

No. 08-15976-JJ

**UNITED STATES COURT of APPEALS
FOR THE ELEVENTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

AUSTAL USA, L.L.C.

Respondent

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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 Petitioner)
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 v.)
)No. 08-15976-JJ
AUSTAL USA, L.L.C.)
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 Respondent)

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 26.1-1 of the Court’s Rules, the National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby files this Certificate of Interested Persons. The Board certifies that the following list of persons, associations, firms, partnerships, and corporations have an interest in the outcome of the proceeding:

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Robert J. Battista (former Board Chairman)

Wilma B. Liebman (Board Member)

Peter C. Schaumber (Board Member)

Charles R. Rogers (regional office trial counsel for the General Counsel of the Board)

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Austal USA, LLC (Respondent)

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Ronald Meisburg (General Counsel of the Board)

Howard E. Perlstein (Counsel for the Board)

Charles Gates (discriminatee)

Tony Causey (discriminatee)

Warren Gatwood (discriminatee)

Curtis Gleason (discriminatee)

Donnell Hill (discriminatee)

Wayne Jenkins (discriminatee)

Micah Kidd (discriminatee)

Andre Love (discriminatee)

Zolia Powell (discriminatee)

Dirk Spencer (discriminatee)

Darrell Spencer (discriminatee)

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Dated at Washington, DC
This 20th day of April 2009

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STATEMENT OF JURISDICTION

This case is before the Court on application of the National Labor Relations Board (“the Board”) for enforcement of its final order against Austal USA, L.L.C. (“the Company”). The Board’s Decision and Order issued on March 21, 2007, and is reported at 349 NLRB No. 51. (D&O 1.)¹

¹ “D&O” refers to the Board’s Decision and Order, contained in both Volume III of the record (Pleadings) at Tab 8, and the Company’s Excerpts of Record at Tab C. However, in both, the even-numbered pages from the Board’s

Pursuant to Section 10(a) of the National Labor Relations Act (“the Act”) (29 U.S.C. § 160(a)), the Board had jurisdiction over the underlying unfair labor practice proceeding. The Sheet Metal Workers International Association, Local 441 (“the Union”) initiated that proceeding by filing unfair labor practice charges against the Company. (Vol. II GX 1(s).) The unfair labor practice proceeding was consolidated with a representation proceeding, 15-RC-8394, in which the Union filed objections to the representation election held on May 24, 2002.

The Board’s Decision and Order regarding the unfair labor practice proceeding is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over the proceeding pursuant to Section 10(e) of the Act, the unfair labor practices having occurred in Mobile, Alabama, where the Company transacts business.

On the basis of the unfair labor practices and the election objections, the Board set aside the election and remanded the representation proceeding to the Regional Director for Region 15 to conduct a new election. (D&O 1, n.2, 18.)

This portion of the Board’s Order is not reviewable in this proceeding. *See*

Decision and Order are inadvertently excluded. Consequently, concurrent with this brief, the Board is moving for leave to file a Supplemental Excerpt of Record containing the full Board Decision and Order. “Vol II GX” and “Vol II RX,” respectively, refer to the exhibits of the General Counsel and the Company (which was the Respondent before the Board), contained in Volume II of the record. “Vol I Tr” refers to the transcript of the hearing, contained in Volume I of the record. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 106 (5th Cir. 1963) (representation proceedings not final orders reviewable by courts of appeals).

The Board's application for enforcement, which was filed on October 17, 2008, is timely. There is no time limit in the Act for seeking enforcement or review of Board orders.²

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its numerous uncontested findings that the Company engaged in extensive unlawful conduct that coerced and discriminated against employees in violation of Section 8(a)(3) and (1) of the Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating eight employees in retaliation for union activities.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by suspending Darrell Spencer in retaliation for union activities.

4. Whether the Company has failed to demonstrate equitable grounds for this Court to deny enforcement of the Board's Order.

² Consequently, and for the additional reasons discussed below in Section IV, the Company's argument (Br 2, 23-25) that the Board's enforcement application is untimely is without merit.

ORAL ARGUMENT STATEMENT

This case involves the application of well-settled principles to straightforward facts and thus the Board believes that argument would not be of material assistance to this Court. If the Court decides that argument is necessary, however, the Board believes that 10 minutes per side would be sufficient.

STATEMENT OF THE CASE

Based on unfair labor practice charges and election objections filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed numerous unfair labor practices in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. §§ 158(a)(3) and (1)), and engaged in objectionable election conduct. (Vol II GX 1(hh).) After a four-day hearing, the administrative law judge found that the Company engaged in most of the alleged unfair labor practices and corresponding election misconduct, dismissed some remaining allegations, set aside the election and directed a new one. (D&O 1-18.) On review, the Board affirmed the judge's findings and order as modified. (D&O 1-4.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Company and Its Management Structure

The Company is a limited liability partnership engaged in the construction of high speed aluminum boats in Mobile, Alabama. (D&O 4, Vol I Tr 470.) The

Company is a subsidiary of Austal Limited, an Australian corporation. (D&O 4, Vol I Tr. 744.)

The Company began operations in late 2000. (D&O 4; Vol I Tr 28-29.) Until April 2002,³ its vice president of operations, Simon Thornton, was the senior management official. (D&O 4; Vol I Tr 468, 701.) On April 12 or 13, Alan Lerchbacker became the Company's chief executive officer. (D&O 4; Vol I Tr 468.)

David Growden, the production coordinator, managed the supervisors in various departments. (D&O 5; Vol I Tr 701.) Mickey Slade was the supervisor for engineering; Dennis Sigur was the supervisor for the fabrication department; and John Calhoun was the supervisor for welding. (D&O 5; Vol I Tr 39-41, 46-47.)

Bender Shipbuilding owns 30 percent of the Company. (D&O 4; Vol I Tr 311.) Bender was actively involved in the operation of the Company during the events at issue. Bender loaned one of its managers, Danny Sellers, to the Company, in order to assist the Company in its antiunion campaign. (D&O 4; Vol I Tr 311, 731.)

³ All dates are in 2002 unless otherwise indicated.

B. The Union Begins an Organizing Drive at the Company, and the Company Quickly Responds With Its Own Antiunion Campaign, Including Unlawful Interrogation and Threats of Reprisals, Job Loss, and Plant Closure

In early April, the Union began an organizing campaign at the Company's facility. (D&O 4; Vol I Tr 59.) On April 3, the Union's business manager and other union representatives handbilled at the Company, giving employees union authorization cards and leaflets. (*Id.*)

The week following the April 3 handbilling, Welding Supervisor Calhoun confronted employee Wayne Jenkins in the toolroom, asking Jenkins if he had signed any union papers. (D&O 5; Vol I Tr 67.) Calhoun stated that if Jenkins had signed a union authorization card, Jenkins could write and get it back. (*Id.*) Calhoun also said "the cards will have to go across [] Thornton's desk . . . [and] if the Union didn't come in that there would be hell to pay for everybody . . . that they will eventually start getting rid of the people that signed the union cards." (D&O 5; Vol I Tr 67-68.)

On April 10, the Union handbilled again, announcing an employee meeting for the next day. (D&O 4; Vol I Tr 59-60.) Following the meeting, the Union filed a representation petition with the Board. (D&O 4; Vol II GX 1(jj).) The petition sought to represent a unit consisting of approximately 71 employees. (D&O 14; Vol II GX 1(jj).)

Shortly thereafter, employees who supported the Union—including Jenkins, Zolia Powell, Donnell Hill, Andre Love, Warren Gatwood, and Tony Causey—began wearing insignia reflecting their sentiments, including T-shirts and stickers that they placed on their hardhats. (D&O 5, 13; Vol I Tr 68-69, 195, 362, 393, 496-497.) Calhoun and Production Coordinator Growden discussed their belief that employees should not be able to put stickers, other than company stickers, on their hardhats. (D&O 5; Vol I Tr 586, 617, 646, 701.) Thereafter, Calhoun asked “any employee” that he saw, including Jenkins, Gatwood, and Hill, to remove “any sticker that Austal did not give to you” from the hardhat. (*Id.*) Team Leader Joe Reed also directed employee Robert Skelton, among others, to remove the stickers. (D&O 5; Vol I Tr 116.)

Skelton began wearing a union T-shirt shortly after April 11. (D&O 6; Vol I Tr 112-114, 151-52.) A few days later, he encountered Supervisor Calhoun outside the breakroom. (D&O 6; Vol I Tr 114-15, 139, 151.) Calhoun asked Skelton where he got the T-shirt and how much he had paid for it. (*Id.*) Skelton responded that the Union gave it to him and he did not have to pay for it. Calhoun responded that it would “cost [Skelton] more than what [he] realized.” (*Id.*)

Around this time, the Company began distributing its own fliers. (D&O6; Vol I Tr 351.) Calhoun urged employees to “get the facts” about the fliers. (D&O 6; Vol I Tr 665.) Contemporaneously with this urging, he threatened employees in

a safety meeting that they would be terminated if they were “caught discussing the fliers that the Union had passed out.” (D&O 6; Vol I Tr 353, 370.)

In mid-April, Team Leader Reed talked to father and son welding employees Darrell Spencer and Dirk Spencer about the Union. In one of these conversations, Dirk Spencer told Reed that he was going to vote for the Union. (D&O 7; Vol I Tr 235, 242.) In another conversation, Darrell Spencer told Reed that he thought the Union would make the Company a better place and he was going to vote “yes” in the election. (D&O 7; Vol I Tr 214-15.) In one conversation, Reed responded to Darrell Spencer, saying “the Company was not going to pay [the employees] any more money, and that they would shut down, and . . . leave here before they would adapt to having a union.” (*Id.*) On May 17, Darrell Spencer put a union sticker on Reed’s back without Reed noticing. (Vol I Tr 213-14.) Darrell later joked with Reed that Reed had worn it all over the shop, although he had not. (*Id.*)

C. The Company “Grades” Prounion Welders for the First Time Ever

In mid-April, the Company, for the first time, assessed prounion welders with letter grades. (D&O 7; Vol I Tr 74, 89, 158-160, 178, 5-1-04, 507.) Team Leader Reed evaluated prounion employee Jenkins, stating that he was performing a job assessment and placing letter grades on a sheet. (*Id.*) Reed similarly assessed employee Hank Williams, who like Jenkins wore a union sticker and T-

shirt. (*Id.*) Reed also graded employee Donnell Hill, who wore union paraphernalia. (*Id.*)

D. The Company Continues To Respond to the Union Campaign By Repeatedly Soliciting Employees' Grievances, Threatening More Reprisals and Stricter Discipline, and Following Through On Its Threats By Suspending Active Union Supporter Causey

In further response to the union campaign, between mid-April and early May, CEO Lerchbacker and other managers summoned employees to meetings to discuss the union campaign. (D&O 5, 7-9; Vol I Tr 120, 216-17.) Following one large, "town hall" group meeting with all employees, Lerchbacker and the other managers and supervisors met with employees individually and in small groups. (D&O 5; Vol I Tr 128, 478, 479.) The top company officials in these meetings included Bender Manager Sellers, Production Coordinator Growden and Vice President Thornton. (*Id.*)

In the above meetings, the Company sought to determine why the employees wanted the Union, and began listening to and questioning employees about it. For example, in one of his many meetings with employees, CEO Lerchbacker stated that he "needed some feedback," that he wanted to know the employees' problems with the Company, and that "he wanted to make it known that . . . the Company was going to help the employees," specifically mentioning improved insurance benefits and raises. (D&O 8; Vol I Tr 216-17.) In another small meeting with Lerchbacker, employee Love noted that he had been promised, but had not

received, a pay raise and that he had been going back and forth between Growden, who was in the meeting, and Calhoun. Lerchbacker stated that “no employee should have to go between his supervisor and his supervisor’s supervisor about raises” and promised that “he would put a stop to that.” (D&O 8-9; Vol I Tr 398.)

At another small meeting, CEO Lerchbacker stated that he “would make a change,” and that within 6 months “there will be a difference.” (D&O 8; Vol I Tr 395.) Later that same meeting, employee Clifford Rayford began speaking against the Union and suggesting that the Company needed to “kick them [pronoun employees] out the gate.” (D&O 8; Vol I Tr 397.) Lerchbacker endorsed the statement, saying “that sounds like a good idea.” (*Id.*)

Other managers, too, asked employees why they wanted a union and promised to help the employees with any concerns they had. For example, in one private meeting, employee Causey complained to Production Coordinator Growden about a warning he had received from Calhoun. (D&O 7; Vol I Tr 258-59.) In their discussion, Growden asked why the employees needed a union. (*Id.*) Causey responded that “nothing was being done” when they came to him with a problem. (*Id.*) As Causey talked, Growden took notes. (D&O 7; Vol I Tr 260-61.) Growden then stated that the employees “were not going to have a union,” and that he was “going to do whatever it takes to keep the Union from th[e] Company.” (D&O 7; Vol I Tr 262.)

Around this time, Growden asked union advocate Williams to come to his office for a meeting. (D&O 8; Vol I Tr 184.) Only Growden and Williams were present. (*Id.*) Growden asked Williams how he thought the Union would help “on the floor.” (D&O 8; Vol I Tr 165-66.) Williams responded that the employees needed better benefits. (*Id.*)

At another meeting, employee Zolia Powell met with Growden alone. (D&O 8; Vol I Tr 357-58.) Growden asked Powell what problems she was having. (*Id.*) In the course of the conversation, Growden asked Powell for her opinion regarding “why the employees wanted the Union at [the Company].” (D&O 8; Vol I Tr 359-61.) As Powell was leaving, Growden stated that wanted to find out what the employees’ complaints were “and see if he could do something.” (*Id.*)

Sellers, who spoke at all of the group meetings, took a carrot-and-stick approach. He emphasized that employees “ought to give Alan [Lerchbacker] a chance,” and stated that if the employees did, they would “see better things happen at the Company.” (D&O 9; Vol I Tr 268.) At the same time, Sellers stated that employees would now be subjected to stricter discipline. (D&O 9; Vol I Tr 199-200.) For example, Sellers stated that he had been “looking at everybody’s time cards” and if employees had excessive absences or tardies, “they would be disciplined.” (D&O 9; Vol I Tr 267, 300.) Sellers also stated that the Company

was going to have to start abiding by the disciplinary guidelines in the handbook. (*Id.*)

Around this time, the Company suspended active union supporter Causey for 3 days for missing a day of work. (D&O 10-11; Vol I Tr 262-63.) Causey had taken the day off to celebrate his wedding anniversary, and his supervisor, Sigur, had given him permission to do so. (*Id.*) In a small group meeting shortly thereafter, in which Sellers again discussed stricter discipline, Sellers told employees, including Causey, that Sellers had “looked at everyone’s attendance,” and that Sellers was the one responsible for Causey’s recent write-up. (D&O 9; Vol I Tr 200.)

E. The Company Discharges Team Leader Gates for Supporting the Union

During the last week of April, Sellers asked Team Leader Gates why the Union was at the Company. (D&O 9; Vol I 318-19.) Gates responded that employees were upset with a lack of standardized pay rates and the manner in which the Company treated employees. (*Id.*) Sellers informed Gates that, “as a member of management . . . [Gates] had to promote a non-union view.” (D&O 9-10; Vol I Tr 319.) Gates responded that he wanted “to be left neutral.” (D&O 9-10; Vol I Tr 320-22.) Sellers informed Gates that Gates could not be neutral; he “had to promote non-union.” (*Id.*) Sellers told Gates that Gates’s decision would be “critical” to Gates’ career. (D&O 9-10; Vol I Tr 322.) A few days later, on

May 1, the Company discharged Gates for failure to uphold company policy on unionism. (D&O 9-10; Vol I Tr 324-25.)

The next day, a foreman at MEI, an electrical contractor that performed work at the Company, called Gates. (D&O 10; Vol I Tr 42, 326.) The foreman asked Gates if he was interested in working for MEI. (D&O 10; Vol I Tr 326.) Gates replied that he was, and the foreman stated that he needed to check with the Company. (*Id.*) The following day, he called Gates and told him that MEI could not hire him because the Company had barred Gates from its property. (D&O 10; Vol I Tr 327.)

F. The Company Seizes an Opportunity to Discharge Union Advocate Causey For Taking a Sick Day, Even Though He Called Before His Absence, Saw a Doctor, and Presented the Company with a Doctor's Note the Next Day

On May 7, between 8 and 8:30 a.m., Causey called into the Company and reported that he was experiencing pain from a prior injury and was going to the doctor. (D&O 11; Vol I Tr 271-72.) He did so and obtained a doctor's note. (*Id.*) Upon reporting to work the next day, Causey spoke with his leadman who suggested that Causey see the company doctor. (*Id.*) Following this conversation, Causey was approached by Supervisor Sigur who told him to get his tools, that he was being "let go." (D&O 11; Vol I Tr 272.)

Causey responded that he had his doctor's note, he had been out because of injury, and wanted to see the company doctor. (D&O 11; Vol I Tr 272-74.)

Causey then gave the doctor's note to Sigur. (*Id.*) After an hour and a half, Sigur returned with Production Coordinator Growden. (*Id.*) Causey repeated what he had told Sigur. Growden and Sigur left. (*Id.*)

Shortly thereafter, Sigur returned and escorted Causey outside, where they were met by Human Resources Director Bobby Woods. (*Id.*) Causey explained his situation to Woods. Woods sent Causey home. Later that day, Woods called Causey to tell him that he was being "let go." (*Id.*)

G. The Company Discharges A Group of Eight Welding Employees, Six of Whom Were Open Union Advocates, Two Weeks Before the Election; The Company Tells the Employees That Their Work Had Been Good and That They Should Re-apply When the Company Gets More Work, But Deems Them Ineligible for Rehire on Internal Personnel Documents; the Union Loses the Election

On May 7 or 8, the Company met to discuss laying off a group of welders. (D&O 13; Vol I Tr 31.) On May 9, Vice President Thornton memorialized this meeting in a memorandum stating "[t]he following employees were laid off due to lack of work on May 9 []." (D&O 13; Vol I Tr 27, Vol II GX 14, p.2.) The employees listed were Donnell Hill, Wayne Jenkins, Warren Gatwood, Andre Love, Dirk Spencer, Zolia Powell, Curtis Gleason, Micah Kidd, and Christopher Lyles.⁴ (D&O 13; Vol II GX 14, p.2.) On May 9, Human Resources Director Woods and Production Coordinator Growden told the affected employees that their

⁴ As the judge noted (D&O 13, n.5), the General Counsel did not allege Lyles as a discriminatee.

selection was not personal, but that they were being terminated. (D&O 13; Vol I Tr 82, 201-02, 238, 364-65, 400, 502-03.)

Indeed, the Company told each of these employees that their performance had been good and that they should re-apply once the Company had more work. (D&O 13; Vol I Tr 82, 202, 364.) For example, the Company told Gatwood that his termination “wasn’t any reflection on [his] work, [that he] showed up for work on time, [and that] [t]hey didn’t have any problems out of [him].” (D&O 13; Vol I Tr 202.) Growden also told Gatwood that he “ought to come back on a later date and put an application in.” (D&O 13; Vol I Tr 202.) Similarly, company management told Powell—whom it called a “great worker”—that in “three to four months, [she] should see an ad in the paper, that they would be doing rehiring,” and that she should contact the Company to come back. (D&O 13; Vol I Tr 364.) So, too, the Company told employee Hill that he was eligible for rehire. (D&O 13; Vol I Tr 502-03.)

Despite these assurances, all of the affected employees’ personnel clearance forms contain the entry, “WOULD YOU REHIRE?” with the word “NO” circled. (D&O 13, 15; Vol II GX 12, 14, 16, 21, 22, 23, 24, 25.) In contrast, two employees who were fired for cause—one well before and one well after the union campaign—had the word “YES” on their personnel clearance forms in response to the “WOULD YOU REHIRE?” question. (D&O 13, 15; Tr Vol II GX 26-27.)

One of these employees, Patrick Lyons, had abandoned his employment with no explanation. (*Id.*) The other employee, Andrew Geoghagan, left for an “unspecified leave of absence” before the required notice period. (*Id.*)

The Board held the election on May 24. (D&O 5, 14; Vol II GX 1(jj), p.2.) The Union lost by a tally of 45 to 18 votes. (*Id.*)

H. After the Election, the Company Disciplines Union Supporters Williams and Darrell Spencer

On June 18, Calhoun warned employee Williams, a union advocate with whom Growden had spoken privately regarding employees’ concerns, for making a weld repair that failed an X-ray test. (D&O 15; Vol I Tr 168-69, TR II GX 13.) Supervisor Calhoun showed Williams the weld, which was, itself, a repair that Williams had performed upon a co-workers’ failed weld. (*Id.*) There was no evidence of any other employee being warned for a problem with only one weld.

Also on June 18, Reed and Calhoun suspended Darrell Spencer for 3 days for “lack of quality work.” (D&O 15; Vol I Tr 218, 654, Vol II GX 20.) Spencer, like Williams, was prounion, and had spoken in favor of the Union with Team Leader Reed. (D&O 15; Vol I Tr 214-15.) Spencer had also joked with Reed about supporting the Union just before the election. (Vol I Tr 213-14.)

Prior to making the weld, Spencer explained to Calhoun that he wanted to use “a smaller diameter wire due to the thickness of the base material.” (D&O 15; Vol I Tr 218-19.) Despite Spencer’s protests, Calhoun told Spencer that he could

not, and insisted that he use a larger diameter wire. (*Id.*) The result was that “[the weld] busted out twice.” (*Id.*)

Spencer “did not weld it deliberately for it not to pass,” but “did the best that [he] could do” using the thicker wire that Calhoun demanded that he use. (D&O 15; Vol I Tr 231.) In contrast, in the past, Spencer had been permitted to “use whatever size wire [he] wanted to” in order to complete a proper weld. (*Id.*)

I. Jenkins Tries to Get Re-Hired When the Company Advertises for More Work, But the Company Rejects Him

In December, discharged prounion employee Jenkins saw an advertisement that the Company was hiring in all crafts. (D&O 13; Vol I 84-87.) On December 23, he went to the company office and filled out an application. (*Id.*) While doing so, he saw Production Coordinator Growden enter the office. (*Id.*) Growden noticed him and then entered the office of Office Manager Mary Dwyer. (*Id.*) Upon leaving Dwyer’s office, Growden opened the door of Scott Reese, the individual who was interviewing applicants, and stated that he needed to see him. (*Id.*) Reese then emerged, took Jenkins’ application from the receptionist, and called Jenkins into the office. (*Id.*) Reese noted that Jenkins had previously worked for the Company and asked Jenkins why he left. (*Id.*) Jenkins replied that he was fired because of the Union. (*Id.*) Reese stated that he would give the application to the appropriate supervisor. (*Id.*) Thereafter, Jenkins received an

undated letter thanking him for his interest in working for the Company but informing him that he was not selected. (D&O 13, Vol II GC 10.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber) found, in almost full agreement with the administrative law judge, that the Company committed numerous violations of Section 8(a)(3) and (1) of the Act. The Section 8(a)(1) violations found include coercively questioning employees, threatening plant closure, job loss, stricter discipline, and other unspecified reprisals if the employees voted for the Union, promising or impliedly promising benefits if employees rejected the Union, giving informal evaluations to three employees because of their union activity, and instructing employees not to read or discuss union material during working time.⁵ (D&O 1.)

The Section 8(a)(3) violations found include terminating Gates and refusing to allow him to return to the Company's premises as an employee of another contractor because he would not support the Company's unionization position, terminating the group of eight employees on May 9, suspending and discharging

⁵ The Board did not pass (D&O 1) on the judge's finding that the Company violated Section 8(a)(1) by temporarily prohibiting employees from displaying union insignia on their hardhats, but found it to be cumulative of the other violations.

Causey, giving Darrell Spencer a 3-day suspension,⁶ and giving employee Williams a warning. (D&O 1-2.) In upholding the judge's finding that the Company violated the Act by terminating the eight employees, the Board explicitly rejected (D&O 2, n.7) the Company's claim that the judge relied on a theory neither alleged in the complaint nor litigated at the hearing.⁷

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O 2, 17-18.) Affirmatively, the Order requires (D&O 2, 17-18) the Company to offer employees Gates and Causey, as well as the eight employees fired on May 9, full reinstatement to their former or equivalent jobs, and make them whole for any losses. The Order also requires (D&O 18) the Company to make Darrell Spencer whole for his suspension, and to expunge the employees' records of the unlawful discipline. Further, the Order requires (D&O 18) the Company to post appropriate notices.⁸

⁶ Chairman Battista dissented (D&O 2-3) from this finding.

⁷ Chairman Battista dissented (D&O 3) from the Board's finding that the Company violated the Act by terminating the group of eight employees, "solely" because he believed that the judge's finding "was based on a theory neither alleged in the complaint nor litigated at the hearing."

⁸ To remedy the objectionable election conduct as well as the unfair labor practices, the Board ordered (D&O 1 n.2, 18) the election set aside and the

SUMMARY OF ARGUMENT

Immediately upon learning of an organizing campaign by the Union, the Company began its own but unlawful campaign to thwart the Union's efforts by committing hallmark violations of the Act. Most of these violations are uncontested before this Court, and include unlawful threats of job loss and plant closure, interrogation of employees, a blanket prohibition on discussion of union activity, the solicitation of employee grievances, promises of benefits if the employees rejected the Union, and the suspension of active union supporter Tony Causey.

The Company's uncontested violations of the Act escalated in its pre-election discharge of employee team leader Charles Gates because he failed to oppose the Union, the Company's subsequent refusal to allow Gates to return to the premises as an employee of a contractor the next day, and the discharge of union supporter Causey for his union activities. The final uncontested violation took place just after the election, which the Union lost, when the Company disciplined union supporter Hank Williams in retaliation for his union activities. These serious uncontested violations of the Act and the Board's corresponding remedial order thus are entitled to summary enforcement. Moreover, these

representation case remanded to the Regional Director to conduct a new election. As noted, this aspect of the Board's Order is not before the Court.

uncontested violations lend context to the sole remaining violations contested by the Company.

Ample evidence supports the first of the Board's remaining findings, that on May 9, just before the election, the Company unlawfully discharged eight employees—most of whom openly supported the Union—in retaliation for union activities. Just days earlier, the Company committed the uncontested violations of discharging Gates and Causey for their union support. Most significantly, the Company cannot escape the import of its own documents—showing that the Company had barred the employees from all future employment—belying the Company's claim that its sole reason for discharging the employees was the loss of a contract. The Company's additional argument, that it was not given due process as to this violation, is similarly without merit, because the Company was on notice from the litigation's inception that the General Counsel challenged the Company's motive for terminating these employees.

There is also no merit to the Company's challenge to the Board's finding that the Company discriminatorily suspended Darrell Spencer. The Company suspended this avid union supporter—on the same day of its uncontested unlawful discipline of his fellow union supporter Williams—despite Darrell Spencer's credible explanation that the failure of the weld for which he was disciplined was not his fault. Indeed, despite Darrell Spencer's repeated requests to use a smaller

wire, his supervisor instead demanded that he make the weld with a wire that Spencer had warned him would be problematic. The Company has provided no grounds to overturn the Board's credibility determinations or factual findings that under such circumstances, the real reason for Spencer's suspension was his union activity.

Finally, seeking to avoid enforcement, the Company ignores Supreme Court precedent solidly establishing that regardless of any compliance efforts by the Company, the Board is entitled to have the resumption of the unfair labor practices barred by an enforcement decree. The Company has utterly failed to provide any equitable reasons for this Court to depart from this well-established precedent. According, the Board is entitled to enforcement of its Order.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS NUMEROUS UNCONTESTED FINDINGS THAT THE COMPANY ENGAGED IN EXTENSIVE UNLAWFUL CONDUCT THAT COERCED AND DISCRIMINATED AGAINST EMPLOYEES IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

In its brief to the Court, the Company does not contest the Board’s findings (D&O 1-2) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by coercively questioning employees about their union sentiments, threatening plant closure, job loss, and stricter discipline, and other unspecified reprisals if the employees voted for the Union, promising benefits if the employees rejected the Union, giving informal evaluations to three employees because of their union activity, and instructing employees not to read or discuss union materials during work time.⁹ *See e.g., NLRB v. McClain of Georgia* (“*McClain*”), 138 F.3d 1418, 1421 (11th Cir. 1998) (coercive questions and threats); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-19 (1969) (threats of plant closure, job loss, stricter discipline and reprisals); *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964) (promises and grant of benefits); *NLRB v. Varo*, 425 F.2d 293, 298-99 (5th

⁹ 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 rights guaranteed in Section 7 of [the Act].” Section 7 of the Act (29 U.S.C. § 157) grants employees “the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid and protection”

Cir. 1970) (soliciting grievances); *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898, 905 (5th Cir. 1978) (warnings not to engage in union activity).

The Company also does not contest the Board's findings (D&O 1-2) that it violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging team leader Gates because he would not support the Company's antiunion position, refusing to allow Gates to return to the Company's premises as an employee of a contractor the day after he was terminated, suspending employee Causey and terminating him for his union activity, and giving an unjustified disciplinary warning to prounion employee Williams just after the election.¹⁰ *See McClain*, 138 F.3d at 1421 (suspension and discharge for union activities); *Int'l Shipping Assn.*, 297 NLRB 1059, 1059 (1990) (employer violates the Act with respect to action affecting employees who are not his own); *NLRB v. Pope Maintenance Corp.*, 573 F.2d at 905 (warning not to engage in union activity).

Because the Company has not challenged these findings in its opening brief, it has waived the right to contest them. The Board is thus entitled to summary enforcement of the portions of its Order that are based on the uncontested findings.

¹⁰ Section 8(a)(3) of the Act provides that an employer may not "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Moreover, a violation of Section 8(a)(3) of the Act results in a "derivative" violation of Section 8(a)(1) of the Act because, as discussed in footnote 9, Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain, or coerce" employees for exercising their statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

U.S. v. Nealy, 232 F.3d 825, 830-31 (11th Cir. 2000) (arguments not raised in opening brief are waived); *Puralator Armored, Inc. v. NLRB* (“*Purolator*”), 764 F.2d 1423, 1427-28 (11th Cir. 1985) (summary affirmance of uncontested Board findings). *See also* Fed. R. App. P. 28(a)(9)(A)(argument must contain party’s contentions with citation to authorities and record).¹¹

Moreover, these uncontested violations do not simply disappear because they have not been contested by the Company. Rather, they remain in the case, “lending their aroma to the context in which the [remaining contested] issues are considered.” *Purolator*, 764 F.2d at 1429 (citation omitted). The aroma of the many unchallenged violations here is particularly foul, given that the primary contested violation—the group discharge on May 9—followed just a few days after the similar uncontested discharge violations of Gates and Causey. Moreover, the only other challenged violation—the June 18 suspension of Darrell Spencer—took place on the same day as the uncontested unlawful discipline of employee Williams.

¹¹ To the extent that the Company’s equitable argument (Br 23-28) can be read to apply to these otherwise uncontested violations, we address that argument in Section IV, below.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY TERMINATING EIGHT EMPLOYEES JUST BEFORE THE ELECTION IN RETALIATION FOR UNION ACTIVITIES

A. Applicable Principles and Standard of Review

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer “discrimination in regard to hire or tenure of employment ... to encourage or discourage membership in any labor organization” Thus, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking other adverse action against employees for engaging in union activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-98 (1983); *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1012 (11th Cir. 1986).

In most cases involving adverse actions taken against employees, the critical question is the employer’s motive. *NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 923 (11th Cir. 1981); *see also Purolator*, 764 F.2d at 1428. In *NLRB v. Transportation Management*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in discrimination cases articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under that standard, if substantial evidence supports the Board’s finding that antiunion considerations were “a motivating factor” in an employer’s decision to

take adverse action, the employer's action is unlawful, unless the record compels the conclusion that the employer would have taken the same action even in the absence of the protected activity. *Transportation Management*, 462 U.S. at 397, 401. *Accord NLRB v. United Sanitation Service*, 737 F.2d 936, 939 (11th Cir. 1984).

Motive is a question of fact, and the Board may rely on circumstantial evidence and inferences reasonably drawn from the totality of the facts. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Purolator*, 764 F.2d at 1428. Factors that support an inference of unlawful motive include employer awareness of the employees' union activities or sentiments, contemporaneous unfair labor practices demonstrating union animus, the timing and abruptness of the adverse action in relation to the union activity, the employer's reliance on pretextual or shifting reasons to justify the adverse action, disparate treatment of employees based on union activities, and an employer's deviation from past practice. *See McClain*, 138 F.3d at 1424; *see also NLRB v. Dan River Mills, Inc.*, 274 F.2d 381, 384 (5th Cir. 1960).

If the record shows that an asserted legitimate reason advanced by the employer for the adverse action was a pretext, that is, the reason did not exist or was not in fact relied upon, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the

employee's union activity. *Wright Line*, 251 NLRB at 1084. *Accord NLRB v. Malta Constr.*, 806 F.2d at 1012.

The Board's findings of fact are conclusive if they are supported by substantial evidence on the record as a whole. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *NLRB v. Malta Constr.*, 806 F.2d at 1010. The reviewing court should not displace the Board's choice between fairly conflicting views of the evidence, "even though the court would justifiably have made a different choice had the matter been before it de novo." *Merchants Truck Line, Inc. v. NLRB*, 577 F.2d 1011, 1015 (5th Cir. 1978). Thus, in discrimination cases, judicial review is limited "to determining whether the Board's inference of unlawful motive is supported by substantial evidence—not whether it is possible to draw the opposite inference." *McClain*, 138 F.3d at 1424-25.

Moreover, judicial review of the Board's credibility determinations is particularly limited. As this Court has recognized, "special deference" is owed to the administrative law judge's credibility determinations, "which will not be disturbed unless they are inherently unreasonable or self-contradictory." *McClain*, 138 F.3d at 1422 (citation omitted).

B. The Company Unlawfully Terminated 8 Employees Just Before the Election Because of Union Activities

Substantial evidence supports the Board's finding (D&O 2, 12-15) that just 2 weeks before the election, the Company terminated 8 employees—more than 10 percent of the proposed bargaining unit—in retaliation for union activity.¹² As an initial matter, the Company does not dispute the judge's findings (D&O 14) that the Company “was aware of the union sympathies of six of the employees terminated on May 9,” and that “the Company bore animus towards employees who engaged in union activities.” Indeed, shortly before they were terminated, Powell, Jenkins, Hill, Love, and Gatwood displayed prounion insignia, and Dirk Spencer told Team Leader Reed that he would be voting for the Union. (Vol I Tr 235, 242.)

Based on these undisputed findings, and the essentially uncontested findings of numerous other unfair labor practices leading up to the discharge of these employees, the Board reasonably determined (D&O 14) that the General Counsel met his initial burden of showing that the union activity of six of the eight employees discharged on May 9 was a motivating factor in their discharge shortly

¹² The Company's bald assertion (Br 21, n. 6) that these 8 employees “would not have made any difference” to the outcome of the election because of the ultimate vote count fails to come to terms with the likely coercive effect such discharges, in combination with the numerous other unfair labor practices, had on the remainder of the eligible voters in the unit. Indeed, as noted above, the Board found these unfair labor practices tainted the outcome of the election and ordered a new one.

before the union election. *See NLRB v. Dan River Mills, Inc.*, 274 F.2d at 384 (factors that support an inference of unlawful motive include employer awareness of the employees' union activities or sentiments, contemporaneous unfair labor practices demonstrating union animus, and the timing and abruptness of the adverse action in relation to the union activity).

In the face of these largely undisputed findings, the Company asserts (Br 20-23) that it met its burden of demonstrating that it would have discharged the employees absent their union activity because it showed that it lost a contract and these were the lowest-paid employees with the least amount of work. To the contrary, the record evidence shows that despite telling these prounion employees that there had been "no problems" with their work, accurately predicting that the Company would be hiring again "in three to four months," and explicitly encouraging the employees to reapply when they saw other openings, the internal personnel documents prepared by the Company ensured that these employees would not be rehired. (D&O 12, Vol I Tr 364.)

Indeed, the judge found (D&O 15) that notwithstanding expressly telling the eight employees to reapply in the future, the Company "made such applications futile" because on "the personnel clearance report of each discriminatee . . . the

question ‘WOULD YOU REHIRE?’ [wa]s followed by the circled word, ‘NO.’”¹³ Moreover, as the judge further recognized (D&O 15), “the reality of that futility was confirmed when Jenkins [unsuccessfully] sought reemployment.” The Company never addressed the inconsistency between its statements to the employees, and its own personnel documents, which powerfully supports the Board’s finding (D&O 14-15) that the Company provided the employees with false explanations about their reemployment status. *See NLRB v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (2d Cir. 1972) (employer’s offering conflicting accounts and pretextual explanations for discharge probative of unlawful intent).

Additional company documents further undermine its asserted reasons for discharging the eight employees on May 9. Thus, as the judge noted (D&O 13, 15), the personnel clearance forms of two other employees who had not engaged in union activity, but who were fired for cause, stated “yes” in answer to the question, “would you rehire?” Thus, these two employees were eligible for rehire, but the mostly prounion employees ostensibly fired on May 9 for non-performance related reasons, for temporary lack of work, were not. *See American Thread Co. v. NLRB*,

¹³ The Company’s attempt (Br 20) to minimize the significance of its own personnel documents by claiming they were “filled out by an unnamed clerk” is unavailing. The Company stipulated to entering them into the record (Vol I Tr 19-27) and then failed to explain the discrepancy between what the Company told the employees versus what it put in its personnel files, thus warranting the inference of unlawful motivation as discussed above.

631 F.2d 316, 322 (4th Cir. 1980) (employer's disparate treatment of union advocate probative of unlawful intent). Accordingly, this Court should affirm the Board's finding (D&O 15) that the Company's discharge of these employees was motivated by the Company's animus towards their union activities.¹⁴ *See Wright Line*, 215 NLRB at 1084 (if record shows asserted legitimate reason advanced by the employer for the adverse action was a pretext, that is, the reason did not exist or was not in fact relied upon, the inquiry ends; there is no remaining basis for finding that the employer would have taken the adverse action even in the absence of the employee's union activity).

C. The Company's Due Process Argument Is Without Merit

The Company's claim (Br 2, 6-9, 16-20) that it did not have proper notice of the allegations against it is meritless. At best, this claim demonstrates nothing more than the Company's own inexcusable failure to counter the compelling evidence that it unlawfully discharged the employees in retaliation for their union activities.

¹⁴ To be sure, the Company makes a weak claim (Br 22) that because one of the discharged employees—Micah Kidd—was not a union supporter, the evidence of pretext is “negat[ed].” To the contrary, it is well-settled that to make out a violation of Section 8(a)(3), it is enough to show that the Company was motivated by its union animus; the General Counsel need not show that every affected employee was a known union supporter. *See Dillingham Marine Co. v. NLRB*, 610 F.2d 319, 321 (5th Cir. 1990); *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1969) (violation found “even if some white sheep suffer along with black sheep”).

To begin, the Board recognized (D&O 2, n.7) that “[t]he complaint alleges that the [Company] terminated the employees, thereby discriminating against them and discouraging membership in a labor organization in violation of Section 8(a)(3) and (1).” (Vol II GX 1(hh), p. 7.) Such a complaint allegation constitutes “a clear and concise description of the acts which are claimed to constitute the unfair labor practices” and is more than sufficient notice to the Company of the conduct constituting the alleged unfair labor practice. *See* Board Rules and Regulations at 29 C.F.R. 102.15 (complaint “shall contain a clear and concise description of the alleged acts which are claimed to constitute unfair labor practices”). *Accord Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993) (complaint that did not specifically mention “mass discharge” theory, but stated that the employer engaged in the dismissals to discourage employees from engaging in protected activities, was “adequate to raise the mass discharge issue”).

The General Counsel also provided the Company with adequate notice at the hearing itself. As the Board recognized (D&O n.7), in the General Counsel’s opening statement at the hearing, he stated that “[t]he employees were told that they were being laid off, but they would not have any recall rights. So, our position is that they were effectively terminated.” (Vol I, Tr 13.) The Board

found that, “[t]hus, both the complaint and the General Counsel’s litigation theory were the same, that the employees were terminated.”

Accordingly, the Company’s myopic focus (Br 17-19, 21-22) on the judge’s assessment, that the Company changed what could have been a temporary layoff to a permanent discharge to prevent the employees from voting in the election, is of no consequence. Rather, what counts is that the Company was put on notice that the ultimate termination of the employees was alleged to be discriminatory. As the Board aptly stated (D&O 2 n.7), “[t]hat additional facts and circumstances surrounding the terminations were established through evidence adduced at the hearing is hardly surprising: it is the General Counsel’s burden to establish sufficient facts to support finding the alleged violation. This process of developing the underlying facts of a case does not alter the basic nature or theory of the complaint.”

The Company seeks to create confusion (Br 17-18, 21, 22) with its own inexact nomenclature—“lay-off” versus “termination”—when it discharged the employees. Again, however, as the Board noted (D&O n.7), “both the complaint and the General Counsel’s litigation theory were the same, that the employees were terminated.”¹⁵

¹⁵ The Company’s related focus (Br 20-21) on the date of the Company’s personnel clearance forms is equally misplaced. Far more salient than the exact date of the Company’s discharge decision is that these forms, which the Company

Thus, the Company has utterly failed to demonstrate to this Court that it suffered any prejudice from the way the case was litigated at trial. *See Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (failure to show prejudice refutes claim of denial of due process); *Coca-Cola Bottling v. NLRB*, 811 F.2d 82, 87-88 (2d Cir. 1987) (employer not prejudiced by lack of complaint allegation). As noted above, the Company was always aware that the General Counsel challenged the Company's motivation for terminating these employees, but it failed to explain its own documents revealing that it made false statements to employees that they were good workers eligible for re-hire. In such circumstances, the Company has no grounds for a successful due process claim. *See Pergament*, 920 F.2d at 136 (employer had full and fair opportunity to litigate issue of motivation on which charge was premised when employer "surely would have presented" the relevant evidence anyway to support the alleged conduct). *Accord NLRB v. St. Vincent's Hospital*, 729 F.2d 730, 735 (11th Cir. 1984) (employer's failure to call witness regarding "the gist" of charges against employer "does not vitiate the validity of the findings and conclusions reached").

admits (Br 20-21) were "filled out the very same day" as their discharge, blatantly contradicted what the Company told the employees on that very same day.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING DARRELL SPENCER IN RETALIATION FOR UNION ACTIVITIES

Darrell Spencer was an avid union supporter, wearing union insignia, telling Team Leader Reed that he was going to vote for the Union, and even jokingly putting a prounion sticker on Reed's back. As the Board found (D&O 2, n.8), Spencer's union activity was a motivating factor in his June 18 suspension, which took place just a few weeks after the election, and on the same date as the Company's uncontested unlawful discipline of union supporter Williams. Moreover, the Board reasonably found (D&O 2 n.8) that in light of the "undisputed facts" and "credibility findings," the Company failed to show that it would have suspended Spencer in the absence of his union activity.

The Company's claims to the contrary rely exclusively on the judge's rationale rather than the Board's, and are primarily founded on discredited testimony. To begin, although it is the Board's decision that is before this Court, the Company consistently refers (Br 14-15) to the judge's—but not the Board's—findings as to the Company's "shifting rationale." The Company's approach fails. *See Merchants Truck Line Inc. v. NLRB*, 577 F.2d at 1014-15, 1014 n.3 (disagreement between Board and judge on inferences from evidence not grounds for denying Board's order). The Board's finding (D&O 2, n.8) is that "if the [Company] had treated this situation routinely, it would have permitted Spencer to

use the wire of his choice” However, “[t]he [Company] did not do that.” Instead, even after Spencer protested the size of the wire, Calhoun forced him to use it. Thus, as the Board noted (D&O 2, n.8), the Company “put Spencer in a situation where he could not properly perform the weld, and then disciplined him.” As the Board concluded (D&O 2 n.8), “[t]here is no credible evidence justifying Calhoun’s conduct or supporting the [Company’s] purported reason for the suspension,” and, “[a]ccordingly, the [Company] did not prove that it would have acted the same way in the absence of Spencer’s union activity.”

Indeed, in agreement with the judge’s credibility determinations, the Board explicitly refused to credit (D&O 2, n.8) Calhoun’s explanation that Spencer was disciplined for intentionally making a bad weld, and credited Spencer, “who testified that he did not deliberately make a faulty weld but, following the instructions of his supervisor, did the best he could using the wire he was instructed to use.” The Company has provided no grounds to overturn this credibility-based finding. *See McClain*, 138 F.3d at 1422 (“special deference” to Board credibility findings). Accordingly, this Court should ignore the judge’s approach, upon which the Company principally relies, and should affirm the Board’s finding (D&O 15) that Company suspended Spencer in retaliation for his union activities.

IV. THE COMPANY HAS FAILED TO DEMONSTRATE EQUITABLE GROUNDS TO DENY ENFORCEMENT OF THE BOARD'S ORDER

Simply put, the Board is entitled to have the resumption of the unfair labor practices barred by an enforcement decree. In a last-ditch attempt to avoid enforcement, the Company contends (Br 23-28) that enforcement would conflict with equitable principles. As we now show, this claim borders on the specious.

To support its position, the Company, conceding (Br 26-27) that it has not fully complied with the Board's Order, primarily contends (Br 25-28, 27) that it is "improper to seek enforcement prior to giving the employer a chance to [fully] comply with the order."¹⁶ As the case law explains, however, a Board remedial order "is not self-executing," and the Board can compel compliance with its order only by asking a court for an enforcement decree that carries the possibility of future contempt sanctions. *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990).

Indeed, as the Supreme Court has held, even if the Company had fully complied with the Order, the Board would nevertheless be entitled to enforcement. *NLRB v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950) ("[a]n employer's

¹⁶ The Company suggests (Br 26-27) that it has not fully complied because the Regional Office has unreasonably delayed calculating the backpay owed. *But see NLRB v. J.H. Rutter-Rex Manufacturing Co. Inc.*, 396 U.S. 258, 264-65 (1970) (Board "not required to place the consequences of its own delay, even if inordinate, upon the wronged employees to the benefit of wrongdoing employers.")

compliance with an order of the Board does not render the cause moot, depriving the Board of its opportunity to secure enforcement from an appropriate court”).

Accord NLRB v. Unoco Apparel, Inc., 508 F.2d 1368, 1371 (5th Cir. 1975)

(compliance does not moot case because Board order imposes a “continuing obligation” and “provides the Board with an effective enforcement procedure should the employer resume the unfair labor practice in the future”); *NLRB v.*

Southern Household Products Co., 449 F.2d 749, 750 (5th Cir. 1971) (same);

NLRB v. Pattersen Menhaden Corp., 389 F.2d 701, 703 (5th Cir. 1968) (same).

Thus, taken to its logical conclusion, the Company’s argument would mean that until the Board determines that it is impossible to effectuate total voluntary compliance, the Board is prohibited from seeking enforcement of its orders. This is simply contrary to established case law. In short, all the Company has done (Br 23-28) is to raise simple protestations that it has attempted compliance, but such allegations are insufficient to deny enforcement. *NLRB v. King Sooper’s, Inc.*, 275 F.3d 978, 980 (10th Cir. 2001) (“simple allegations of compliance . . . will not justify denial [of enforcement of a Board order]”).

Finally, the Company’s citation to the Compliance Manual in these circumstances (Br 23, 26-27) is irrelevant because it is the Board’s Order, and not the Region’s enforcement proceedings, that is before this Court. It is, however, notable that the Company has selectively cited (Br 23, 26-27) to the Compliance

Manual, conveniently omitting its explicit guidance—consistent with the above Supreme Court precedent—that “the Region may recommend enforcement of a Board [o]rder notwithstanding a respondent’s offer of compliance or even the achievement of compliance.” *See* Casehandling Manual, Pt. III, Section 10606.3.

CONCLUSION

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

s/Jill A. Griffin

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April 2009

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 08-15976-JJ
v.	*	
	*	Board Case No.
AUSTAL USA, LLC	*	15-CA-16552
	*	
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), the Board certifies that its brief contains 9,283 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/Linda Dreeben
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Dated at Washington, DC
this 20th day of April 2009

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	*	
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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 electronic filing and first-class mail delivery service the required number of copies of the Board's brief in the above-captioned case, and has served that brief by electronic filing and by sending two copies by first-class mail upon the following counsel at the address listed below:

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