, and discriminatorily discharged seven employees who were members of the Union's bargaining committee. The facts supporting the Board's

findings are summarized below, followed by an outline of the Board's Conclusions and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Background and the Parties**

The Hotel is a large 837-room hotel in Waikiki, Hawaii. (ER 13; 266.) The Union first sought to represent a unit of hotel employees in 2002, and on July 31, the Board held the first election. (ER 1.) The Board set aside the election on the basis of the Company's coercive interrogation of employees and its issuance of an overly broad no-solicitation rule and ordered a second election. *See Pacific Beach Corp.*, 342 NLRB 372, 372 (2004). The second election, conducted on August 24, 2004, also involved objectionable conduct by the Company. *See Pacific Beach Corp.*, 344 NLRB 148, 148 (2005) (finding economic benefits granted by the Company during the critical period were objectionable). Despite that unlawful interference with the election, the Union won the election by one vote. Accordingly, on August 15, 2005, the Board certified the Union as the employees' exclusive bargaining representative. (ER 14; SER 357.)

The entities that comprise the Company are, as the Board found, a single employer with a complex history of relationships.<sup>2</sup> (ER 2, 14.) Since the Union's certification in 2005, HTH, PBC, and Koa have jointly operated the Hotel.

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<sup>2</sup> The Company does not dispute the single employer finding.

Specifically, HTH serves as a parent or holding company of the Hotel. (ER 13; SER 10.) PBC was the HTH subsidiary that operated the Hotel between August 15, 2005, and December 31, 2006. (ER 13; SER 15.) Also in 2006, HTH created Koa to satisfy certain loan requirements, and the Hotel had become collateral for an HTH loan. (ER 13; SER 11-14.) On January 1, 2007, Pacific Beach Hotel Management (“PBHM”) “nominally” operated the Hotel, but on December 1, 2007, PBC resumed operations. (ER 2; ER: 271, 476, SER: 16, 38-39, 286-87, 450.)

**B. Between November 2005 and December 2006, the Union and the Company Negotiate for a First Contract**

After the Company requested several postponements, the parties began negotiations for a collective-bargaining agreement on November 29, 2005. (ER 16; SER 28.) Robert Minicola, Vice President of Operations for PBC and HTH, was the Company’s chief spokesperson, and David Mori was the Union’s chief spokesperson. (ER 16; ER 474, SER 8-9.) At the first bargaining session, the parties discussed the Union’s opening proposal, which was to use, as a template, a recently negotiated collective-bargaining agreement between the Hotel and another of the Union’s units. (ER 16; SER 29-30.) Minicola insisted that Mori read aloud the entire proposal to the Company’s bargaining committee, despite his own familiarity with the contract. (ER 17; ER 477, SER: 31, 32.) During this meeting and throughout bargaining, Minicola insinuated that the Union lacked support by

repeatedly stating that the Union had won the second election by only a single vote. (ER 16-17; ER 462, SER: 27, 34, 156-57.)

On January 5, 2006, the parties met again, and the Company offered its first comprehensive set of proposals. (ER 17; SER 33, 361-79.) The Company proposed that the Board-ordered unit, as specified in the Union's certification, be disregarded and that the provision in the contract that specified the covered unit read as follows: "The employer has and shall maintain at any and all times its sole and exclusive right to unilaterally and arbitrarily change, amend, and modify the certified bargaining unit . . . and any and all hours, wages, and/or other terms and conditions of employment at-will." (ER 15; SER 364.) The Company also proposed a sweeping management rights clause that provided:

The Hotel has and shall retain the sole and exclusive right to manage its operation and direct its workforce at will. . . . [S]uch management rights . . . include, but are not limited to, the right to select, hire, discipline and discharge employees at-will; transfer, promote, reassign, demote, layoff and recall employees; establish, implement, and amend rules and regulations, and policies and procedures; determine staffing patterns; establish and change work hours and work schedules; assign overtime; assign and supervise employees; establish service standards and the methods and manner of performing work; determine and change the duties of each job classification; add or eliminate job classifications; determine and change the nature and scope of operations; determine and change the nature of services to be provided and establish the manner in which the Hotel is to be operated.

(ER 15-16; SER 364.)

The Company's January 5 proposal also included a complaint procedure that would operate in lieu of a standard grievance and arbitration provision and vested "final and binding" decisionmaking authority in the Company's General Manager, rather than a neutral arbitrator. (ER 16; SER 375-76.) The Company's proposed procedure would limit the "retroactive adjustment" period to 30 days from submission of the complaint, which would, for example, allow an employee who received improper pay for several months to receive only 30 days of corrected pay. (ER 16; SER 376.) The Company also proposed an open shop provision with a 31-day waiting period for employees to join the Union voluntarily and did not include a dues checkoff provision, the effect of which was to leave dues collection to the Union. (ER 17; SER 365.)

While negotiations were ongoing, and in response to certain of the Company's positions, the Union conducted a number of rallies, leafleting campaigns, and demonstrations in front of the Hotel and notified some of the Hotel's Japanese clients of the labor dispute. (ER 24; ER 461-62, SER: 19, 54-55, 60-65.) The demonstrations occurred directly across the street, in plain view of Minicola's office. (ER 24; ER 461, SER: 18-19, 21-22.) Minicola recalled seeing employees and some of the Union's bargaining committee members present at rallies. (ER 24; ER 461, SER 18-19.)

The parties met approximately 37 times over the course of the year, ultimately reaching about 170 tentative agreements on only “unremarkable noneconomic matters.” (ER 15, 19; ER 95-265, SER 355.) On December 7, the Company provided its “last and final offer,” which maintained the Company’s opening proposals on the unit description, the management rights clause, and the open shop and dues collection provisions. (ER 19; SER 36-37, 380.) The Company, however, slightly modified its proposed complaint procedure to permit an employee to file a complaint with the Department of Labor after receiving a negative decision from the General Manager. (ER 19; SER 35, 382-83.)

**C. PBHM Assumes Control of the Hotel and Bargains with the Union; the Company Terminates that Relationship on December 1, 2007, and Resumes Control of Hotel Operations**

On January 1, 2007, pursuant to a management agreement between the Company (through Koa) and the Outrigger Enterprises Group (“Outrigger”), hotel operations passed to PBHM, an Outrigger subsidiary. (ER 13, 17; ER 266-33, SER 286-87.) During negotiations for that agreement, Minicola observed that when the one-year certification period expired in August, the Company could move to decertify the Union if, as he predicted, negotiations were not completed. (ER 18; SER 156, 158-60, 674.) Minicola also emphasized that the Union had won by only one vote and that the Hotel’s owner was “pissed off” at the employees. (ER 18; SER 156, 674.)

The management agreement directed PBHM to hire all the current hotel staff in their same jobs, with the same rates of pay and benefits, and with the same seniority dates. (ER 17; 273-75.) The agreement also charged PBHM with negotiations, with some limitation. (ER 17; ER 273, SER 71.)

In taking over contract negotiations, PBHM assumed all prior tentative agreements and made significant progress with the Union over the next six months. (ER 19; ER: 480, 481, SER: 44, 72-73, 389-402.) At some point during negotiations, Mori began to question whether PBHM actually controlled negotiations. (ER 19; SER 48-49.) To that end, the Union sent several letters to PBHM and Minicola seeking information concerning the management agreement and limitations on PBHM's bargaining authority and requesting a copy of the agreement. (ER 19-20; SER 49-52, 403-10.) Minicola did not provide the information because he claimed that HTH and PBC were not parties to a management agreement and because "HTH Corporation is no longer the employer of [Hotel] employees." (ER 20; SER 52, 419.) For its part, PBHM responded that it was the employer of the hotel employees and provided a heavily redacted portion of the management agreement. (ER 20; SER 411-18.)

On July 30, PBHM sent a letter to the Company requesting permission to respond to the Union's information request and providing a bargaining update. (ER 21; SER 430-38.) The letter indicated that the Union's information request

was relevant because the Act requires disclosure to the other party of any limit on a negotiator's authority to bind the employer. (ER 21; SER 431-32.) The letter then explained PBHM's compromise with the Union on an agency shop provision rather than the Company's original open shop proposal, indicating that this compromise made reaching a collective-bargaining agreement likely. (ER 22; SER 432-33.) The letter concluded by requesting consent to execute the collective-bargaining agreement, noting that withholding consent would cause PBHM "to no longer be able to bargain in good faith." (ER 22; SER 433.) PBHM reiterated its requests on August 2. (ER 22; SER 439-49.) On August 3, Minicola issued notice to PBHM that, effective December 1, the Company was exercising its right under the management agreement "to terminate for any reason whatsoever in the sole discretion at any time." (ER 22; SER 450.)

On August 10, PBHM notified hotel employees that as of December 1, PBHM would no longer be their employer. (ER 22; 390-95.) Beginning on August 27, and at least four times thereafter,<sup>3</sup> the Union contacted the Company to schedule negotiations once the Company resumed management functions and to demand information concerning the change-over. (ER 23, 25; ER 482, SER: 6-7, 53, 74, 359-60, 424-29.) The Company never responded to the Union's demands for bargaining or information. (ER 23; ER 482, SER 7.)

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<sup>3</sup> The Union contacted the Company on September 11, October 11, November 17, and November 28. (ER 23, 25; SER 74, 360, 424-29.)

**D. The Company Requires Hotel Employees To Reapply for Their Jobs and Issues New Rules and Policies that Restrict Employee Rights; the Company Resumes Management of the Hotel on December 1, 2007, and Withdraws Recognition**

Beginning on September 15, PBC told all employees that if they wished to remain with the Hotel, they had to reapply for their jobs. (ER 23; SER 76, 83-84 111-12, 121-22.) In the offer letters, PBC set the wage rate at the employee's current rate (reserving the right to adjust it), established a 90-day "introductory" period, identified the employment as "at will," required the applicant to pass a drug screen, and indicated that the benefits package would be described at a later date. (ER 23; SER 451, 677-79.) The letter provided a signature line for the employee to accept its terms. (ER 23; SER 451, 677-79.)

Before offering positions, Minicola made business projections as to how many employees were needed in each department on the basis of consultations with other executives. (ER 23; SER 180-84, 262-64, 267, 268, 269-72, 273-74, 275-78.) In October, as part of the business planning, Minicola decided to close the Shogun Restaurant, which resulted in an unspecified number of layoffs. (ER 24; SER 16-17, 265-66.) After Minicola determined the Company's business needs, he began discussing the hiring process with HTH's corporate director of human resources, Linda Morgan, and the Company's liaison with PBHM, John Lopianetzky. (ER 23; SER 275-78.) These three individuals developed a six-factor test to determine which employees should be re-hired. (ER 23; ER: 536-

540, 572-73, SER: 163-65, 186, 197, 198-202.) The factors were: attitude, job performance, flexibility in scheduling, attendance, customer service, and teamwork. (ER 23; ER: 539, 572-73, SER: 186.) The Company did not review any personnel files during the decisionmaking process; rather, it sought input from mid-level managers regarding their knowledge of individual employees. (ER 23; ER: 536-40, 572-73, SER: 163-65, 180-84, 185, 186, 197, 198-202.) Lopianetzky, Morgan, and Christine Ko, the executive housekeeper, were principally responsible for providing the input. (ER 23; ER 586, SER: 177, 197, 201, 282-83, 284.)

Morgan had no direct knowledge of the work performance of any employee over the prior 10 months. (ER 24; SER 196.) Lopianetzky had some knowledge of food and beverage department employees due to his involvement in that department during PBHM's management. (ER 24; SER 165.) The Company did not seek input from department heads because the process needed to be completed quickly and the Company was considering not rehiring some of them, which would hinder the process. (ER 24; SER 279-81.) At the conclusion of the selection process, the Company offered employment to substantially fewer employees and did not extend offers to seven members of the Union's bargaining committee. (ER 24.)

Consistent with the Company's position that rehired employees were "new" employees, it issued an employment processing packet with the job offers and

implemented a new employee manual. (ER 25; SER 288-353, 452-73.) The packet included a “conflict of interest” policy sheet and a “Confidentiality Statement,” both of which the Company required employees to sign. (ER 25; SER 469-70, 473.) Both documents contained restrictions on employees’ statutory rights.<sup>4</sup> (ER 25; SER 469-70, 473.) The employee manual similarly contained rules that prohibited conduct protected by the Act.<sup>5</sup> (ER 25-26; SER 288-353.)

Meanwhile, PBHM and the Union continued to negotiate until November 30, and memorialized their tentative agreements. (ER 19; ER 334-47; SER 41-43.) By November 30, only two major items remained: dues checkoff and the agency shop proposal. (ER 22; SER 45-47.) On December 1, the Company took over operations of the Hotel and made further unilateral changes in the terms and

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<sup>4</sup> The “conflict of interest” policy stated: “Any advice by any [PBC] employees, solicited or unsolicited, for the intended purpose of discouraging any potential or actual customer from utilizing services of [PBC] to aid another organization will be considered as an act of serious disloyalty and subject the employee to termination.” (ER 25; SER 469-70.) The “Confidentiality Statement” provided, in relevant part: “Any information acquired by myself during the performance of my duties pursuant to my employment act, or in association with, or outside the scope of my employment, at the [PBC], shall be regarded as confidential and solely for the benefit of [PBC.]” (ER 25; SER 473.)

<sup>5</sup> Such rules included: a prohibition on sharing of information with the media and outsiders; a requirement to keep strictly confidential certain information about the business operations of the Hotel, including employee addresses and employee compensation; a probation on leaving the property or work areas during working hours, even when off the clock; a prohibition on making derogatory remarks; a prohibition on “loitering or straying into areas not designated as work areas, or where your duties do not take you;” and a prohibition on “unauthorized” discussions in “public” areas. (ER 25-26; SER 341-42.)

conditions of employment, including a wage increase, an increase in housekeeper workloads, and position reassignments. (ER 26; ER 465, SER 20.) The Company did not implement the wage rates that had recently been negotiated between the Union and PBHM. (ER 26; ER 465, SER 20.) On December 3, Minicola informed the Union that the Company “is not recognizing the Union, so there won’t be any collective bargaining” and that the Hotel’s owner was offended by the Union’s boycott campaign and other activities that were affecting the Hotel’s financial condition. (ER 25; SER 75.)

**E. The Union Holds Demonstrations To Protest the Company’s Actions; the Company Responds with Threats of Job Loss**

On January 25, 2008, three members of the Union’s bargaining committee were leafletting near the Company’s business offices. (ER 24; SER 90-92.) During the demonstration, the three committee members engaged Minicola in conversation; Minicola accused them of “ma[king] this personal.” (ER 24; SER 93.) Minicola initially insisted that the decision not to rehire the three employees had been for business reasons, but he eventually admitted that he “was upset about the boycott and the leafletting,” and once again, emphasized that the Union had won the election by only one vote. (ER 25; SER 94-96, 137.) Minicola also indicated that, unlike when PBHM became manager of the Hotel and the Company required PBHM to retain all the hotel employees, the Company no longer cared

whether employees were rehired because of the union activities and rallies. (ER 25; SER 137.)

In late April 2008, the Union conducted another highly visible demonstration during a Japanese holiday period, which prompted the Company to hold a series of meetings with employees. (ER 26; SER 124-28, 139-43, 144-48.) Approximately 25 restaurant employees attended a meeting during which Minicola told the group that any employee who disagreed with the rally to “come over to HR . . . we wanna hear from you.” (ER 27; SER 144-47.) He indicated that “his hands were tied” and that he needed feedback from employees. (ER 27; SER 149.) Company representatives also commented that the boycotts were adversely affecting Japanese sales and no other employer would pay similar medical benefits for its employees. (ER 27; SER 149-51.) Minicola then warned employees that “if [the Hotel] continues the way [it’s] going—we probably, all of us, will be out of jobs. . . . You know, ‘we,’ meaning the managers would probably get other jobs, but what about you? Can all of you get other jobs?” (ER 27; SER 150.)

The Company held a similar meeting for housekeeping staff around the same time, which about 40 employees attended. (ER 27; SER 123-26, 140-41.) Company representatives again insinuated that the demonstrations negatively affected sales and referred to the recent shutdown of Aloha Airlines and the employees who had lost their jobs. (ER 27; SER 125-27, 142-43.) Minicola then

mentioned that he disagreed with the boycott because it was designed to hurt the Hotel and that if the employees agreed with him, they should go see the human resources staff. (ER 27; SER 127, 142.) A number of employees did as Minicola implored and spoke to human resources. (ER 27; SER 474-90.) In total, nine maintenance department employees collectively expressed opposition to the boycott and 54 employees whose names were redacted also opposed the boycott. (ER 27; SER 474-90.) One unnamed employee said: “We don’t want to follow the step of Aloha Airline. We need a job which is dependable and reliable [] like what have right now. Please stop the boycott and make our life [] better.” (ER 27; SER 490.)

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

On the basis of the foregoing, the Board (Chairman Pearce and Members Becker and Hayes) determined, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by:

- Promulgating overbroad rules through employment offers and the issuance of a new employee handbook that discourage employees from engaging in union and other protected activity (ER 5);
- Polling employees concerning their union membership, activities, and sympathies (ER 5);
- Threatening unspecified consequences to an employee for being assertive during the collective-bargaining process (ER 5); and
- Threatening employees with the loss of their jobs if the Hotel had to close because of union boycotts. (ER 5.)

The Board also determined that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging seven employees—Keith Kanaipaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villaneuva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte—because they were union activists. (ER 5.) The Board further found that the unilateral discharges violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). (ER 4 n.14.)

The Board further agreed with the judge that the Company violated Section 8(a)(5) and (1) of the Act by:

- Failing to bargain in good faith (ER 5);<sup>6</sup>
- Withdrawing recognition from the Union as the certified Section 9(a) representative of the unit employees (ER 5);
- Unilaterally promulgating rules through employment offers and the issuance of a new employee handbook (ER 5);
- Unilaterally changing the housekeepers' workloads by adding two additional rooms to clean per day (ER 5);
- Unilaterally imposing new conditions of employment on its employees, including requiring them to apply for their own jobs and treating them as new employees, requiring drug tests, and imposing a 90-day probationary period (ER 5);
- Unilaterally closing the Shogun Restaurant and discharging an undetermined number of employees who worked in that restaurant (ER 5);

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<sup>6</sup> Member Hayes agreed that the Company engaged in bad-faith bargaining, but would not have relied on certain evidence cited by the judge. (ER 2-3 n.11.)

- Unilaterally implementing wage increases for both tipping and nontipping category employees (ER 6); and
- Failing to respond to the Union's information requests. (ER 6.)

In addition to the judge's findings, the Board also found that the Company violated Section 8(a)(5) and (1) by:

- Using its agent, Pacific Beach Hotel Management ("PBHM"), "as a middleman as part of a scheme to disguise [its] decision to deprive the employees of union representation and to escape [its] obligation to collectively bargain in good faith" (ER 5);
- Unilaterally laying off hotel employees (ER 6); and
- Unilaterally reassigning certain employees to different positions and lowering their wages. (ER 6.)

The Board's Order requires the Company to:

- Cease and desist from the unfair labor practices found and from violating the Act in any other manner (ER 6, 7);
- Offer full reinstatement and a make whole remedy to the seven discharged union activists and to laid-off employees (ER 6);
- Bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement (ER 6);
- Furnish the Union with the information requested (ER 6);
- Reinstatement all tentative agreements reached by the parties for purposes of good-faith bargaining (ER 6);
- Rescind all unilateral changes and overbroad rules and restore the previously existing wages and other terms and conditions of employment (ER 6-7);

- Make unit employees and former unit employees whole for any losses suffered as a result of those unilateral changes (ER 7); and
- Offer reinstatement and a make whole remedy to any employee who was discharged as a result of the unilaterally imposed 90-day probationary period policy, and who would not have been terminated under the preexisting, lawful policy. (ER 7.)

Finally, the Board's Order extends the Union's certification period by one year, directs the Company to reimburse the Union's negotiating expenses, and orders a public reading of the Board's remedial notice by a responsible corporate executive.<sup>7</sup> (ER 7.) The Board also remanded the isolated issue of the appropriate remedy, if any, for the Company's unilateral closing of the Shogun Restaurant and layoff of the restaurant's employees.<sup>8</sup> (ER 10.)

### **SUMMARY OF THE ARGUMENT**

1. Before the Court, the Company did not challenge the bulk of the Board's unfair labor practice findings. Accordingly, the Board is entitled to summary enforcement of the portions of its Order remedying those violations. Further, the Company's failure to challenge those findings vastly narrows the issues before the

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<sup>7</sup> Member Hayes dissented from the one-year extension, the order of reimbursement for bargaining costs, and the order to read the notice to employees. (ER 8 n.18.)

<sup>8</sup> On December 31, 2011, the Board issued a Supplemental Decision and Order, in which it determined that no additional remedy was warranted. *See HTH Corp.*, 357 NLRB No. 177 (2011). Member Hayes would have dismissed this issue rather than remand. (ER 5 n.17.)

Court. The remaining issues, therefore, are whether the Board properly determined that the Company failed to bargain in good faith, unlawfully withdrew recognition from the Union, and unlawfully discharged seven union activists, and whether the Board imposed appropriate remedies.

2. The Board, exercising its recognized expertise in the area of a party's obligation to bargain in good faith, reasonably found that the Company failed to bargain in good faith. The Board properly assessed the totality of the circumstances, focusing on the Company's extreme proposals, its steadfast adherence to those positions, its scheme to use an agent to run out the certification-year clock, and its demonstrated antiunion animus. These findings, the vast majority of which the Company does not dispute, constitute substantial evidence supporting the Board's conclusion that the Company failed to bargain in good faith. The record evidence concerning the number of bargaining sessions held and tentative agreements executed simply does not counter the overwhelming evidence of bad faith.

3. Applying *Levitz Furniture Co.*, 333 NLRB 717 (2001), the Board reasonably determined that the Company unlawfully withdrew recognition from the Union. The Company readily concedes that as of December 1, 2007. It attempts to justify its withdrawal on a claimed loss of majority support. The Board rejected that claim. In doing so, the Board properly applied *Levitz* and found that

the Company's proffered "general consensus" evidence and a decertification petition signed 7 months *after* the Company withdrew recognition failed to satisfy the requirement of objective evidence that a union lacked majority support at the time an employer withdraws recognition. In short, the Board correctly determined that the Company's proffer of untimely evidence and conjecture that would fail as a matter of law to show that the Union lacked majority support was properly excluded at the hearing.

4. The Board reasonably determined that the Company discharged seven employees who served on the Union's bargaining committee and who engaged in extensive prounion activities because of their protected activity. Substantial evidence supports the Board's finding that the General Counsel satisfied his initial burden of showing that the discharges were unlawfully motivated and that the Company failed to show it would have discharged those employees absent their union activity.

5. The Board acted well within its broad discretion in ordering traditional and special remedies to address the Company's widespread and damaging unfair labor practices, and the Company's challenges to the remedies are frivolous. The Board carefully considered the Company's conduct and, among other remedies, determined that a bargaining order, a one-year extension of the certification period, a broad cease and desist order, and reimbursement for the Union's negotiating

expenses were appropriate. The Board traditionally issues a bargaining order when an employer has unlawfully withdrawn recognition from a union. With respect to the certification extension, the Board predicated its order on the Company's "sabotage" and other insincere efforts that "infected" the entire course of bargaining for the parties' first contract. In issuing a broad cease and desist order, the Board relied on the Company's misconduct that demonstrated both an unrestrained proclivity to violate the Act and an unbridled contempt for its employees' statutory rights. According to the Board, the Company intended, as the Act proscribes, merely to run out the certification-year clock rather than, as the Act prescribes, genuinely to attempt agreement; this finding fully supports a determination that the special remedy of reimbursement is warranted. Under these circumstances, the Board's remedies were highly appropriate and properly issued within its broad remedial authority.

### **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. *See* 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). 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.” *Universal Camera Corp.*, 340 U.S. at 488. This Court will not reverse the Board’s credibility determinations unless they are “inherently incredible or patently unreasonable.” *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1006 (9th Cir. 1995). As the Company acknowledges (Br. 31), the Board’s interpretation and application of the Act will be upheld provided it is rational and consistent with the Act. *See Retlaw Broad. Co.*, 53 F.3d at 1006; *accord Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996).

Further, the Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial review.” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board is directed to order remedies for unfair labor practices. The Supreme Court “has repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *accord California Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 308 (9th Cir. 1996) (the Board’s remedial order is reviewed only for “clear abuse of discretion”).

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 which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power*

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

## ARGUMENT

### I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS

Before the Board, the Company did not contest the administrative law judge's finding that it violated Section 8(a)(1) of the Act by threatening a bargaining committee employee with unspecified consequences during negotiations. (ER n.10.) The Court is jurisdictionally barred from reviewing the Board's finding in this regard because the Company did not file exceptions to it with the Board. See 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1992). Nor does the Company contest the Board's affirmance of that finding in its opening brief to the Court. For that reason, the Company has waived any defense to that finding, and the Board is entitled to summary enforcement of that portion of its Order. See *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991, 998 (9th Cir. 1992); see also Fed. R. App. Proc. 28(a)(9)(A) (party must raise all claims in opening brief).

In its opening brief to the Court, the Company similarly does not contest the Board's findings that:

- The Company violated Section 8(a)(5) and (1) by, between January 1 and December 1, 2007, using its agent, PBHM, to escape its obligation to collectively bargain in good faith (ER 5);

- The Company violated Section 8(a)(5) and (1) by issuing overbroad rules through employment offers and through a new employee handbook that discouraged employees from engaging in union and other protected activity (ER 5);
- The Company violated Section 8(a)(5) and (1) by unilaterally imposing new conditions of employment on their employees, including requiring them to apply for their own jobs and treating them as new employees, requiring drug tests, and imposing a 90-day probationary period (ER 5);
- The Company violated Section 8(a)(5) and (1) by unilaterally discharging the seven union activists without bargaining (ER 6); and
- The Company violated Section 8(a)(5) and (1) by failing to provide the information requested by the Union. (ER 6).

Accordingly, the Company has waived any defense to those findings, and the Board is entitled to summary enforcement of those portions of its Order. *See Sparks Nugget*, 968 F.2d at 998.

The uncontested violations, however, 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.” *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). Thus, the Court should consider the Board’s contested findings “against the backdrop of acknowledged violations.” *Torrington Extend-A-Care Emp. Ass’n v. NLRB*, 17 F.3d 580, 590 (2d Cir. 1994).

## II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN IN GOOD FAITH

### A. Applicable Principles

Section 8(a)(5) provides that “[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.”<sup>9</sup> Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the obligation to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” At a minimum, good faith requires the parties “to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . . . This duty does not require reaching an agreement, but it does prohibit mere pretense at negotiation with a completely closed mind and without a spirit of cooperation and good faith.” *NLRB v. Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972) (citations and internal quotations omitted); accord *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 485 (1960). Though “the parties need not contract on any specific terms . . . they are bound to deal with each

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<sup>9</sup> 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. 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(5) results in a “derivative violation” of Section 8(a)(1). See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

other in a serious attempt to resolve differences and reach a common ground.” *Ins. Agents’ Int’l Union*, 361 U.S. at 486.

The Board may inquire “into an employer’s motive or state of mind during the bargaining process” and will make its determination on the basis of “an examination of the totality of circumstances.” *Seattle-First Nat’l Bank v. NLRB*, 638 F.2d 1221, 1225 (9th Cir. 1981). The Board may also examine the contents of proposals. *See Holmes Tuttle*, 465 F.2d at 719. “The Board must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations if it is not to be blinded by empty talk and by the mere surface motions of collective bargaining.” *Id.* (citations and internal quotations omitted). The Board enjoys flexibility in determining whether a party has engaged in good-faith bargaining, and the Court will not “lightly disregard” the Board’s expertise in this area. *See id.*; *accord Universal Camera*, 340 U.S. at 488. “Findings as to the good faith of parties involved in collective bargaining . . . will not be upset unless unsupported by substantial evidence.” *Sparks Nugget*, 968 F.2d at 994.

**B. Substantial Evidence Supports the Board’s Finding that the Company Failed to Bargain In Good Faith**

In assessing the totality of the circumstances surrounding bargaining, the Board first considered the content of the Company’s proposals and the Company’s “steadfast[] adhere[nce]” to those proposals. (ER 2.) Specifically, the Board

found that the union recognition clause was an outright “rejection of collective bargaining” by “demand[ing] cessation of any control whatsoever over the bargaining unit itself” (ER 15), and by “forcing [the Union] to abandon its lawfully won bargaining unit description.” (ER 33.) Likewise, the management rights clause, according to the Board, “set[] parameters [that] allow the Union virtually no say in the nature of the jobs held by employees [that] the Union represents.” (ER 16.) Moreover, the Board determined that the “virtually absurd” (ER 33) complaint procedure merely “set[] up an illusion . . . [where an] employee’s valid grievance could conceivably never be remedied simply because of the arbitrariness of the General Manager.” (ER 16.) The Company only slightly changed its position on these terms and included them in its final offer.

Indeed, the Company’s proposals, specifically its detailed management rights clause that leaves the Union with “no say” and its union recognition clause that sought to modify the Board’s certification, are akin to proposals that have supported a finding of bad faith. For example, the Board, with court approval, has found bad faith where an employer’s proposals serve to “exclude the labor organization from any effective means of participation in important decisions affecting the terms and conditions of employment of its members.” *United Contractors, Inc.*, 244 NLRB 72, 73 (1979) (analyzing management rights clause), *enforced*, 631 F.2d 735 (7th Cir. 1980); *accord Modern Mfg. Co.*, 292 NLRB 10,

11 (1988). An employer's broad management rights proposal that reserves the exclusive right to set wages is also significant evidence of bad faith. *See In re Liquor Indus. Bargaining Grp.*, 333 NLRB 1219, 1220 (2001), *enforced*, 50 Fed. Appx. 444 (D.C. Cir. 2002). Similarly, the Board has previously found an employer's insistence on a clause that retains unfettered discretion to redefine the unit at any time demonstrates bad-faith bargaining. *See Newspaper Printing Corp.*, 232 NLRB 291, 291 (1977); *Columbia Tribune Publ'g Co.*, 201 NLRB 538, 551 (1973), *enforced in relevant part*, 495 F.2d 1384 (8th Cir. 1974).

While the obligation to bargain in good faith does not require compromise, the Company's "steadfast adherence" to extreme proposals further supports the Board's finding of bad-faith bargaining. *See, e.g., Sparks Nugget*, 968 F.2d at 995-96. In *Sparks Nugget*, this Court upheld the Board's finding of bad faith where an employer refused to compromise in negotiations and adhered to a proposal that included "total control of wages, seniority, and work rules" without explaining why subjects of such importance to the employees should be "beyond the influence of the employees' collective-bargaining representative." *Id.* at 995-96. The Company's proposals here effect the same result: unchecked authority. Accordingly, the Board properly determined that the Company's proposals demonstrate "clearly that [the Company] entered into the bargaining process with the mindset of evading its responsibility . . . to bargain in good faith. . . . It did not

wish to grant the Union any authority whatsoever over the wages, hours and terms and conditions of its employees' employment." (ER 16.)

The Board also rested its finding of bad faith on factors in addition to the content of the proposals and the Company's overall conduct evincing bad faith. The Board found that Company actively sought to evade its obligation to bargain, citing the Company's use of PBHM as "a surrogate" and as part of a "long-term scheme to wash the Union from the Hotel." (ER 33, 34.) The Company's plan to use PBHM as "an 'independent' manager . . . was designed to make it appear that [the Company was] a bona fide successor to PBHM where it could also claim that the Union's one-vote majority of 2 years before had become dissipated." (ER 34.) The Board explained further that the Company's ultimate goal in creating the "surrogate" was to be able to treat all employees as if they were new hires and set new terms and conditions of employment, ignoring all prior agreements. (ER 34.) Under these circumstances, the Board determined that the Company had simply gone through the motions for the sole purpose of "running out the certification-year clock." (ER 3.) The Board also relied (ER 3) on Minicola's incantation that the Union had only won by one vote. On the basis of this "strong evidence" (ER 33), the Board properly concluded that the Company violated Section 8(a)(5) and (1) of the Act by failing to discharge its duty to bargain in good faith.

### **C. The Company's Challenges Are Unavailing**

The Company does not challenge any of the Board's findings as to its proposals or its conduct throughout bargaining. Instead, the Company opts to characterize these extensive findings as "minor" or "isolated instances of possible misconduct." (Br. 41.) Additionally, the Company refers (Br. 39-41) the Court to the number of bargaining sessions held and tentative agreements reached and cites (Br. 40) various cases wherein the Board did not find bad faith.

The Company's reliance on the number of tentative agreements on non-economic subjects fails to appreciate the Board's finding: the Company *never* approached the negotiations with a sincere desire to reach agreement; it simply went through the motions until the certification clock expired. Indeed, the number of tentative agreements and bargaining sessions is not inconsistent with a party "going through the motions," nor alone is it evidence of good faith.

The cases cited by the Company are similarly unpersuasive. (Br. 40.) In *APT Medical Transportation*, 333 NLRB 760, 768-70 (2001), the Board found no bad faith where the employer did not invoke a "take it or leave it" posture and the union acknowledged that certain of the employer's seemingly unpalatable proposals would be acceptable in exchange for other issues. The Company here cannot reasonably maintain that it adopted a similarly unoffensive posture or point

to any evidence that the Union viewed the Company's key proposals as acceptable under any condition.

The Company also cites (Br. 40) *American Thread Co.*, 274 NLRB 1112 (1985), and *Dish Network Service Corp.*, 347 NLRB No. 69, 2006 WL 2206952 (2006), which are both similarly distinguishable on their facts. In both cases, the Board declined to find bad faith solely on the basis of a single area of disagreement. *See American Thread Co.*, 274 NLRB at 1113 (no finding of bad faith on the basis of the employer's refusal to agree to a dues checkoff provision); *Dish Network Serv. Corp.*, 2006 WL 2206952, at \*51 (no finding of bad faith solely on the basis of the employer's grievance procedure proposal omitting an arbitration provision). The facts here simply do not reveal an isolated issue of disagreement; rather, the Board determined that the Company engaged in a relentless campaign to "wash" itself of the Union, which included unrealistically extreme proposals that gutted the very purpose of an exclusive bargaining representative and the creation of a surrogate entity to continue to evade its bargaining obligation.

The Company's reliance (Br. 40) on *Coastal Electric Co-op*, 311 NLRB 1126, 1127 (1993), is also misplaced. There, the Board restated the unremarkable proposition that a broad management rights clause alone is not sufficient to sustain a finding of bad faith. In that case, unlike here, the employer complied with

information requests, made concessions, betrayed no evidence of union animus, and refrained from conduct away from the table that suggested it intended to frustrate agreement. *See id.* The Company cannot paint the same picture.

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNLAWFULLY WITHDRAWING RECOGNITION FROM THE UNION**

#### **A. Applicable Principles**

An employer also violates Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with its employees' certified representative. *See* 29 U.S.C § 158(a)(5) and (a)(1). This obligation extends through at least the first year of certification, during which the union's majority status cannot be challenged. Upon expiration of the certification year, the union enjoys a presumption of continuing majority status. This presumption "promotes continuity in bargaining relationships . . . and protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing." *Pennex Aluminum Corp.*, 288 NLRB 439, 441 (1988), *enforced*, 869 F.2d 590 (3d Cir. 1989); *see also Virginia Mason Med. Ctr. v. NLRB*, 558 F.3d 891, 894 (9th Cir. 2009). The Board has determined that this presumption is, under limited circumstances, rebuttable. *See Levitz Furniture Co.*, 333 NLRB 717, 725 (2001).

In *Levitz*, the Board redefined the circumstances in which an employer can unilaterally withdraw recognition from a union. Prior to *Levitz*, an employer could

lawfully rely on a “good-faith reasonable doubt” as to the loss of majority support. *See id.* at 719-20. The Board heightened that burden in *Levitz*. The Board announced in *Levitz* that employers could “rebut the continuing presumption of . . . majority status, and unilaterally withdraw recognition, only upon a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit.” *Id.* If the union challenges the employer’s withdrawal, the employer must demonstrate by a preponderance of the evidence that the union actually lacked majority support at the time of the withdrawal. *See id; accord Frankl v. HTH Corp.*, 650 F.3d 1334, 1360-61 (9th Cir. 2011).

Therefore, at the time it withdraws recognition, an employer must possess objective evidence, that is, “evidence external to the employer’s own subjective impressions” that the union has lost majority status. *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 367-68 n.2 (1998). The Board has recognized that such objective evidence may include, for example, “a petition signed by a majority of the employees in the bargaining unit” (*Levitz*, 333 NLRB at 725), or a letter signed by a majority of employees rejecting the union, along with a decertification petition (*Lexus of Concord, Inc.*, 343 NLRB 851, 851-52 (2004)). Even with such evidence, however, an employer “withdraws recognition at its peril” because it still must prove actual loss of majority support by a preponderance of the evidence. *See Levitz*, 333 NLRB at 725; *accord Frankl*, 650 F.3d at 1361.

**B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Withdrew Recognition from the Union**

It is undisputed, and the Company readily acknowledges, that it withdrew recognition from the Union as of December 1, 2007. The Company defends (Br. 37-39) its withdrawal of recognition by claiming that the Union had lost majority support. At the hearing before the administrative law judge, and again before the Board, the Company sought to introduce evidence that it claimed would demonstrate loss of majority support. Specifically, the Company tried to present evidence of “a general consensus that employees did not support the Union in late 2007, as well as a decertification petition purportedly signed by a majority of employees in mid-2008.” (ER 2 n.9.) According to the Company (Br. 26-28), its “general consensus” evidence would show that “the majority of employees were against the [union] boycotts” and that because employees knew the boycotts were “caused by the Union, the general consensus of the employees was that they were also against the Union.” (Br. 27.) The Company’s offer of proof also included general statements that a majority of employees did not want to be represented by the Union. (Br. 27.) Lastly, the Company offered to prove (Br. 28) that in April and May 2008, there continued to be a “general consensus” among hotel employees that they did not want to be represented by the Union.

The Board properly found that the mid-2008 decertification petition, which postdated the Company’s withdrawal of recognition by seven months, lacked any

probative value. (ER 2 n.9.) As *Levitz* made eminently clear, an employer must prove that a union actually lost majority support at the time the employer withdraws recognition. See *Levitz*, 333 NLRB at 725; see also *Frankl*, 650 F.3d at 1361 (“The Hotel has not presented any objective evidence of a loss of majority support as of December 1, 2007.”) (emphasis added); accord *Highlands Hosp. Corp. v. NLRB*, 508 F.3d 28, 32 (D.C. Cir. 2007).<sup>10</sup> Thus, the antiunion petition signed seven months *after* the Company had withdrawn recognition is unequivocally irrelevant under *Levitz*.<sup>11</sup> Accordingly, the Board properly upheld the judge’s decision to exclude such evidence.

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<sup>10</sup> It bears noting that this Court, in the context of a preliminary injunction under 29 U.S.C. § 160(j), recently upheld the district court’s rejection of this same evidence as insufficient to show that the Union, in fact, lost majority support by December 2007. See *Frankl*, 650 F.3d at 1361, *aff’g Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176, 1196 (D. Haw. 2010). The district court observed:

[The Company] had no petition, much less any factual confirmation that a majority of its employees did not support the Union. Rather, [the Company] decided to withdraw [u]nion recognition based on conjecture, speculation, and assumptions derived from Minicola’s observation of [u]nion rallies and the comments by some employees. This evidence is simply not persuasive; otherwise, “a few antiunion employees could provide the basis for withdrawal of recognition.” *Golden State Habilitation Convalescent Ctr.*, 224 NLRB 1618, 1619-1620 (1976).

*Norelli*, 699 F. Supp. 2d at 1196-97 (citations omitted).

<sup>11</sup> Interestingly, as the Board noted in its Decision, as of April 2008, or five months after withdrawal of recognition, the Company’s unlawful interrogation and polling

Further, the judge and the Board properly rejected the offers of proof because, even if admitted, such evidence “would not support [the Company’s] withdrawal of recognition.” (ER 2 n.9.) As the Board explained, “[g]eneral employee testimony would not provide the required proof of actual loss of majority support under *Levitz*.” (ER. 2 n.9.) Further, the “general consensus” evidence was “entirely conjectural” (ER 33) and much of it, like the decertification petition, post-dated the withdrawal of recognition. As the Board noted, the Company “never conducted a lawful poll, nor was it presented with an uncoerced disaffiliation petition.” (ER 33.) Under these circumstances, the Board properly upheld the judge’s refusal to admit the Company’s proffered evidence.

The Company contends (Br. 32-33) that *Levitz* and *Allentown* demonstrate that “statements from Hotel employees that the majority of the workforce did not support the Union were clearly admissible and should have been made a part of the record in this case.”<sup>12</sup> (Br. 33.) Neither case supports the Company’s argument.

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of employees did not “come close” to revealing that a majority of employees no longer supported the Union. (ER 33.)

<sup>12</sup> The Company also claims (Br. 32-33) that the Board’s own internal legal memorandum supports its argument that the hearsay statements should have been allowed. As a preliminary matter, the General Counsel memorandum is an internal guidance document, not binding authority on the Board. In any event, the memorandum does not advance the Company’s position. The Company relies on (Br. 32) portions of the memorandum that expressly relate to employee statements in a decertification election petition for an employer (referred to as an RM petition) and quotes sections of the memorandum falling under the heading “Processing RM

As the Supreme Court explained, “[u]nsubstantiated hearsay assertions that other employees do not support the union certainly do not establish *the fact of that disfavor* with the degree of reliability ordinarily demanded in legal proceedings.” *Allentown*, 522 U.S. at 369 (emphasis in original).

Finally, the Company does not contest the Board’s findings that the Company committed numerous violations of Section 8(a)(5) and (1) of the Act *after* its unlawful withdrawal. Specifically, these violations are: unilateral layoffs of restaurant employees, promulgating overbroad rules and policies that unlawfully curtail employees’ Section 7 rights, refusal to provide information, unilaterally changing job position and terms and conditions of employment, threatening employees with closure of their work if they engage in protected activity, and unlawfully polling employees. (ER 5-6.) As a result of the Company’s failure to defend against the Board’s reasonable finding of its unlawful withdrawal of recognition, the Board is entitled to summary enforcement of those uncontested findings.

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petitions in light of *Levitz*.” Guideline Memorandum Concerning *Levitz*, Memorandum GC 02-01, at p. 8 (Oct. 22, 2001). In *Levitz*, the Board determined that it would assess such petitions under a lower “good-faith reasonable doubt” standard (333 NLRB at 727-28), which has no application here.

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING SEVEN MEMBERS OF THE UNION'S BARGAINING COMMITTEE ON THE BASIS OF THEIR UNION ACTIVITIES**

**A. Section 8(a)(3) of the Act Bars Employers from Taking Adverse Actions Against Employees Because of Their 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.” 29 U.S.C. § 158(a)(3). An employer violates Section 8(a)(3) and (1) by taking adverse employment actions against employees for engaging in protected union activity. *See NLRB v. Mike Yourek & Son, Inc.*, 53 F.3d 261, 267 (9th Cir. 1995).

Whether such action violates the Act depends on the employer's motive. *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). Under the Board's seminal decision in *Wright Line*, the Board's General Counsel bears the burden of showing that an employee's protected activity was “a motivating factor” in the employer's decision to take adverse action against that employee. “The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.”

*Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once the Board's General Counsel satisfies this 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. See *Wright Line*, 251 NLRB at 1089; accord *Mike Yourek*, 53 F.3d at 267.

The Board may rely on direct evidence to establish unlawful motive, and, because an employer will rarely admit an unlawful motive, the Board may also infer discriminatory motivation from circumstantial evidence. 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). 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, its deviation from customary practices, and its reliance on shifting or pretextual explanations for the adverse action. *Healthcare Emps. Union 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).

On review, the Board's finding of unlawful motive must be upheld if it is supported by substantial evidence. Moreover, courts are particularly "deferential when reviewing the Board's conclusions regarding discriminatory motive, because most evidence of motive is circumstantial." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 734 (D.C. Cir. 2000); accord *Clear Pine Mouldings*, 632 F.2d at 726

(the determination of motive is “particularly within the purview of the Board”).<sup>13</sup>

**B. Substantial Evidence Supports the Board’s Finding that the General Counsel Carried His Burden of Demonstrating that an Unlawful Motive Prompted the Discharge, or Non-Rehire, of the Seven Union Activists**

The Board determined that the General Counsel satisfied his burden of showing that protected activity was a motivating factor in the Company’s decision to discharge, or not rehire, seven union activists: employees Kanaipaupuni, Miyashiro, Hatanaka, Villaneuva, Recaido, Bumanglag, and Revamonte. (ER 5.) In finding that the General Counsel carried that burden, the Board relied on the well-known union activity of the seven employees (ER 28-30; ER: 505-06, 522-23, SER: 81, 85-86, 101, 102-06, 108, 109, 113-18, 119, 120, 135), and the fact that the Company was fully aware of the employees’ union activity (ER 28-30; ER 593, SER: 21-22, 80, 82, 87-88, 89, 103, 110, 119, 136, 138, 161-62, 178, 207, 208.) Lastly, with respect to union animus, the Board considered the record replete with evidence that the Company harbored considerable animus towards the Union, including the extensive (and undisputed) unfair labor practices committed by the Company, the undisputed threats toward a bargaining committee member, and Vice President of Operations Minicola’s observations that the Company was taking

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<sup>13</sup> The Company’s assertion (Br. 42-43) that the Board’s reliance on circumstantial evidence was improper is wrong as a matter of law. In any event, as discussed in this section (pp. 42-43), the Board relied, in part, on direct evidence of Minicola’s disdain for the Union.

the Union's activities "personally" and his mantra about the one-vote margin of victory. (ER 24, 25.)

In addition to this union animus evidence, the Board also relied on the absence of a "credible record explanation for the process that was used [to make rehiring decisions.]" (ER 28.) The Board also noted the employees' exemplary work records (ER 28-29; SER 115, 133-34, 492), a lack of prior discipline (ER 28-29, 31; SER 77-78, 115, 133-34, 240-41), the hiring of less qualified employees,<sup>14</sup> and the Company's otherwise unsubstantiated claims.<sup>15</sup> Moreover, the Board noted that for certain of the discharges, the Company offered shifting explanations. For instance, General Manager Lopianetzky testified that there were two reasons for one employee's discharge, but only recorded one in his earlier affidavit to the Board. (ER 29; ER 543-44, SER 166.) Lopianetzky and Minicola offered conflicting reasons for another employee's discharge. (ER 29; ER: 549-50, 639, SER 170.) Company witnesses did not provide consistent testimony as to who was responsible for a third employee's discharge. (ER 32; ER: 541-42, 682, SER 204-06.) Thus, substantial evidence amply supports the Board's finding that the General Counsel established that the Company's discharge of the seven union activists was unlawfully motivated. The burden then shifted to the Company to

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<sup>14</sup> ER 29, 31-32; SER 168-69, 172, 192-95, 213-17, 222-33, 234-39, 242, 243-54, 255, 493-535, 539-614, 615-70.

<sup>15</sup> ER 29-30, 32; ER 639, SER: 167, 171, 179, 191, 203, 211-12, 256, 257, 285.

demonstrate that it would have discharged the seven employees even in the absence of their union activity.

**C. The Board Reasonably Found that the Company Failed To Carry Its Burden of Proving that It Would Have Made the Same Decisions in the Absence of the Employees' Protected Activity**

As an initial matter, the Company does not appear to contest (Br. 43) the Board's finding that it discharged employees Kanaiaupuni and Hatanka because of their union activity. Rather, the Company seems to suggest (Br. 43) that its subsequent decision to rehire them in 2008 somehow erased any finding of discrimination. The Company's contention is baseless. The Board, aware of the rehires in 2008, still found that both discharges were discriminatory. (ER 29, 32.) The Court should therefore summarily find that the Company's discharge of Kanaiaupuni and Hatanka violated Section 8(a)(3) and (1) of the Act.

The Company defends (Br. 43-45) its decision to discharge the other five employees by claiming they were either unqualified or less qualified than other employees whom the Company did retain. The Board properly rejected the Company's anemic defenses.

The Company claims (Br. 44) that it would have discharged Miyashiro absent his union activity because of a coworker complaint and an incident

involving the improper disposal of a sterno canister.<sup>16</sup> As a result of that incident, Miyashiro received a one-day suspension, which was non-precedential for purposes of progressive discipline. (ER 28; ER 546, SER 79.) The Board specifically found that the coworker complaint, not having been mentioned in Lopianetzky's affidavit, was "an afterthought . . . [that] did not play a role in the decision not to retain Miyashiro." (ER 29.) The Board therefore gave "no weight whatsoever" to this proffered justification. The Board also rejected the sterno incident because, by the express terms of the disciplinary record, it "could play no role in personnel decisions." (ER 29.) The Company has not provided any basis for the Court to disturb these factual findings.

With respect to Virbina Revamonte, the Company offers (Br. 45) a single conclusory statement that she was not rehired because she was unable to work and was not listed on the work schedule. The Board found, however, that this reason "clearly fails as a credible explanation." (ER 30.) Revamonte indicated on her

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<sup>16</sup> Miyashiro discarded into the trash a used sterno canister that he believed had been extinguished. (ER 28; 594.) The canister was still alit, and a fire ensued that was quickly extinguished with damage only to the trash can. (ER 28; 594.) This incident occurred during Miyashiro's tenure on the union bargaining committee. (ER 28; 595.) In a sidebar to the negotiations, Minicola told Miyashiro that normally this type of incident warranted a two-week suspension, because Miyashiro was such a good employee, the suspension would be one day. (ER 28; 597.) Lopianetzky signed off on the one-day suspension, which included a negotiated modification stating: "This disciplinary action will not be preceden[t] setting." (ER 28; ER 546, SER 79.)

application that she was available to work, and the Company retained at least two employees who were also not on the active payroll. (ER 30; SER 203, 256, 257, 536-38.) The Company does not contest these factual findings and offers the Court no plausible basis to disturb the Board's conclusion.

The Company asserts (Br. 44) that it would have discharged Recaido in any event because he was insubordinate and not a team player. The Board expressly rejected this explanation as "untenable," (ER 31), noting that the Company "retained employees whose histories of transgressions were far worse." (ER 31; SER 217, 222-33, 234-39, 242, 635-70.) Specifically, the Board identified four housekeepers who had significant and documented performance issues but who were retained over Recaido. (ER 31; SER 217, 222-33, 234-39, 242, 539-614, 615-17, 622-25, 641-44.) Further, the Board found that several unidentified employees had received warnings for failing to treat coworkers with respect. (ER 31; SER 213-16, 618-21, 626-40.) The Company offers no explanation as to why it retained these employees whose work performance was clearly inferior to Recaido's. Accordingly, it failed to show that it would have discharged Recaido in the absence of protected activity.

According to the Company (Br. 43-44), it would have discharged Villanueva regardless of his union activity because he committed safety violations, had poor attendance, and was "prone to taking shortcuts." Company witnesses, however,

conceded that Villanueva's file contained no written disciplinary records. (ER 31; SER 240-41.) The Board also found (ER 31; SER 107) that his absences were attributable to a verifiable and documented health condition. Lastly, the Board emphasized (ER 31; SER 645-58) that the Company retained at least one similarly situated employee who had five different disciplinary actions in the six months preceding the discharge decisions, including suspensions, written warnings, and counselings. Once again, the Company does not dispute any of these findings.

In sum, ample evidence supports the Board's finding that the Company has failed to demonstrate that it would have made the same employment decisions in the absence of the employees' protected activities. *See Vincent Indus. Plastics*, 209 F.3d at 736 (refusing to "second guess" the Board's finding that an employer's proffered explanations were not credible). Accordingly, its defense must fail.

## **V. THE COMPANY'S CHALLENGES TO THE BOARD'S REMEDIAL ORDER BORDER ON FRIVOLOUS**

### **A. Applicable Principles**

As shown above, the Board enjoys broad discretion in fashioning an appropriate remedy. *See Fibreboard Paper Prods. V. NLRB*, 379 U.S. 203, 216 (1964), and cases cited at pp. 23-25. Under certain circumstances, the Board will order special remedies where it finds they are needed "to dissipate fully the coercive effects of the unfair labor practices." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (citing cases), *enforced in relevant part*, 97 F.3d 65 (4th Cir.

1996). Such remedies include the requirement that the Board's remedial notice be read aloud to the employees (*see J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969)), an extension of the certification period (*see Dominguez Valley Hosp.*, 287 NLRB 149, 151 (1987), *enforced*, 907 F.2d 905 (9th Cir. 1990)), and the reimbursement of negotiating expenses (*see Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), *enforced in pertinent part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997)).

**B. The Board Properly Exercised Its Discretion In Ordering Special Remedies To Address the Company's Extensive and Deleterious Unfair Labor Practices**

In addition to the traditional remedies such as reinstatement, backpay, rescission of unilateral changes, and a bargaining order (outlined above at pp. 19-20), the Board imposed certain special remedies to address the Company's extensive unfair labor practices. Specifically, the Board issued a broad cease and desist order, extended the Union's certification period by one year, ordered reimbursement of the Union's negotiating expenses, and directed a responsible corporate executive to read aloud the Board's remedial the notice.<sup>17</sup> (ER 10.) The Board carefully considered the Company's extensive and pervasive misconduct and properly determined that special remedies were warranted.

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<sup>17</sup> The Company does not challenge the notice reading requirement.

Under *Hickmott Foods*, 242 NLRB 1357, 1357 (1979), a broad cease and desist order is appropriate where an employer demonstrates a proclivity to violate the Act, is an egregious offender, or has committed numerous different violations of the Act. Here, the Board acknowledged the Company's "proclivity to violate the Act and [its] serious misconduct that demonstrates a general disregard for [its] employees' fundamental rights." (ER 7.) As the Board has found, the Company has committed varied and extensive violations of the Act, including discriminatory discharges, unilateral changes in the terms and conditions of employment, failure to bargain in good faith, and unlawful withdrawal of recognition. These violations establish that the Company is a repeat and egregious offender. As such, the Board properly exercised its wide discretion in issuing a broad cease and desist order.

In ordering a one-year extension of the certification period, the Board considered the "number of coercive unfair labor practices that undermined the Union and prevented the parties from reaching an agreement." The Board also emphasized "the Company's failure to bargain in good faith from the time it made its first counterproposal on January 1, 2006," and the fact that its "bad faith infected the entire course of negotiations." (ER 36, 7.) According to the Board, a one-year extension was necessary to remedy the "illusory" process and "sabotage" of bargaining that the Company undertook. (ER 7.) The Board's order in this

regard is entirely reasonable in light of the express findings concerning the Company's misconduct.

Additionally, the Board's special remedy of reimbursement for the Union's negotiating expenses is proper. The Board has recognized that:

In cases of unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," . . . an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.

*Frontier Hotel & Casino*, 318 NLRB at 859 (citations omitted). The Board considered that the Company had "no intention of reaching an agreement and purposely sabotaged the progress made by the Union in its negotiations with PBHM." (ER 8.) Under these circumstances, the Board reasonably determined that there was a "direct causal relationship between the [Company's] action in bargaining and the [Union's] losses." (ER 36, quoting *Teamsters Local 122*, 334 NLRB 1190, 1195 (2001), *enforced*, 2003 WL 880990 (D.C. Cir. 2003) (consent judgment)). As such, the Board's order of reimbursement was a proper exercise of its broad discretion.

### **C. The Company's Challenges to the Board's Remedies Are Meritless**

The Company first contends (Br. 46-48) that a bargaining order, a traditional remedy in any unlawful withdrawal of recognition case, is “not appropriate because the majority of hotel employees clearly do not want to be represented by the Union.” (Br. 46.) The Company’s argument is merely a recitation of its unilateral withdrawal defense, which, as show above (pp. 34-39), the Board properly rejected. The Board’s bargaining order therefore was proper. *See In re Miller Waste Mills, Inc.*, 334 NLRB 466, 470 (2001), *enforced*, 315 F.3d 951 (8th Cir. 2003).

The Company next argues (Br. 48-51) that the Board improperly extended the certification period by one year. Notably, the Company concedes that its conduct warranted *some* extension: “a shorter extension period is more appropriate than the maximum 12-month extension.” (Br. 51.) In variously urging the Court to impose a 3-month or 6-month extension, the Company once again challenges (Br. 49-50) the Board’s finding of bad faith. For the reasons outlined above (pp. 27-33), the Court must reject the Company’s attempts to recast its bargaining as simply “hard bargaining” to avoid imposition of a one-year certification extension. Further, the Company’s expressed concern for how the extension will affect the rights of its employees justifiably warrants skepticism. *Cf. Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996) (the Board is entitled to suspicion and

giving an employer “a short leash” when it claims to act as the “vindicator of its employees’ organizational freedom”).

The Company then asserts (Br. 53, 55-56) that the Board’s order of reimbursement of negotiating expenses was “absurd and contrary to Board law” and that a broad cease and desist order “was definitely not warranted.” (Br. 53, 55.) Losing all credibility, the Company summarily declares that it did “not engage[] in flagrant, egregious, deliberate or pervasive bad-faith conduct aimed at frustrating the bargaining process,” or “demonstrate a proclivity to violate the Act.” (Br. 54.) The Company then brazenly posits (Br. 55) that its actions, in fact, vindicated its employees’ fundamental rights. In short, and without restating those findings here, the Company’s statements patently ignore the Board’s express and overwhelming findings to the contrary. As such, the Company’s claims provide no basis to disturb the well-tailored remedies chosen by the Board.

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full and denying the petition for review.

## STATEMENT OF RELATED CASES

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

Respectfully submitted,

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# **STATUTORY ADDENDUM**

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. §§ 151, et. seq., are excerpted below:

**Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8 of the Act (29 U.S.C. § 158). Unfair Labor Practices.**

**(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**(d) Obligation to bargain collectively**

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract

incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

**Section 10 of the Act (29 U.S.C. § 160). Prevention of Unfair Labor Practices.**

**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

**(c) Reduction of testimony to writing; findings and orders of Board**

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . .

**(e) Petition to court for enforcement of order; proceedings; review of judgment**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems

just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

**(f) Review of final order of Board on petition to court**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

**(j) Injunctions**

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. . . .

**Form 6. Certificate of Compliance With Type-Volume Limitation,  
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Signature /s/ Linda Dreeben

Attorney for NLRB

Date February 13, 2012

9th Circuit Case Number(s) 11-71676, 11-71968

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