

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

**NATIONAL LABOR RELATIONS BOARD,**

**Petitioner/Cross-Respondent**

**v.**

**INTER-DISCIPLINARY ADVANTAGE, INC.,**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**UNITED STATES COURT OF APPEALS  
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**Nos. 07-2276, 07-2357**

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**NATIONAL LABOR RELATIONS BOARD,**

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**v.**

**INTER-DISCIPLINARY ADVANTAGE, INC.,**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board to enforce, and the cross-petition of Inter-Disciplinary Advantage, Inc. (“IDA”) to review, a Board order issued against IDA. In this unfair labor practice case, the Board found that IDA violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule, creating the impression of surveillance, threatening to discharge employees, coercively interrogating

employees, prohibiting employees from talking about the Union at work while allowing other non-work discussions, soliciting and implicitly promising to redress grievances, and coercively interrogating an employee regarding discussions with Board agent and asking her to provide copies of affidavits given to the Board. In addition, the Board found that IDA violated Section 8(a)(3) and (1) of the Act by firing employees Kelly Lashbrook, Linda Foran, and Marie Abrakian for engaging in union activities.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Shelby Township, Michigan.

The Board’s Decision and Order issued on March 15, 2007, and is reported at 349 NLRB No. 49.<sup>1</sup> That Order is final under Section 10(e) of the Act. The Board filed its application for enforcement on October 9, 2007, and IDA filed a cross-petition for review on October 23, 2007. Both the Board’s application and

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<sup>1</sup> DO 1-33,A.7-39. In this proof brief, “DO” references are to the Board’s Decision and Order. “Tr.” References are to the transcript of the 2005 hearing, “GC” refers to the General Counsel’s exhibits from that hearing, and “RX” refers to IDA’s exhibits. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

IDA's cross-petition are timely; the Act places no limit on the time for filing actions to enforce or review Board orders.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that the briefs and record demonstrate that this case involves the routine application of settled principles to well-supported findings of fact. As a result, the Board submits that oral argument would not significantly aid this Court's decisional process. If, however, the Court deems oral argument necessary, the Board requests that it be permitted to participate.

### **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Board is entitled to summary enforcement of uncontested portions of its order. Specifically, IDA fails to contest the Board's findings that it violated Section 8(a)(1) of the Act by: threatening to discharge employees for their union activities, coercively interrogating employees about their union activities, and prohibiting employees from talking about the Union while allowing other non-work discussions.

2. Whether substantial evidence supports the Board's findings that IDA violated Section 8(a)(1) of the Act by:

- maintaining an overly broad confidentiality rule,
- creating the impression that the union activity of employees Abrakian and Lashbrook was under surveillance,

- soliciting and implicitly promising to redress grievances,
- interrogating employees regarding their discussions with Board agents, and
- asking employees to provide copies of affidavits given to the Board.

3. Whether substantial evidence supports the Board's findings that IDA violated Section 8(a)(3) and (1) of the Act by firing employees Marie Abrakian, Kelly Lashbrook, and Linda Foran because of their union activities.

### **STATEMENT OF THE CASE**

This case came before the Board on a complaint issued by the Board's General Counsel on August 12, 2005, pursuant to an amended charge filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("the Union"). (DO 2,A.8.) The complaint alleged that IDA violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. § 158(a)(3) and (1), by firing employees Kelly Lashbrook, Linda Foran, and Marie Abrakian in retaliation for union activity culminating in the Union's request to bargain and, ultimately, an election. (*Id.*) Further, the complaint alleged that IDA violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule, creating the impression of surveillance, threatening to discharge employees, coercively interrogating employees, prohibiting employees from talking about the Union at work while allowing other non-work discussions, soliciting and implicitly

promising to redress grievances, and coercively interrogating an employee regarding discussions with Board agent and asking her to provide copies of affidavits given to the Board. (*Id.*)

After a hearing on the complaint, an administrative law judge found that these actions by IDA violated Section 8(a)(3) and (1) of the Act. (DO 31,A.37.) IDA and the General Counsel both filed exceptions to the judge's decision with the Board. (DO 1 & nn.1,2,A.7&nn.1,2.) The Board affirmed the findings and decision of the administrative law judge. (DO 1,A.7.) The Board also modified the judge's recommended notice to include a requirement that IDA rescind its overbroad confidentiality rule in conformity with the judge's recommended order. (DO 1 n.4, 2,A.7n.4,8.) The facts supporting the Board's order are summarized below; the Board's conclusions and order are described thereafter.

## **STATEMENT OF FACTS**

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

#### **A. Background: IDA's Operations and Its Confidentiality Rule**

IDA operates four residential care homes in Michigan for adults with mental disabilities or mental illnesses, including the Morowske Home in Shelby Township. (DO 3,A.9; Tr. 785,A.701[Pettyplace].) IDA's administrative office is located in Midland; Executive Director Deborah Pettyplace, Program Coordinators Kasie Prevatt and Diane Davis, and other office staff work out of the Midland

office. (Tr. 785,A.701[Pettyplace], Tr. 1163,A.759[Prevatt].) Each home, including Morowske Home, is managed by a home supervisor and an assistant home supervisor. At the time of the events in question, Diane Haack worked as Morowske Home's home supervisor, and Mark Romain worked as the assistant home supervisor. (DO 3,A.9; Tr. 792,A.702[Pettyplace].) Haack reported to Program Coordinator Davis, who reported to Executive Director Pettyplace. (DO 3,A.9; RX 3 p. 22,A.156, Tr. 793,A.703[Pettyplace].)

Morowske Home's 10 community support specialists, also called direct care workers, work in 3 shifts, 24 hours per day, providing around-the-clock supervision of residents. (DO 3,A.9; Tr. 793,A.703[Pettyplace], RX 3 pp. 17-19,A.151-53.) Upon hire, the direct care workers sign a confidentiality statement, which reads:

Any and all information regarding business, employees or Inter-Disciplinary Advantage, Inc., and/or individuals served in IDA homes which is conducted in this office is strictly confidential. Any breach of this confidentiality will result in disciplinary action up to and including immediate dismissal.

(DO 2 & 2 n.2,A.8&8n.2; RX 22,A.277.)

**B. Employees Discuss Unionization; IDA Threatens To Discharge Them**

In February or March 2005, Morowske Home direct care worker Marie Abrakian began discussing the benefits of unionization with co-workers Linda Foran and Kelly Lashbrook. (DO 4,A.10; Tr. 62-63,A.568-69[Lashbrook], Tr.

263,A.606[Foran], Tr. 462,A.644[Abrakian].) Abrakian contacted the Union in late March and arranged a meeting between employees and the Union at the Union's local hall. (DO 4,A.10; Tr. 462-63,A.644-45[Abrakian].) On March 28 and 29, Abrakian contacted her fellow employees to tell them about the meeting, which was set for April 4 at 11 a.m. (DO 4,A.10; Tr. 371,A.630[Foran], Tr. 410,A.631[Bibbee], Tr. 463,A.645[Abrakian].)

In late March, after employees began discussing the need for a union, co-workers Tammy Bibbee, Kelly Hibbs, and Tracey Gevedon were conversing in the Home during the change of shifts with Assistant Home Supervisor Romain. (DO 6, 24-25,A.12,30-31; Tr. 411,A.632[Bibbee], Tr. 525-27,A.665-67[Hibbs].) Hibbs stated that she thought the Union was "a good idea" because the employees did not "get any raises or any holiday pay or any perks." (Tr. 526,A.666[Hibbs].) In response, Romain told the employees that if IDA found out that they were for the Union, they could be terminated. (DO 6, 24-25,A.12,30-31; Tr. 411,A.632[Bibbee], Tr. 527,A.667[Hibbs].) A few days later, as Hibbs and Romain stood together on the Morowske Home porch, Romain questioned Hibbs about her union sympathies. (DO 25,A.31; Tr. 427,A.639[Bibbee].)

Around March 29, Program Coordinator Davis gave Supervisor Haack a stack of documents 1 ½ to 2 inches high, including a copy of the Morowske Home budget. (DO 4,A.10; GC 5,A.110-15, Tr. 631-32, 636, 660-61,A.689-90,694,695-

96[Haack].) Davis told Haack only to “look over” the budget and tell her what she thought; she did not give Haack instructions regarding handling the budget or tell her that it was confidential. (DO 4,A.10;Tr. 632-33,A.690-91[Haack].) Because Davis gave her the documents at the end of her work day after she had locked her office, Haack slid the documents clearly stamped “confidential” in red under her locked office door; she left the stack of other documents, including the budget, on a counter near the fax machine, where both employees and residents could see it. (DO 4,A.10; Tr. 634, 660,A.692,695[Haack].)

Abrakian, when she reported to work, saw the budget by the fax machine and looked at it. (DO 4,A.10; Tr. 467,A.647[Abrakian].) Because the budget “didn’t look right” to her (it included line items for resident allowances and overtime), Abrakian made a copy of the budget and left the original on the counter. (DO 4,A.10; Tr. 468,A.648[Abrakian].) The next day, Supervisor Haack showed the budget to employee Lashbrook and discussed it with her. (DO 4,A.10; Tr. 634-36,A.692-94[Haack].)

**C. Employees Attend a Union Meeting; IDA Interrogates Lashbrook and Abrakian**

On April 4, the day of the union meeting, Foran and Lashbrook reported to work for their 6 a.m. to 2 p.m. shift and asked Haack for permission to leave early. Haack gave them permission. (DO 4,A.10; Tr. 65, 77-78,A.570,575-76[Lashbrook], Tr. 267,A.607[Foran], Tr. 587-88,A.680-81[Haack].) Neither told

her they wanted to leave early to attend the meeting. (DO 4,A.10.) Lashbrook told Haack she had to go to the bank, which she did after the meeting. (DO 4,A.10; Tr. 78,A.576[Lashbrook], Tr. 588,A.681[Haack].) Foran did not give a reason for her early departure. (DO 4,A.10; Tr. 280,A.609[Foran], Tr. 588,A.681[Haack].)

Resident Daniel D. had been complaining of an earache, so Haack told Foran and Lashbrook to try to get a doctor's appointment for him. (DO 4,A.10; Tr. 584,A.677[Haack].) Lashbrook called the doctor's office. Because Daniel already had an appointment for a physical scheduled on April 7, Lashbrook asked that the physical appointment be moved up as well. (DO 4,A.10; GC 39,A.131, Tr. 72,A.571[Lashbrook].) The doctor's office could not accommodate Lashbrook's requests; the receptionist said that she would "try to get him in," but that Daniel would be unable to see his own doctor and the physical appointment could not be rescheduled. (DO 4,A.10; Tr. 72,A.571[Lashbrook].) Because direct care workers prefer their clients to see their regular doctor, with whom they are comfortable, Lashbrook did not schedule an appointment for Daniel for April 4. (DO 5,A.11;Tr. 251,A.605[Lashbrook], Tr. 347,A.628[Foran], Tr. 585,A.678 [Haack].)

After checking Daniel's vital signs, which were normal, Haack told Foran and Lashbrook to take him to the Friendship House (a "clubhouse" providing day programs) along with the other residents. (DO 5,A.11; Tr. 585-86, A.678-79[Haack].) As Haack instructed, Foran and Lashbrook took Daniel and three

other residents to the clubhouse. (DO 5,A.11; Tr. 74-75,A.572-73[Haack].) They returned to the Morowske Home between 10:30 and 11 a.m., then drove together in Lashbrook's Ford Explorer to the union meeting. (DO 5,A.11; Tr. 76-77, 80,A.574-75,577[Lashbrook], Tr. 282-83,A.11610-[Foran].)

In addition to Lashbrook and Foran, employees Abrakian, Tammy Bibbee, and Randi Schwark attended the union meeting. (DO 5,A.11; Tr. 284,A.612[Foran].) Abrakian took with her the copy of the Morowske Home budget she had found but kept it out of view throughout the meeting. (DO 5,A.11; Tr. 287,A.615[Foran], Tr. 414,A.634[Bibbee].) Concerned that Home funds were being misappropriated, Abrakian asked a union representative if she would like to see the budget, but the representative declined. (DO 5, A.11 Tr. 471-72, A.650-51 [Abrakian].) Abrakian did not show the budget to anyone; she later took the budget home and threw it away. (DO 16-17,A.22-23; Tr. 482,A.657[Abrakian].) At the end of the meeting, all but Schwark signed authorization cards. (DO 5,A.11; GC 6-9,A.116-19, Tr. 285-86,A.613-14[Foran].) Lashbrook, Abrakian, and other employees also took union bumper stickers, which they placed on their cars. (DO 5,A.11; Tr. 90,A.579[Lashbrook], Tr. 476,A653[Abrakian].)

After the meeting, Assistant Home Supervisor Romain questioned Abrakian and Lashbrook about their attendance. While they prepared resident meals together, Romain asked Abrakian "how [the] union meeting went for that day."

(DO 5,A.11; Tr. 475,A.652[Abrakian].) Abrakian had not previously told him about the meeting. (*Id.*) When Lashbrook returned to the Home, Romain asked her if she had attended the union meeting, adding that he did not think the Union was a good idea and that she would not “get anything out of it.” (DO 5,A.11; Tr. 104-05,A.583-84[Lashbrook].) Lashbrook replied that she “was all for the Union.” (DO 5,A.11; Tr. 104,A.583[Lashbrook].) Romain then stated that he was “worried” and that Lashbrook should “be careful.” (DO 5,A.11; Tr. 105,A.584[Lashbrook].) Like Abrakian, Lashbrook had not previously told Romain about the union meeting. (DO 5,A.11; Tr. 106,A.585[Lashbrook].)

On April 8, employees Bibbee and Hibbs separately called Home Supervisor Haack to ask if they could be fired for supporting the Union; they explained that Romain had told them they could be fired. (DO 6,A.12; Tr. 412,A.633[Bibbee], Tr. 528,A.668[Hibbs], Tr. 610-12,A.682-84[Haack].) Haack assured them they could not be fired, and she told Romain to stop telling the employees otherwise. (DO 6,A.12; Tr. 611, 613,A.683,685[Haack].) The next day, Haack posted a sign on the Morowske Home’s bulletin board that employees could not be fired for trying to start a union, but the sign was removed a few days later. (DO 6,A.12; Tr. 613,A.685[Haack].)

#### **D. The Union Demands Recognition, and IDA Begins an Investigation**

On April 8, Executive Director Pettyplace met with Program Coordinator Davis to discuss Davis's investigation into employee complaints. (DO 8,A.14; Tr. 845,A.705[Pettyplace], Tr. 1479,A.807[Davis].) Davis had received telephone calls and written allegations about Haack, including that she was not at the Home at certain times during the day and that she showed favoritism to some employees. (DO 7,A.13; Tr. 1461-63, 1554,A.803-05,829[Davis].) They also discussed two claims by employee Schwark: that Abrakian had a copy of the Morowske Home budget with her at the union meeting, and that Schwark thought she had seen IDA's van at a union meeting – though there were no markings on the van identifying it as belonging to IDA – and assumed Lashbrook and Foran had driven it because she did not see their cars. (DO 7 & n.12,A.13&n.12; GC 33,A.126-28, Tr. 1475,1554,1556-57,A.806,829,831-32 [Davis].)

During this meeting, Pettyplace called Haack and told her “that the van had been spotted at a union meeting.” (DO 8-10,A.14-16; Tr. 614,A.686[Haack], Tr. 1480-81,A.808-09[Davis].) Pettyplace then directed Haack to tell the employees that they would be terminated if they participated in union activities on paid time. (DO 9,A.15; Tr. 615,A.687[Haack].) She also asked Haack to fax certain documents, including a log used to record van mileage, health care chronologicals (a form listing doctor's appointments) for all residents, and documents concerning

medical appointments for resident Daniel D. (DO 9,A.15; GC 38,A.129-30, RX 31,A.287-296, Tr. 101,A.582[Lashbrook], Tr. 849,A.708[Pettyplace], Tr. 1481,A.809[Davis].)

Citing employee Schwark's claims, Pettyplace and Davis began an investigation into Abrakian, Lashbrook, and Foran's conduct on the day of the union meeting. (DO 9-10,A.15-16; Tr. 1009,A.747[Pettyplace], Tr. 1485,A.812[Davis].) Later that day, the Union, having a majority of signed authorization cards, faxed and mailed a letter to Pettyplace demanding recognition as the collective-bargaining representative of a unit of employees consisting of Morowske Home's direct care workers. (DO 10-11,A.16-17; GC 22,A.123-24.)

**E. IDA Interviews Morowske Home Employees, Forbids Union-Related Speech, Threatens To Fire Employees Who Talk about the Union, and Solicits Grievances**

Davis instructed Haack to inform Morowske Home's employees that there would be a mandatory employee meeting on April 14. (DO 11,A.17; Tr. 616,A.688[Haack].) As required, all but one employee gathered at the Home that day. (Tr. 1574-75,A.837-838[Davis].) Davis and Program Coordinator and Consultant Kasie Prevatt told the assembled employees that they were there to investigate certain allegations and that employees would be interviewed individually. (DO 11,A.17; Tr. 1009,A.747[Pettyplace], Tr. 1485, 1523,A.812,823[Davis].)

Prevatt then told employees that they were not to discuss any nonwork-related matters among themselves as they waited to be interviewed. (DO 12,A.18; Tr. 120,A.586[Lashbrook], Tr. 305,A.616[Foran], Tr. 531,A.670[Hibbs], Tr. 1524,A.824[Davis].) Lashbrook responded that employees “don’t have to answer any of their questions about the Union,” (DO 12,A.18; Tr. 120,A.586[Lashbrook], Tr. 1525,A.825[Davis]) but Prevatt warned them “there was to be no more discussion about the Union or [they] could be terminated.” (DO 12,A.18; Tr. 120,A.586 Lashbrook], Tr. 305-06,A.616-17 Foran], Tr. 421-22,A.635-36[Bibbee], Tr. 502,A.664[Abrakian], Tr. 531,A.670[Hibbs].)

After this exchange, employees, along with Assistant Home Supervisor Romain, were called into an office individually to be interviewed by Davis and Prevatt. (DO 13,A.19; RX 32 [sign-in sheet],A.297.) Prevatt primarily questioned the employees while Davis took notes of the interviews. (DO 12 n.19, 19-20 A.18 n.19,25-26; RX 7, 32,A.254-57,297-301, Tr. 306-08,A.617-19[Foran].)

During the interviews, Prevatt asked employees about the Union, including whether employees knew how their supervisors felt about the Union (DO 16,A.22; Tr. 128,A.591[Lashbrook], Tr. 425,A.638[Bibbee], Tr. 481,A.656[Abrakian]), and “who brought up the union talk” at a recent Morowske Home staff meeting (DO 16,A.22; Tr. 425,A.638[Bibbee]). Employees were also asked if they “were aware” that IDA’s van had been seen at the April 4 union meeting. (DO 15-

16,A.21-22; Tr. 123,A.587[Lashbrook], Tr. 311,A.622[Foran], Tr. 424-25,A.637-38[Bibbee], Tr. 480,A.655[Abrakian].) Prevatt concluded the interviews by asking whether there was “anything [IDA] could do to improve the workplace or [the employees’] enjoyment on the job.” (DO 12 & n.20,A.18&n.20; RX 7,A.254-57, Tr. 131,A.592[Lashbrook], Tr. 313,A.624[Foran].)

Not all employees were asked all the questions or the same questions. (DO 14,A.20.) Prevatt questioned employees Lashbrook and Foran about their activities on April 4 and resident Daniel D.’s medical appointment. (DO 15, 17, A.21,23; Tr. 123,A.587[Lashbrook], Tr. 308,A.619[Foran].) Lashbrook explained that they had been unable to get an appointment with Daniel D.’s regular doctor on April 4. (DO 15,A.21; Tr. 123-24,A.587-88[Lashbrook].) Instead, he was taken to the doctor on April 7. (DO 15, 17,A.21,23; Tr. 125-26,A.589-90[Lashbrook], Tr. 308-09, 368,A.619-20,629[Foran].) Neither Prevatt nor Davis showed any documents concerning Daniel D. to Lashbrook or Foran for explanation. (DO 15, 17,A.21,23; Tr. 221-22,A.603-04[Lashbrook], Tr. 310, 314,A.621,625[Foran].) Prevatt also asked Foran whether she possessed a set of keys to the Morowske Home. (DO 18,A.24; Tr. 312,A.623[Foran].) Foran stated that she still had the keys assigned to her as medical coordinator. (*Id.*) Prevatt asked that she return the keys, which Foran did. (DO 18,A.24; Tr. 313,A.624[Foran].)

Prevatt also questioned Abrakian about the copy she made of the budget, asking how she acquired it, what she had done with it, and whether she knew that she had violated the Home's confidentiality policy by taking it. (DO 16,A.22; Tr. 482,A.657[Abrakian].) Prevatt, however, did not ask Abrakian whether she had shown the budget to others. (DO 17,A.23.) Abrakian explained that she had found the budget by the fax machine and had made a copy of it. (DO 16,A.22; Tr. 482,A.657[Abrakian].) She told Prevatt that the budget was not stamped confidential and that she believed financial statements of non-profit corporations to be public information. (DO 16,A.22; Tr. 483,A.658[Abrakian].) Prevatt told Abrakian that if she took any other documents out of the home she could be terminated. (DO 16,A.22; Tr. 482,A.657[Abrakian].)

**F. IDA Discharges Abrakian, Foran, and Lashbrook**

After the interviews on April 14 and with no further investigation, Prevatt and Davis recommended to Pettyplace that Foran, Lashbrook, and Abrakian be terminated. (DO 21,A.27.; Tr. 1332-33, 1354,A.795-96,799[Prevatt], Tr. 1575,A.838[Davis]) Pettyplace approved the recommendations; Prevatt and Davis then prepared the termination letters. (DO 21,A.27; Tr. 803,A.704[Pettyplace], Tr. 1332-33,A.795-96[Prevatt].)

On April 25, Davis told Abrakian she was fired but would not explain why. (DO 22,A.28; Tr. 489,A.659[Abrakian].) Instead, Davis handed Abrakian a

termination letter, which stated that Abrakian was being fired for “theft, misappropriation and misuse of company property,” because she had taken “a financial/budget report from the home, without permission and knowing that it was company property,” and because she had shared it “with others, outside of the workplace.” (DO 22,A.28; GC 17,A.122, Tr. 490,A.660[Abrakian].)

The same day, Davis separately told Lashbrook and Foran that they, too, were fired but offered no explanation other than the termination letters. (DO 22,A.28; Tr. 137,A.593[Lashbrook], Tr. 318-19,A.626-27[Foran].) Foran’s letter identified three categories of misconduct: dishonesty, misappropriation of company equipment and time, and refusal to acknowledge the unauthorized possession of keys and the safe combination. (DO 22 n.26,A.28 n.26; GC 15,A.121.) Lashbrook’s letter gave the reasons for her firing as dishonesty, personal use of the van, conducting personal business on paid time, and documenting time spent on personal business as time worked. (DO 23,A.29; GC 14,A.120.)

**G. IDA Demands that Hibbs Give a Copy of Her Affidavit to Its Attorney, Who Threatens To Subpoena Her if She Does Not Comply**

On October 27, 2005, the week before the hearing in this case, Program Coordinator Davis met with IDA’s attorney, Daniel Gwinn, and they called employee Hibbs at work. (DO 23,A.29; Tr. 534-35,A.671-72[Hibbs].) Davis

began the conversation by asking Hibbs to meet with Gwinn the next day; Hibbs said she would have to find a babysitter but would try. (DO 23,A.29; Tr. 535,A.672[Hibbs].) Gwinn got on the telephone and asked if Hibbs could meet with him. Again, she said she would try, but would have to find a babysitter. Gwinn told Hibbs that if she “didn’t cooperate that he would subpoena” her. (*Id.*) Hibbs told him to go ahead; she had already been subpoenaed. (DO 23,A.29; Tr. 536,A.673[Hibbs].) Gwinn asked Hibbs what she had discussed with the Board attorney and if he could get a copy of her affidavit to the Board. (DO 24,A.30; Tr. 536,A.673[Hibbs].) Hibbs responded that she was not sure if she should give it to him; he told her “there was no attorney-client privilege between us and that it was fine” to share it with him. (*Id.*)

Davis later contacted Hibbs at home and asked her to give Gwinn a copy of her affidavit, that “she was getting bugged for it.” (DO 24,A.30; Tr. 537,A.674[Hibbs].) Hibbs agreed to fax the affidavit to Davis because she wanted “to get her off of my back,” and “didn’t really want to upset the attorney who works for” her employer. (*Id.*)

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

On the foregoing facts, the Board (Members Liebman, Kirsanow, and Walsh) found, in agreement with the administrative law judge, that IDA violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining an overly broad

confidentiality rule, creating the impression of surveillance, threatening to discharge employees, coercively interrogating employees, prohibiting union speech, soliciting and implicitly promising to redress grievances, and coercively interrogating an employee regarding discussions with a Board agent and asking her to provide copies of her affidavits to the Board. The Board further found, also in agreement with the administrative law judge, that IDA violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employees Abrakian, Foran, and Lashbrook for engaging in union activities.

The Board's order requires IDA to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the order directs IDA to take the following actions: to rescind and cease giving effect to its confidentiality statement; to offer full reinstatement to Abrakian, Foran, and Lashbrook; to make those employees whole for any loss of earnings and benefits suffered; to remove from IDA's files any reference to the unlawful discharges; and to post a remedial notice.

## SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that IDA violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule that restricted employees' discussion of their wages and other conditions of employment; creating the impression that employees' union activity was under surveillance; soliciting and implicitly promising to redress employee grievances; and interrogating an employee regarding her discussions with Board agents and asking her for a copy of her affidavit to the Board. In addition, the Board is entitled to summary affirmance of its uncontested findings that IDA violated Section 8(a)(1) of the Act by threatening employees with discharge if they engaged in union activity or discussed the Union, interrogating employees about their union activities and support for the Union, and prohibiting union speech while allowing other non-work related discussions.

Substantial evidence also supports the Board's finding that IDA discharged three leading union activists in violation of Section 8(a)(3) and (1) of the Act. Just 4 days after employees attended an initial meeting with the Union, organized by employee Marie Abrakian, and the same day the Union demanded recognition as the employees' collective-bargaining representative, IDA began an investigation into alleged misconduct by Abrakian and two other union activists, Kelly Lashbrook and Linda Foran. IDA, moreover, discharged the three activists after

only a cursory investigation designed to be “inquisitorial. . . rather than an honest attempt to ascertain what occurred . . . .” (DO 30,A.36.)

The Board reasonably rejected as false and pretextual IDA’s asserted reasons for the three discharges. Specifically, the Board found that IDA “produced no evidence, other than its false assertion,” that Abrakian shared a copy of the Morowske Home budget with others, while Abrakian’s credited testimony to the contrary was corroborated by other employees. (DO 27,A.33.) Further, the Board reasonably rejected IDA’s claims that it discharged Lashbrook and Foran for using IDA’s van to attend a union meeting on paid time and falsifying documents to cover it up as pretextual justifications “based on nothing more than on false assumptions, speculation, and conjecture, rather than on any real evidence.” (DO 28-29,A.34-35.) Lashbrook’s and Foran’s credited testimony that they did not use IDA’s van was corroborated by other employees. Moreover, IDA managers never spoke to Lashbrook’s and Foran’s supervisor, who had given them permission to leave early on the day of the union meeting. Thus, as the Board found, Lashbrook and Foran had nothing to cover up. In any event, IDA failed to establish that Lashbrook and Foran falsified any records; indeed, IDA managers never even showed the purported records to Lashbrook and Foran or gave them the opportunity to explain. As the Board found, those failures reflect “an unwillingness . . . to get at the truth.” (DO 30,A.36.)

IDA's challenges to the Board's findings amount to little more than an unwarranted attempt to upend the administrative law judge's reasonable credibility determinations, which this Court will not disturb "except in the most extraordinary circumstances."<sup>2</sup> IDA has failed to demonstrate any "extraordinary circumstances." Thus, as shown below, the Board's findings are supported by substantial evidence, and the Order should be enforced.

### STANDARD OF REVIEW

In reviewing the Board's findings that an employer has violated the Act, a court must accept the Board's factual findings if supported by substantial evidence on the record as a whole.<sup>3</sup> "Substantial evidence consists of 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"<sup>4</sup> Under that standard of review, a court "must defer both to reasonable inferences drawn by the Board from the facts before it and to the Board's assessment of the credibility of witnesses."<sup>5</sup> Further, a court may not displace the Board's choice

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<sup>2</sup> *NLRB v. Howell Automatic Mach. Corp.*, 454 F.2d 1077, 1081 (6th Cir. 1972).

<sup>3</sup> 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Dayton Newspapers, Inc. v. NLRB*, 402 F.3d 651, 659 (6th Cir. 2005).

<sup>4</sup> *Dayton Newspapers*, 402 F.3d at 659 (citation omitted).

<sup>5</sup> *Id.*

between fairly conflicting views of the evidence, even if the court might justifiably have made a different choice had the matter been before it in the first instance.<sup>6</sup>

Furthermore, this Court has observed that it is “uniquely *unsuited*” to evaluate matters related to witness credibility in Board proceedings.<sup>7</sup> Rather, the “assignment of credibility to witnesses is the prerogative of the Board.”<sup>8</sup> This is “particularly true where the record is fraught with conflicting testimony and essential credibility determinations have been made.”<sup>9</sup> Indeed, this Court will not question those determinations “except in the most extraordinary circumstances.”<sup>10</sup>

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT IDA UNLAWFULLY THREATENED AND INTERROGATED EMPLOYEES AND PROHIBITED THEM FROM DISCUSSING THE UNION**

In its opening brief, IDA does not contest the Board’s findings (DO 25,A.31) that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) when Program

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<sup>6</sup> *Universal Camera*, 340 U.S. at 488; *NLRB v. Wehr Constructors*, 159 F.3d 946, 950 (6th Cir. 1998).

<sup>7</sup> *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 812 (6th Cir. 2002) (emphasis added).

<sup>8</sup> *Pikeville United Methodist Hosp. v. NLRB*, 109 F.3d 1146, 1154 n.7 (6th Cir. 1997).

<sup>9</sup> *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 225 (6th Cir. 2000) (internal quotations and citations omitted).

<sup>10</sup> *Howell Automatic*, 454 F.2d at 1081.

Coordinator Prevatt: threatened employees with discharge if they discussed the Union while waiting to be interviewed on April 14; questioned employees Bibbee and Abrakian about the Union and asked who brought up the union talk at a staff meeting; and told employees at the April 14 interviews that there could be no discussion about the Union or they would be fired and the restriction applied only to union speech (see pp. 13-14, above). Nor does IDA contest the Board's findings (DO 24-25, A.30-31) that it violated Section 8(a)(1) when Assistant Home Supervisor Romain told employees that IDA would try to fire them if they got involved with the Union and questioned employee Hibbs about her union sympathies a few days after his threat of discharge (see p. 7, above).

Because IDA failed to contest these findings in its opening brief, the Board is entitled to summary enforcement of the portions of its order based on these uncontested findings.<sup>11</sup> In any event, as shown in the Statement of Facts, substantial evidence supports these findings.<sup>12</sup> Moreover, the uncontested

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<sup>11</sup> See *Kentucky Gen., Inc. v. NLRB*, 177 F.3d 430, 436 n.3 (6th Cir. 1999) (granting summary enforcement of unfair labor practice findings where employer failed to contest those findings on appeal). See also *U.S. v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) ("An appellant abandons all issues not raised and argued in its initial brief on appeal"), *cert. denied*, 127 S. Ct. 48 (2006); *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006) (same).

<sup>12</sup> See *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 833 (7th Cir. 2005) (restrictions on union-related speech only); *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 861 (6th Cir. 1990) (coercive interrogation); *NLRB v. E.I. DuPont de*

violations do not disappear but remain relevant to this Court’s consideration of the contested violations, “lending their aroma to the context in which the contested issues are considered.”<sup>13</sup>

## **II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT IDA COMMITTED NUMEROUS VIOLATIONS OF SECTION 8(a)(1) OF THE ACT**

### **A. Section 7 of the Act Prohibits Employers from Coercing Employees in the Exercise of Their Section 7 Rights**

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce” employees in the exercise of their statutory rights, including the right to self-organization and to form, join, or assist unions. An employer’s conduct violates Section 8(a)(1) if it has a reasonable tendency to coerce employees in their exercise of their Section 7 (29 U.S.C. § 157) right to form, join or assist labor organizations and to engage in other concerted activities, regardless of whether they are actually coerced.<sup>14</sup>

As demonstrated below, IDA engaged in numerous forms of coercive conduct. We show below that, under the substantial evidence standard of review, each of the Board’s findings of violations is entitled to affirmance.

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*Nemours*, 750 F.2d 524, 527 (6th Cir. 1984) (employer statements indicating futility of unionization).

<sup>13</sup> *Gen. Fabrications*, 222 F.3d at 232 (quoting *NLRB v. Talsol Corp.*, 155 F.3d 785, 793 (6th Cir. 1998)).

<sup>14</sup> *New York Univ. Med. Ctr. v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998.)

## **B. IDA Unlawfully Maintained an Overbroad Confidentiality Rule**

### **1. Employers may not prohibit employees from discussing wages and other terms and conditions of employment**

Section 7 “rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others.”<sup>15</sup> Therefore, Section 7 encompasses the rights of employees to solicit and communicate with other employees regarding wages and other terms and conditions of employment.<sup>16</sup>

Generally, any “rule prohibiting employees from communicating with one another regarding wages, a key objective of organizational activity, undoubtedly tends to interfere with the employees’ right to engage in protected concerted activity” in violation of Section 8(a)(1) of the Act.<sup>17</sup> An employer’s rule that does not explicitly restrict Section 7 activity violates Section 8(a)(1) if “employees would reasonably construe the language to prohibit Section 7 activity.”<sup>18</sup> Any ambiguity in a rule must be construed against its promulgator.<sup>19</sup>

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<sup>15</sup> *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972).

<sup>16</sup> *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978).

<sup>17</sup> *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 537 (6th Cir. 2000).

<sup>18</sup> *Martin Luther Mem’l Home d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

<sup>19</sup> *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

**2. IDA’s rule is overly broad and reasonably construed as tending to prohibit employee discussion of wages and other terms and conditions of employment**

Substantial evidence supports the Board’s finding (DO 1 n.4, 24,A.7n.4,30) that IDA violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule that “would reasonably tend to chill employees” in exercising their Section 7 rights to discuss wages and working conditions.<sup>20</sup> In making that determination, the Board considers whether “employees could reasonably believe that the rule prohibits discussions among employees concerning wages, benefits, and other terms and conditions of employment.”<sup>21</sup>

As the Board explained (DO 24,A.30), IDA’s rule “contains no limitations or exceptions, and simply prohibits the disclosure of ‘any and all information.’” Accordingly, in the absence of an explanation or clarification, employees could reasonably construe that unqualified rule as prohibiting them from discussing their wages, benefits, and other terms and conditions of employment.<sup>22</sup> Indeed, given the breadth of the all-encompassing phrase “any and all information” regarding employees or IDA, “it is difficult to interpret the rule otherwise.”<sup>23</sup>

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<sup>20</sup> *Id.* at 825. *Accord Main St.*, 218 F.3d at 537-38.

<sup>21</sup> *Lafayette Park*, 326 NLRB at 826.

<sup>22</sup> *Cintas Corp. v. NLRB*, 482 F.3d 463, 468-70 (D.C. Cir. 2007).

<sup>23</sup> *Id.* at 468.

The rule here is no different than similar rules the Board found unlawful in *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001), and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). The rule in *IRIS* prohibited employees from revealing “information” about “employees.”<sup>24</sup> In *Flamingo Hilton*, the rule banned revealing “confidential information” about “fellow employees.”<sup>25</sup> The unlawful ban in *Flamingo Hilton* was thus even less restrictive than IDA’s rule, which applies to “any and all information regarding business, employees or Inter-Disciplinary Advantage, Inc., and/or individuals served in IDA homes” and could reasonably be construed as restricting any discussion of information about not only other employees, but one’s own wages and other terms and conditions of employment.

IDA asserts (Br. 34-35) that it has not violated Section 8(a)(1) by maintaining the confidentiality rule because there is no evidence that it applied the rule to union activity. The Board has consistently held that non-enforcement of an overly broad rule does not change the unlawful nature of the rule.<sup>26</sup> As this Court

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<sup>24</sup> *IRIS, U.S.A., Inc.*, 336 NLRB 1013, 1015 (2001).

<sup>25</sup> *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291 (1999).

<sup>26</sup> See *Lutheran Heritage*, 343 NLRB at 647 (“violation is dependent upon a showing of *one* of the following” – employees could reasonably construe to prohibit Section 7 activity, rule promulgated in response to union activity, *or* application of the rule to Section 7 activity) (emphasis added); see also *Brockton Hosp.*, 333 NLRB 1367, 1377 (2001) (confidentiality rule found unlawful in absence of any employee being disciplined), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir.

has explained, “in analyzing a §8(a)(1) claim, ‘the actual effect of a statement is not so important as is its tendency to coerce.’”<sup>27</sup> Moreover, whether employees continued to engage in Section 7 activity notwithstanding the rule is not germane to a determination of whether the rule is overly broad and thus unlawful.<sup>28</sup>

IDA also complains (Br. 34) that the Board ignored the “legitimate business purpose” of its confidentiality provision, which, it claims, was only the “protection of residents’ right to privacy” as mandated by law. On its face, however, the rule does not articulate any such limitation. Rather, it broadly restricts employees from discussing “any and all information” upon threat of discipline “up to and including immediate dismissal.” (RX 22,A.277.)

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1992) (rule prohibiting employees from discussing wages and other terms and conditions of employment violated Section 8(a)(1) “even absent evidence of [its] enforcement”); *IRIS, U.S.A.*, 336 NLRB at 1017 (confidentiality rule prohibiting release of “information” about “employees” found unlawful even where no employees were disciplined under the rule); *Flamingo Hilton*, 330 NLRB at 287 n.3, 291 (same).

<sup>27</sup> *Main St.*, 218 F.3d at 539 (quoting *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 107 (6th Cir. 1987)).

<sup>28</sup> See *Franklin Iron & Medal Corp.*, 315 NLRB 819, 820 (1994) (“[n]or does it matter whether the rule was unenforced or unheeded”), *enforced*, 83 F.3d 156 (6th Cir. 1996); *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (“the finding of a violation is not premised on . . . subjective impact”), *enforced*, 987 F.2d 1376 (8th Cir. 1993); *Waco, Inc.*, 273 NLRB 746, 747-48 (1984) (rule prohibiting discussion of wages unlawful where no employee disciplined and “no employee testified that this instruction inhibited him from engaging in protected activity”).

The Board has recognized that employers have a “legitimate interest in maintaining the confidentiality of private information,” including information about clients or guests, contracts, and other proprietary information.<sup>29</sup>

Accordingly, the Board has upheld employer confidentiality rules that protect that interest, and do not implicate employee Section 7 rights.<sup>30</sup>

The rules found to be lawful by the Board, however, do not contain language prohibiting disclosure of information about employees, which is exactly the type of information sharing that is protected by the Act and is restricted by IDA’s unlawful rule. IDA’s confidentiality rule does not contain any limitation prohibiting only the discussion of private, proprietary information.

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<sup>29</sup> *Lafayette Park*, 326 NLRB at 826.

<sup>30</sup> See *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278-79 (2003) (rule entitled “Proprietary Information” prohibiting improper use of “intellectual property,” which was enumerated to include “customer and employee information,” reasonably read to prohibit only disclosure of information assets); *Super K-Mart*, 330 NLRB 263, 263 (1999) (rule prohibiting disclosure of “company business and documents” would be reasonably understood by employees to protect private information, such as guest information, trade secrets, and contracts with suppliers); *Lafayette Park*, 326 NLRB at 826 (rule prohibiting disclosure of “Hotel-private information” reasonably construed to protect proprietary information).

**C. IDA Unlawfully Created the Impression of Surveillance of Employees Abrakian and Lashbrook**

An employer violates Section 8(a)(1) of the Act when it either engages in surveillance of protected activity or creates the impression that it is doing so.<sup>31</sup>

The rationale for finding such a violation is that “employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking notes of who is involved in union activities, and in what particular ways.”<sup>32</sup> A violation will be found if “the employee[s] would reasonably assume from the [employer’s] statement that their union activities had been placed under surveillance.”<sup>33</sup>

The record amply supports the Board’s finding (DO 24,A.30) that Assistant Home Supervisor Romain, by asking employees Abrakian and Lashbrook how the union meeting had gone, unlawfully created the impression that their union activities were under surveillance. Contrary to IDA’s claims (Br. 35), Romain was not a “minor” supervisor. He was the assistant home supervisor at the Morowske Home and, according to IDA, the employees’ direct supervisor. (Tr. 792,A.702[Pettyplace].)

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<sup>31</sup> See, e.g., *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 550 (6th Cir. 1984); *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 452 (4th Cir. 2002).

<sup>32</sup> *Flexsteel Indus., Inc.*, 311 NLRB 257, 257 (1993).

<sup>33</sup> *Id.*

On the day of the union meeting, Assistant Home Supervisor Romain separately questioned Abrakian and Lashbrook about the meeting. Romain asked Abrakian “how [the] union meeting went for that day” while they prepared the residents’ evening meal together. (DO 5,A.11; Tr. 475,A.652[Abrakian].) Later, he asked Lashbrook if she had attended the union meeting and told her that he did not think the Union was a good idea. (DO 5,A.11; Tr. 104,A.583[Lashbrook].) Romain then went further, telling Lashbrook that he was “worried” and that she should “be careful.” (DO 5,A.11; Tr. 105,A.584[Lashbrook].)

The Board found that neither Abrakian nor Lashbrook had been open in her support of the Union prior to April 4, and Foran, who had mentioned her union support to Romain, did so before the April 4 meeting was scheduled. (DO 24,A.30.) Nor was there any credible evidence that any other employee mentioned the meeting to Romain or any other manager. (*Id.*) Although in his affidavit to the Board Romain claimed that he heard Hibbs say she attended the meeting, the Board found “the statements in his affidavit [to be] too vague to be worthy of belief.” (DO 24 n.27,A.30 n.27.) Instead, the Board credited Hibbs’ testimony that she had only two conversations with Romain about the Union, both in March. Thus, she could not have told Romain that she attended a union meeting on April 4. (*Id.*) Moreover, Romain did not explain to Abrakian or Lashbrook how he knew about the meeting. In all of these circumstances, Romain’s questioning

employees about the meeting conveyed that IDA was monitoring employees' union activity.<sup>34</sup>

Finally, IDA mischaracterizes (Br. 36) the Court's holding in *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967). In *Swan*, this Court found that "testimony that one minor supervisor asked . . . [Employee A] about a union meeting does not prove . . . that such supervisor knew about the activities of . . . [Employee B]." <sup>35</sup> In other words, the testimony about knowledge was too "meager" to establish that the employer knew about Employee B's union activities. The Court did, however, enforce the Board's finding that the employer created the impression of surveillance, a finding based on the same employee's testimony.<sup>36</sup>

**D. Substantial Evidence Supports the Board's Finding that IDA Solicited and Implicitly Promised To Redress Grievances**

It is undisputed that, during the April 14 investigatory interviews, Program Coordinator Prevatt asked each employee if there was anything IDA could do to improve the workplace or the employees' enjoyment on the job. (DO 25,A.31; RX 7,A.254, Tr. 1292,A.789[Prevatt].) As this Court has explained, "Under the Act,

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<sup>34</sup> See *NLRB v. Gold Standard Enters., Inc.*, 679 F.2d 673, 676-77 (7th Cir. 1982); *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 691 (7th Cir. 1982). See also *United Charter Serv., Inc.*, 306 NLRB 150, 151 (1992) (unlawful impression of surveillance where employer did not explain source of information or show that it was voluntarily given or lawfully obtained).

<sup>35</sup> *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609, 614 (6th Cir. 1967).

<sup>36</sup> *Id.* at 620. See also *Swan Super Cleaners, Inc.*, 152 NLRB 163, 182 (1965).

an employer cannot solicit grievances from employees during a union organizing campaign with the express or implied suggestion that the problems will be resolved if the union is turned away.”<sup>37</sup> Similarly, promises made by an employer in the course of a union campaign are unlawful because they link improved working conditions with defeat of the union.<sup>38</sup> Therefore, an employer’s promise during a union campaign is presumed to influence employees unless IDA establishes a legitimate business reason for the timing of its announcement.<sup>39</sup>

IDA failed to establish a legitimate business reason to explain Prevatt’s solicitation of grievances. Before this Court, IDA contends (Br. 37-38), for the first time, that it had a past practice of soliciting employee grievances as set forth in its employee handbook. As an initial matter, this contention was not raised before the Board (DO 26,A.32) and, accordingly, IDA is barred from raising it now by Section 10(e) of the Act.<sup>40</sup>

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<sup>37</sup> *Ctr. Constr. Co., Inc. v. NLRB*, 482 F.3d 425, 435 (6th Cir. 2007) (quoting *NLRB v. V & S Schuler Eng’g*, 309 F.3d 362, 370 (6th Cir. 2002)).

<sup>38</sup> *See Reliance Elec. Co.*, 191 NLRB 44, 46 (1971), *enforced*, 457 F.2d 503 (6th Cir. 1972).

<sup>39</sup> *See Niblock Excavating, Inc.*, 337 NLRB 53, 53-54 (2001), *enforced*, 59 Fed. Appx. 882 (7th Cir. 2003).

<sup>40</sup> 29 U.S.C. § 160(e). *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e)’s bar on judicial consideration of issues not raised before the Board “is jurisdiction[al]”). *Accord NLRB v. Price’s Pic-Pac Supermarkets, Inc.*, 707 F.2d 236, 241 (6th Cir. 1983).

In any event, as the Board explained (*id.*), there was no evidence that IDA had a past practice of soliciting and redressing employee grievances. As IDA notes (Br. 38), it had a “communications” policy in its employee handbook directing employees to take grievances to their supervisors. Prevatt, however, was not soliciting grievances through this policy in the employee handbook. Rather, Prevatt, a manager from the administrative office who had never spoken to these employees and had to be introduced to them, personally asked employees about improving the workplace during a mandatory, investigatory interview. (RX 7,A.254-57, Tr. 1189, 1368,A.761,800[Prevatt].) This manner of soliciting grievances certainly varied from the “open door policy” in IDA’s employee handbook, which directed employees to first approach their immediate supervisors with grievances. (RX 3 p. 71,A.220.) Deviating from the usual policy of soliciting grievances violates the Act.<sup>41</sup>

**E. IDA’s Attorney Unlawfully Questioned Hibbs about her Statements to the Board, Demanded a Copy of her Board Affidavit, and Threatened To Subpoena Her**

The Board found (DO 26,A.32), and IDA does not contest (Br. 39-40), that its attorney questioned employee Hibbs about her statements to the Board and then asked for a copy of the affidavit she gave to the Board. Questioning employees

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<sup>41</sup> *Ctr. Constr.*, 482 F.3d at 435.

about statements given to the Board and requesting copies of affidavits given to the Board are both inherently coercive and unlawful.<sup>42</sup>

Hibbs' undisputed testimony shows that she gave the affidavit to Davis only after IDA Attorney Gwinn had asked for it, and after Davis said she was "getting bugged" by Gwinn. (DO 26,A.32; Tr. 537,A.674[Hibbs].) As Hibbs' credited testimony shows, she complied with IDA's demands because she "didn't really want to upset the attorney who works for the company that I work for." (*Id.*) Thus, as the Board reasonably found (DO 26,A.32), Hibbs' decision to give the affidavit to Davis and Gwinn was hardly voluntary.

Contrary to IDA's suggestion (Br. 39), Gwinn's conduct was not consistent with the Board's admonition in *Johnnie's Poultry Co.*, where the Board held that although employers may question employees if "necessary in preparing the employer's defense," the Board "has generally found coercive, and outside the ambit of privilege, interrogation concerning statements or affidavits given to a Board agent."<sup>43</sup> Moreover, as this Court has explained, even where Board affidavits are not involved, "an employer must (1) communicate to the employee

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<sup>42</sup> See *Montgomery Ward & Co. v. NLRB*, 377 F.2d 452, 455-56 (6th Cir. 1967). *Accord Wire Prods. Mfg. Corp.*, 326 NLRB 625, 626 (1998), *enforced sub nom. NLRB v. R.T. Blankenship & Assocs., Inc.*, 210 F.3d 375 (7th Cir. 2000); *Astro Printing*, 300 NLRB 1028, 1029 n.6 (1990).

<sup>43</sup> *Johnnie's Poultry Co.*, 146 NLRB 770, 774-76 (1964), *enf. denied*, 344 F.2d 617, 619 (8th Cir. 1965).

the purpose of the questioning; (2) assure the employee that no reprisal will take place; and (3) obtain the employee's voluntary participation."<sup>44</sup> Not only did Gwinn fail to give Hibbs the required reassurances, he threatened to subpoena her if she did not cooperate. (DO 26,A.32; Tr. 535,A.672[Hibbs].) Based on these circumstances, the Board reasonably found that Gwinn's conduct was coercive and a violation of Section 8(a)(1) of the Act. (DO 26,A.32.)

### **III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT IDA VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING ABRAKIAN, FORAN, AND LASHBROOK BECAUSE OF THEIR UNION ACTIVITY**

On April 25, IDA discharged Marie Abrakian, the ringleader of the union organizing campaign, and Linda Foran and Kelly Lashbrook, two outspoken union supporters. As shown below, substantial evidence supports the Board's findings that those terminations violated the Act.

#### **A. An Employer Violates the Act by Discharging Employees for Engaging in Union Activity**

A primary purpose of the Act is to "safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining . . . without restraint or coercion by their employer."<sup>45</sup> Congress saw

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<sup>44</sup> *ITT Auto. v. NLRB*, 188 F.3d 375, 389 (6th Cir. 1999). *See also Beverly Health & Rehab. Servs., Inc. v. NLRB*, 297 F.3d 468, 477-78 (6th Cir. 2002).

<sup>45</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); *see also* 29 U.S.C. § 151 (declaring Congress's objective of "protecting the exercise by

the assurance of that employee right “as basic to the attainment of industrial peace.”<sup>46</sup> Two of the Act’s central prohibitions effectuate Congress’s aims.

First, Section 8(a)(3) of the Act makes it an unfair labor practice for an employer “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.” 29 U.S.C. § 158(a)(3). Second, as discussed above (pp. 25-26), Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. 29 U.S.C. § 158(a)(1). Although the protections of Section 8(a)(3) and Section 8(a)(1) “are not coterminous, a violation of [the former] constitutes a derivative violation of [the latter].”<sup>47</sup>

An employer therefore generally commits an unfair labor practice under Section 8(a)(3) and (1) by “making an employment decision that discourages union membership or interferes with an employee’s right to organize.”<sup>48</sup> Unlawful

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workers of full freedom of association, self-organization, and designation of representatives of their own choosing”).

<sup>46</sup> *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

<sup>47</sup> *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

<sup>48</sup> *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 806 (6th Cir. 2002).

employment decisions include the termination of employees, when motivated by anti-union animus.<sup>49</sup>

In determining whether an employee's discharge violates the Act, the critical inquiry focuses on the employer's motivation for the discharge, using a test approved by the Supreme Court.<sup>50</sup> Under that test, if substantial evidence supports the Board's finding that union activity was a "motivating factor" in the employer's decision, the Board's conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the conclusion that the same action would have been taken even in the absence of union activity.<sup>51</sup> If the Board reasonably concludes that the employer's non-discriminatory justification for its action is non-existent or pretextual, the defense fails.<sup>52</sup>

It has long been true that "[d]irect evidence of a purpose to discriminate is rarely obtained, especially as employers acquire some sophistication about the

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<sup>49</sup> *NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 227 (6th Cir. 2000).

<sup>50</sup> *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983), approving a test first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

<sup>51</sup> *Id.*, 462 U.S. at 395, 397-403; *accord Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 278 (1994).

<sup>52</sup> *See W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995); *Wright Line*, 251 NLRB at 1084.

rights of their employees under the Act . . . .”<sup>53</sup> That being so, this Court has recognized that the Board may “look for illumination to a variety of factors from which antiunion motivation may reasonably be inferred.”<sup>54</sup> Indeed, “[c]ircumstantial evidence *alone* is sufficient to create an inference of antiunion animus on the part of an employer.”<sup>55</sup> Among the factors supporting an inference of unlawful motivation are the employee’s union activity; the employer’s knowledge of that activity; coincidence in timing between the adverse action and the employee’s union activity; the employer’s hostility to union activity; the employer’s inconsistent employment practices; and the employer’s reliance on pretextual justifications for the adverse action.<sup>56</sup>

As we now show, substantial evidence supports the Board’s conclusion that IDA discharged three employees in retaliation for their efforts to unionize. In making that finding, the Board reasonably relied on the key factors of IDA’s knowledge of the union activity, the timing of the actions, and its antiunion

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<sup>53</sup> *Corrie Corp. v. NLRB*, 375 F.2d 149, 152 (4th Cir. 1967).

<sup>54</sup> *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1479 (6th Cir. 1993); *see also ITT Auto.*, 188 F.3d at 388 (observing that “wrongful animus may be inferred from all the circumstances”) (citations and quotations omitted).

<sup>55</sup> *Kentucky Gen., Inc. v. NLRB*, 177 F.3d 430, 436 (6th Cir. 1999) (emphasis added).

<sup>56</sup> *NLRB v. Taylor Mach. Prods., Inc.*, 136 F.3d 507, 515 (6th Cir. 1998); *W.F. Bolin*, 70 F.3d at 871; *NLRB v. A&T Mfg. Co.*, 738 F.2d 148, 150 (6th Cir. 1984).

animus, as demonstrated by its unlawful threats of discharge, coercive interrogations, impressions of surveillance, prohibition of union speech, and solicitation of grievances. (DO 26-28,A.32-34.) The Board also examined IDA's stated justifications for its actions and reasonably concluded that they were pretextual. (DO 27-31,A.33-37.)

**B. Substantial Evidence Supports the Board's Finding that Antiunion Animus Motivated IDA's Decision To Discharge Employee Abrakian**

**1. IDA discharged Abrakian because of her union activity**

Overwhelming evidence supports the Board's finding (DO 26,A.32) that IDA fired Abrakian because of her union activity. As the Board found (*id.*), the record clearly showed that Abrakian was "the primary mover of the Union's organizational campaign." Abrakian initiated the discussions about a union with Lashbrook and Foran, she contacted several unions to get information about organizing, and she arranged to have the Union meet with employees on April 4. (*Id.*) In addition, Abrakian notified the employees about the April 4 meeting, she attended that meeting and others before her discharge, she signed a union authorization card, and she put a union bumper sticker on her car. (Tr. 463, 466 470, 476, 500,A.645,646,649,653,663[Abrakian].)

IDA was fully aware of Abrakian's union activity. (DO 26,A.32.) After she returned from the April 4 union meeting, Assistant Home Supervisor Romain

asked her how the meeting had gone. (DO 5,A.11; Tr. 475,A.652[Abrakian].) The April 11 letter purportedly written by employee Schwark – which IDA officials claimed to have seen before the discharges – identified Abrakian as one of the employees who attended the April 4 union meeting. (DO 26,A.32; Tr. 846, 984, 986-88,A.706,743,744-46[Pettyplace], Tr. 1326,A.792[Prevatt].)

Furthermore, there is no dispute that IDA’s investigation of Abrakian, Lashbrook, and Foran followed closely on the heels of its discovery that the direct care workers at Morowske Home were seeking to unionize.<sup>57</sup> Just 4 days after the employees’ first meeting with the Union and the same day the Union demanded recognition as collective-bargaining representative, IDA began its investigation into misconduct by Abrakian, Lashbrook, and Foran. Evidence of such a close temporal link is “[o]ne of the strongest forms of circumstantial evidence” to support the finding of a forbidden motive.<sup>58</sup> In this case, the Board’s inference of antiunion animus was therefore proper because the timing of IDA’s actions was “stunningly obvious.”<sup>59</sup>

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<sup>57</sup> See *W.F. Bolin*, 70 F.3d at 871 (noting that animus may be proven by the “proximity in time between the employees’ union activities and [the employer’s action]”).

<sup>58</sup> *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 468 (5th Cir. 2001); accord *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

<sup>59</sup> *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 547 (6th Cir. 1991) (citations and quotations omitted).

As this Court has explained, the Board may consider all the circumstances to determine whether an employer exhibited antiunion animus.<sup>60</sup> As described above (pp. 23-37), once it became aware of the employees' interest in unionization, IDA engaged in a series of unlawful actions to coerce those employees in the exercise of their Section 7 rights. The Board reasonably relied on those actions – threatening to discharge employees, coercively interrogating them about and creating the impression that their union activities were under surveillance, prohibiting them from talking about the Union while allowing other non-work related discussions, and soliciting and implicitly promising to remedy grievances – as evidence of IDA's antiunion animus.

IDA's reliance on a pretextual justification for firing Abrakian likewise buttresses the Board's finding of unlawful motivation.<sup>61</sup> Before this Court, IDA suggests (Br. 11), as it did before the Board (DO 27,A.33), that it fired Abrakian for "stealing" a budget, sharing it with others, and admitting that she shared it during her April 14 interview. As shown below, however, the Board reasonably found (DO 27,A.33), that Abrakian did not "steal" the budget, and that she credibly

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<sup>60</sup> *Vemco*, 989 F.2d at 1479; *see also ITT Auto.*, 188 F.3d at 388.

<sup>61</sup> *Laro Maint. Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995); *Van Vlerah Mech., Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997); *Union-Tribune Publ'g Co. v. NLRB*, 1 F.3d 486, 490-491 (7th Cir. 1993).

denied sharing the budget or making any such admission that she had during her interview.

**2. IDA failed to show that it would have discharged Abrakian in the absence of union activity**

As the Board found (*id.*) IDA “failed to provide a clear, consistent, and credible explanation for Abrakian’s termination.” IDA claims (Br. 30-31) that it fired Abrakian because she “stole” the Morowske Home budget and this theft violated the Home’s confidentiality policy. It is settled that an “employer cannot meet his burden simply by articulating a legitimate nondiscriminatory reason” for the challenged action.<sup>62</sup> Rather, as shown above (pp. 40-43), once the evidence supports an inference of antiunion discrimination, IDA bears the burden of *demonstrating* that it would have taken the same action regardless of the employees’ protected activity.<sup>63</sup>

IDA failed to demonstrate that it would have fired Abrakian in the absence of her protected activity. Instead, the Board found (DO 27,A.33) that IDA’s stated reasons for Abrakian’s discharge were pretextual. Thus, Executive Director Pettyplace and Program Coordinator Prevatt claimed that IDA discharged Abrakian because she admitted during her April 14 interview that she not only

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<sup>62</sup> *E&L Transport Co. v. NLRB*, 85 F.3d 1258, 1271 (7th Cir. 1996).

<sup>63</sup> *Id.*; *Southwest Merch. Corp. v. NLRB*, 53 F.3d 1334, 1342 (D.C. Cir. 1995).

made a copy of the budget but also shared it with others at the union meeting. (DO 22, 27,A.28,33; GC 17,A.122, Tr. 490,A.660 [Abrakian], Tr. 1076, 1108-09,A.754,756-57[Pettyplace], Tr. 1225-26, 1328-29,A.768-69,793-94[Prevatt].)

Abrakian, however, credibly testified that during her interview, while she admitted taking a copy of the budget, she did not tell Prevatt and Davis that she showed it to others. (DO 17, 27,A.23,33; Tr. 471-72, 491,A.650-51,661[Abrakian].) Other witnesses present at the union meeting corroborated Abrakian's testimony that she did not show anyone the budget. (Tr. 91-92, 192,A.580-81,598[Lashbrook], Tr. 287,A.615[Foran], Tr. 414,A.634[Bibbee].) Furthermore, nothing in Prevatt or Davis's notes of those interviews supported their testimony that Abrakian admitted showing the budget to others. (DO 17,A.23; RX 7, 32,A.254-57,297-301, Tr. 1076-77,A.754-55[Pettyplace].)

In contrast, the Board explicitly discredited IDA's witnesses – Pettyplace, Prevatt, and Davis – as well as Prevatt and Davis's notes of the interviews. Pettyplace, as the Board explained, was not present during the interviews. She had, therefore, no personal knowledge of what Abrakian may have said but relied only on what Prevatt and Davis told her and their notes of the interviews. (DO 27,A.33; Tr. 928-30, 933, 937, 1076,A.732-34,735,736,754[Pettyplace].)

The Board also discredited Prevatt's testimony because of her "not particularly convincing" demeanor, poor recall, and "numerous inconsistencies and

discrepancies in her testimony.” (DO 14, 18,A.20,24.) She was unable “to recall much without resorting to Respondent Exhibit 7, her alleged interview notes.” (DO 18,A.24; Tr. 1219, 1229-30,A.766,770-71[Prevatt].) Despite having to rely on her notes, Prevatt testified that she “was nevertheless able to recall word-for-word the first question she put to Abrakian during the latter’s interview.” (DO 17,A.23; Tr. 1224-25,A.767-68[Prevatt].) The Board rejected Prevatt’s claim as “pure fabrication, more likely than not intended to convince others of her interrogation skills.” (DO 17,A.23.)

The Board also rejected as untrustworthy both Prevatt’s and Davis’s notes of the April 14 investigatory interviews. (DO 14,A.20; RX 7, 32,A.254-57,297-301.) The two sets of notes not only contradicted each other, but also contradicted Prevatt’s and Davis’s testimony as well as the corroborated testimony of other witnesses. (DO 19,A.25.) Although Prevatt took handwritten notes during the interviews, she threw them away and typed up the notes in RX 7. RX 7, Prevatt admitted at the hearing, is only a synopsis of her original notes, limited to what she thought to be “appropriate.” (DO 19,A.25; Tr. 1292, 1295-96,A.789,790-91[Prevatt].) The Board found that Prevatt’s claim that her notes were an “accurate representation” of her handwritten notes to be unverified and unsubstantiated. (DO 19,A.25; Tr. 1197,A.764[Prevatt].) Davis also admitted that

her notes were incomplete, failing to reflect everything said during the interviews. (Tr. 1544,A.828[Davis].)

Therefore, the Board reasonably found that IDA “produced no evidence, other than its false assertion that Abrakian admitted doing so during her interview, to show that Abrakian indeed shared the budget with others either at the Union or elsewhere.” (DO 27,A.33.) IDA has not demonstrated the “most extraordinary circumstances” this Court requires before it will overturn the Board’s credibility findings.<sup>64</sup>

Though IDA argues (Br. 30) that Abrakian violated IDA’s confidentiality rule by removing the budget from Morowske Home, the Board found (DO 28,A.34) that this reason was pretextual. IDA did not list the alleged breach of the confidentiality rule in its termination letter to Abrakian, but instead raised the issue for the first time at the administrative hearing, “an afterthought designed to guarantee that Abrakian’s discharge would stick.” (DO 28,A.34; GC 17,A.122.) As discussed above (pp. 27-32), the confidentiality rule was, in any event, “facially invalid and unenforceable.” (DO 28,A.34.) The discharge of an employee pursuant to an invalid confidentiality rule is itself unlawful.<sup>65</sup>

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<sup>64</sup> *NLRB v. Howell Automatic Mach. Corp.*, 454 F.2d 1077, 1081 (6th Cir. 1972).

<sup>65</sup> *Convenience Food Sys.*, 341 NLRB 345, 351 (2004).

Finally, as the Board noted, “there are, in any event, sound reasons for doubting [IDA’s] claim that the budget was a confidential document.” (*Id.*) Unlike other documents Program Coordinator Davis gave to Home Supervisor Haack that day, the budget was not stamped confidential. (DO 28,A.34; Tr. 633,A.691[Haack].) Haack did not receive any instructions about how to handle it, nor was she told it was confidential. Accordingly, Haack treated the budget as non-confidential and placed it next to the fax machine – a place accessible to both staff and residents. By contrast, Haack treated the documents clearly labeled confidential very differently, sliding them under her locked office door. In addition, Haack showed the budget to employee Lashbrook and discussed it with her. Thus, the Board reasonably found (DO 28,A 34) that IDA did not demonstrate that the budget was in fact a confidential document.

Given the “numerous inconsistencies and discrepancies” in the testimony of Pettyplace, Prevatt, and Davis, the Board reasonably discredited the claim of IDA’s officials that Abrakian showed the budget to her coworkers. There is likewise no evidence other than IDA’s bare assertion to support its post hoc contention that the document was confidential. Hence, IDA failed to establish that it would have discharged Abrakian even absent her union activity. This Court should therefore uphold the Board’s finding that IDA violated the Act by discharging Abrakian.

**C. Substantial Evidence Supports the Board's Finding that Antiunion Animus Motivated IDA's Decision To Discharge Employees Foran and Lashbrook**

**1. IDA discharged Foran and Lashbrook because of their union activity**

As with Abrakian, IDA was fully aware of Foran and Lashbrook's union activity. Indeed, before the Board, IDA did not dispute its knowledge of their activity. (DO 28,A.34.) Both Lashbrook and Foran attended the April 4 union meeting. Lashbrook was questioned the same day by Assistant Home Supervisor Romain, who asked how the union meeting had gone, a clear indication that he knew about her attendance. Foran had made her support of the Union clear to Romain in March. Furthermore, the April 11 letter Program Coordinator Davis claimed she received from employee Schwark identifies Lashbrook and Foran as two of the attendees at the meeting. (GC 33,A.126-28.)

As discussed above in connection with Abrakian's unlawful discharge (pp. 44-46), the Board found that IDA exhibited overwhelming evidence of antiunion animus through its myriad efforts at surveillance, interrogation, and coercion. Moreover, IDA's investigation into Lashbrook and Foran's alleged misconduct began just a few days after they attended the first union meeting and the same day the Union demanded recognition as the employees' collective-bargaining representative.

As shown below, the Board reasonably rejected (DO 31,A.37) IDA's claims that it discharged Lashbrook and Foran for improper use of IDA's van, falsifying documents, and attending a union meeting on paid time, as "mere pretexts." The Board also found that IDA provided, at the hearing and in its brief to the administrative law judge, additional, shifting explanations for the discharges. Where an employer provided shifting explanations for its actions, those explanations further support a finding of pretext.<sup>66</sup>

**2. IDA failed to show that it would have discharged Foran and Lashbrook notwithstanding their union activity**

The Board found that IDA's affirmative defense – that it discharged Lashbrook and Foran for "improper use of a company vehicle and the subsequent cover up of that misconduct" (Br. 17) – was only a "proverbial house of cards based on nothing more than on false assumptions, speculation, and conjecture, rather than on any real evidence." (DO 28-29,A.34-35.) IDA claims here (Br. 8, 17), as it did before the Board (DO 28,A.34), that Lashbrook and Foran drove IDA's van to the union meeting, attended the union meeting on company time, and then invented an elaborate scheme of falsified documents to cover it up. (Tr. 870,A.717[Prevatt].) IDA bases its claim on the testimony of its officials – Pettyplace, Prevatt, and Davis – testimony the Board reasonably rejected as

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<sup>66</sup> *Aljoma Lumber, Inc.*, 345 NLRB No. 19, slip op. at 41 (2005); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), *enforced*, 160 F.3d 353 (7th Cir. 1998).

untrustworthy. (DO 20,A.26.) As demonstrated below, the Board’s detailed credibility determinations show that IDA failed to establish the “extraordinary circumstances” required for this Court to overturn them.<sup>67</sup>

First, Pettyplace, Prevatt, and Davis claimed that Lashbrook and Foran violated company policy by using the van to attend a union meeting, and, in making this determination, they relied upon a letter purportedly written by employee Schwark. (Tr. 846, 901, 905, 951,A.706,728,731,738[Pettyplace], Tr. 1353,A.798[Prevatt], Tr. 1475, 1513-14,A.806,821-22[Davis].) The Board, however, found the letter to be “unreliable and untrustworthy” with “no evidentiary value.” (DO 29,A.35.) The Board noted that it was not clear who had actually written the letter (the signature did not match other instances of Schwark’s signature in the record), and IDA did not call Schwark to authenticate the letter, contrary to its counsel’s stated intention to do so. (DO 29,A.35; Tr. 36,A.567[Gwinn].)

Furthermore, as the Board noted, the letter says only that because Schwark did not see Lashbrook or Foran’s personal cars, she “assumed” they drove the van. (DO 29,A.35; GC 33,A.126-28.) This assumption was erroneous: Lashbrook and Foran arrived late to the meeting after the others had arrived, and Schwark would not have seen Foran’s car in any event because she carpooled with Lashbrook. (Tr.

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<sup>67</sup> See *Howell Automatic Mach.*, 454 F.2d at 1081.

83,A.578[Lashbrook], Tr. 282,A.610[Foran].) Moreover, the van described in the letter, a silver-gray passenger van, had no markings of any kind to identify it as belonging to IDA. (Tr. 76,A.574[Lashbrook], Tr. 283-84,A.611-12[Foran].)

The Board, after weighing the demeanor and testimony of all the witnesses, credited Lashbrook and Foran. Based on these credibility determinations, the Board found that Lashbrook and Foran did not take the van to the union meeting but, instead, went together in Lashbrook's personal car. (DO 29,A.35; Tr. 80,A.577[Lashbrook], Tr. 282-83,A.610-11[Foran].) Other employees corroborated Lashbrook and Foran's testimony, stating that they did not see IDA's van at the meeting. (DO 29,A.35; Tr. 424-25,A.637-38[Bibbee], Tr. 480-81,A.655-56Abrakian].) Thus, the Board reasonably rejected IDA's assertion that Lashbrook and Foran improperly used the Morowske Home van as "baseless and devoid of record support" and "nothing more than a pretext." (DO 29,A.35.)

Pettyplace's second explanation for Lashbrook and Foran's discharges centered on a doctor's appointment for resident Daniel D. Pettyplace claimed that Lashbrook and Foran, in order to cover up their use of IDA's van to go to the union meeting, lied in the investigatory interviews and falsified documents to show they took resident Daniel D. to a doctor's appointment instead. (DO 21, 29-30,A. 27,35-36; Tr. 897-98,A.726-27[Pettyplace].)

As an initial matter, as described above (p. 48), Pettyplace had no personal knowledge of what any employee said during the interviews. Moreover, the Board rejected Prevatt's and Davis's contentions that Lashbrook and Foran claimed, during their interviews, to have taken Daniel to the doctor on April 4. (DO 29,A.35; Tr. 1234, 1268,A.772,784[Prevatt], Tr. 1541,A.826[Davis].) The Board noted that Lashbrook and Foran had no reason to make this admission to cover up improper use of the van since "that alleged misconduct never occurred." (DO 29,A.35.) It also found that Lashbrook and Foran credibly denied telling Prevatt and Davis they took Daniel to the doctor on April 4. (DO 29,A.35; Tr. 126,A.590[Lashbrook], Tr. 308-09,A.619-20[Foran].) Moreover, Davis's notes of the interviews, despite their unreliability (see p. 46 above), do not even mention Lashbrook being asked about an April 4 doctor's appointment. Nor do the notes contain an admission that Lashbrook took Daniel D. to the doctor that day. (DO 29,A.35; RX 32,A.297-301.)

Prevatt and Davis did ask Foran about a doctor's appointment for Daniel D., and because they did not mention a date, Foran assumed they meant April 7 (when she did, in fact, take him to the doctor). (DO 29,A.35; Tr. 308-09,A.619-20[Foran].) Although Davis's notes show Foran describing a doctor's appointment on April 4, the Board credited Foran's testimony because the notes, as Davis admitted, were incomplete. (DO 29,A.35; Tr. 1544,A.828[Davis].) In addition,

the Board found Davis, who answered questions from IDA's counsel without difficulty but "repeatedly responded 'I don't know'" to straightforward questions from the General Counsel, to be "not very reliable." (DO 20,A.26; Tr. 1554-57, 1559-62,A.829-32,833-36[Davis].)

Regarding the falsified documents IDA claimed to rely upon in discharging Lashbrook and Foran, as the Board noted, there were "certain discrepancies regarding entries found in some Morowske Home documents which tend to show that Daniel was taken to the doctor on April 4, even though it is clear no such visit occurred." (DO 30,A.36.) Nevertheless, the Board found that IDA failed to demonstrate "that either Lashbrook or Foran doctored, or were in any way responsible for, falsifying these questionable documents." (*Id.*) Rather, IDA seemed to "have made up its mind to discharge Lashbrook and Foran" and then "designed the interviews to provide it with some cover." (*Id.*)

As the Board observed, although some of the discrepancies could have been explained, Lashbrook and Foran were never given an opportunity to do so. (*Id.*) Though Prevatt testified that Lashbrook and Foran were shown the allegedly falsified documents and asked to explain them, this claim was undermined not only by Lashbrook's and Foran's testimony, but also by Davis and Assistant Home Supervisor Romain. (DO 30,A.36; Tr. 221-22,A.603-04[Lashbrook], Tr. 310, 313-14,A.621,624-25[Foran], Tr. 1411,A.802[Romain], Tr. 1542,A.827[Davis].)

Pettyplace also testified that she made her decision to discharge Lashbrook and Foran without knowing or asking whether they had been shown the documents. (Tr. 1043-44,A.749-50[Pettyplace].) As the Board found (DO 30,A.36), this failure to give Lashbrook and Foran the opportunity to explain also supports the Board's findings of pretext.<sup>68</sup>

The third reason Pettyplace gave for terminating Lashbrook and Foran was that they went to the union meeting on company time. (DO 30,A.36; Tr. 883-84, 901, 904, 1124,A.719-20,728,730,758[Pettyplace].) The Board, however, rejected Pettyplace's claim as "patently untrue." (DO 30,A.36.) In reaching this conclusion, the Board credited Lashbrook and Foran's testimony that they asked for, and received, permission from Home Supervisor Haack to leave early, and noted that Haack corroborated their testimony. (DO 30,A.36; Tr. 77-78,A.575-76[Lashbrook], Tr. 280,A.609[Foran], Tr. 587-88,A.680-81[Haack].) The Board also observed that Pettyplace, Prevatt, and Davis failed to ask Haack to explain, even though she was present for the April 14 investigatory interviews. (DO 30,A.36; Tr. 1030, 1071, 1073,A.748,752,753[Pettyplace], Tr. 1288, 1352,A.788,797[Prevatt], Tr. 1579,A.839[Davis].) Like their failure to show Lashbrook and Foran the documents they were accused of falsifying, Prevatt and

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<sup>68</sup> See *Diamond Elec. Mfg. Corp.*, 346 NLRB No. 83, slip op. at 4 (2006); *La Gloria Oil Gas Co.*, 337 NLRB 1120, 1124 (2002), *aff'd mem.*, 71 Fed. Appx. 441 (5th Cir. 2003).

Davis's failure to question Haack about this and other issues related to the investigation "further reflects an unwillingness on [IDA's] part to get at the truth." (DO 30,A.36.)

In addition to the three reasons it initially gave for Lashbrook's and Foran's discharges (improper use of the van, falsifying documents, and attending a union meeting on company time), IDA presented additional excuses for its actions during the hearing and in its brief to the administrative law judge. The Board reasonably rejected these belated explanations as further evidence that IDA's excuses were merely pretexts. (*Id.*)

Pettyplace claimed, for the first time at the hearing, that Lashbrook's discharge was based in part on the disciplinary "write-up" issued to her on April 8 for not dispensing a medication to resident Daniel D. (DO 30,A.36; Tr. 882,A.718[Pettyplace]).) She did not, however, include this reason in Lashbrook's discharge letter. (GC 14,A.120.) The Board rejected Pettyplace's explanation as "an afterthought" and found it to be evidence of a shifting explanation for the discharge and supporting an inference of pretext.<sup>69</sup>

IDA also contended in its brief to the administrative law judge that it based its decision to fire Foran on her failure to notify IDA of a drunk driving conviction.

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<sup>69</sup> *Aljoma Lumber*, 345 NLRB No. 19, slip op. at 41; *GATX Logistics*, 323 NLRB at 335.

(DO 30,A.36.) The Board rejected this explanation as “a post hoc attempt to rationalize” its decision to discharge Foran and “nothing more than pretext.” (*Id.*) IDA knew about the conviction in January – 3 months before the dismissals – and at the time, simply told Foran she was no longer allowed to drive the company van. (GC 27,A.125.) Moreover, Pettyplace testified that she would not fire an employee for having an adverse driving record; she would just forbid that employee to drive the van – exactly what happened with Foran. (Tr. 1064,A.751[Pettyplace].)

Finally, IDA protests (Br. 18-19) that Lashbrook’s and Foran’s testimony is “uncorroborated” and “self-interested” and, therefore, the Board’s findings cannot stand. This argument is without merit. IDA (Br. 19-20) rests its entire argument on language in *NLRB v. Barberton Plastics Prods., Inc.*,<sup>70</sup> citing that case for the proposition that “[u]ncorroborated testimony from self-interested and untrustworthy witnesses, as a matter of law, does not constitute substantial evidence” of an unfair labor practice.

In *Sam’s Club v. NLRB*, however, this Court held that “[t]aken out of context,” such a generic statement does not properly reflect the law in this Circuit.<sup>71</sup> Instead, the Court recognized that even uncorroborated and self-serving

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<sup>70</sup> *NLRB v. Barberton Plastics Prods., Inc.*, 354 F.2d 66, 69 (6th Cir. 1965).

<sup>71</sup> *Sam’s Club v. NLRB*, 141 F.3d 653, 658 (6th Cir. 1998).

statements made by a party who stands to benefit from an award of back pay, standing alone, constitute substantial evidence “where such testimony is reasonably deemed to be credible and trustworthy, and where it is not undermined by evidence to the contrary.”<sup>72</sup> Here, Lashbrook and Foran were found to corroborate each other and to be “credible and trustworthy.” Moreover, the contrary testimony of IDA’s managers is not only self-serving but also inconsistent, incomplete, illogical, and untrustworthy in terms of demeanor. The testimony of those managers therefore does not “undermine” Lashbrook’s and Foran’s testimony.<sup>73</sup>

IDA, determined to discharge Lashbrook and Foran after learning of their union activity, designed an investigation to “provide it with some cover in the event the discharges were subsequently challenged.” (DO 30,A.36.) IDA based its case against Lashbrook and Foran on “false assumptions, speculation, and conjecture, rather than on any real evidence.” (DO 28-29,A.34-35.) The Board’s detailed credibility determinations show that IDA failed to establish the

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<sup>72</sup> *Id.*

<sup>73</sup> *See Bowling Transp., Inc. v. NLRB*, 352 F.3d 274, 285 (6th Cir. 2003) (testimony of management officials is considered equally as self-serving as testimony of employee witnesses); *NLRB v. Publishers Printing Co.*, 650 F.2d 859, 860 (6th Cir. 1981) (same).

“extraordinary circumstances” required for this Court to overturn them.<sup>74</sup> Instead, IDA’s attack on those determinations amounted only to a “house of cards,” which the Board reasonably rejected. Because IDA failed to establish that it would have discharged Lashbrook and Foran in the absence of their union activity, this Court should uphold the Board’s finding that IDA violated the Act by discharging them.

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<sup>74</sup> See *NLRB v. Howell Automatic Mach. Corp.*, 454 F.2d 1077, 1081 (6th Cir. 1972).

## CONCLUSION

For the reasons stated above, the Board respectfully requests that this Court enter a judgment enforcing the Board's Order in full and denying IDA's cross-petition for review.

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National Labor Relations Board  
April 2008

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 07-2276, 07-2357
	)	
v.	)	
	)	
INTER-DISCIPLINARY ADVANTAGE	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	07-CA-48706
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,946 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 4th day of April, 2008

UNITED STATES COURT OF APPEALS  
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	)	

**CERTIFICATE OF SERVICE**

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

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