

NO ORAL ARGUMENT REQUESTED

Nos. 07-9519 and 07-9525

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEISER CONSTRUCTION, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

IRON WORKERS LOCAL UNION NO. 10, AFFILIATED WITH
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL,
ORNAMENTAL & REINFORCING IRON WORKERS, AFL-CIO

Intervenor

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF RELATED CASES

Pursuant to Local Rule 28.2(C)(1), Board counsel is unaware of any prior or related appeals.

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Leiser Construction, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order against the Company. The Board’s Decision and Order issued on February 28, 2007, and is reported at 349 NLRB No. 41. (D&O 1-17.)¹

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is a final order under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice occurred in the State of Kansas.

The Company filed its petition for review of the Board’s Order on April 3, 2007. The Board filed its cross-application for enforcement on April 27, 2007.

¹ “D&O” references in this brief are to the Board’s Decision and Order, which includes the attached decision of the administrative law judge. “Tr” references are to the transcript of the hearing before the administrative law judge. “GCX,” “RX” and “CPX” refer, respectively, to exhibits introduced by the General Counsel, the Company, and the Charging Party. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Both were timely filed because the Act imposes no time limits on such filings. Iron Workers Local Union No. 10, affiliated with International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers, AFL-CIO (“the Union”), has intervened on the Board’s behalf.

STATEMENT OF THE ISSUES

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order which remedy several violations of the Act.

2. Whether substantial evidence on the record as a whole supports the Board’s determination that the Company violated Section 8(a)(1) and (3) of the Act in its treatment of employees David Coleman and Travis Williams.

Specifically:

a. Whether the Company violated the Act by discharging Coleman for his union activity.

b. Whether the Company violated the Act by threatening Williams, suspending him, and then threatening him with physical violence because of his union activity.

3. Whether substantial evidence on the record as a whole supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by refusing to hire job applicants Richard Christopherson and Michael Bright.

4. Whether the Board's Order is within the Board's broad remedial discretion.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company committed several violations of the Act. (D&O 10; GCX 1(a), (c), (e).) The Company filed an answer denying that it violated the Act. (D&O 10; GCX 1(g).) After a hearing, an administrative law judge found that the Company committed the alleged unfair labor practices. (D&O 15.)

On review, the Board affirmed, as modified, the judge's rulings, findings, and conclusions, and adopted, as modified, his recommended order. (D&O 6-7.) Thereafter, the Company initiated these proceedings with a petition to review the Board's Order, which was followed by the Board's cross-application for enforcement of its Order, and the Union's motion to intervene on the Board's behalf.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Hiring Process; the Company Advertises for Employees

The Company is a nonunion employer that performs ironwork for the construction of commercial buildings primarily in Kansas and the western portion of Missouri. Lloyd Leiser ("Leiser") and his wife Sandra Leiser ("S. Leiser") founded the Company in approximately 1998 and maintain an office in Madison, Kansas. (D&O 10, 11; Tr 60, 139-40, 163-64, 244, GCX 1(e) par. 2(a), (b), par. 4, 1(g) par. 2, 4.)

Leiser spends most of his time in the field, overseeing approximately 10 individuals in two or more crews. Each crew has a leadman and a foreman who report to Leiser. (D&O 11; Tr 172, 245.) S. Leiser runs the office along with her secretary Tracy Thompson and her assistant Sheena Scheck. (D&O 10; Tr 163-64, 241, 242-45, GCX 1(e) par. 4, 1(g) par. 5.)

Leiser and S. Leiser maintain phone contact during the workday. (D&O 11; Tr 247-48.) S. Leiser receives employment applications at the office, culling the applicants to those with the most experience and often conducting initial interviews. Although S. Leiser unilaterally hires some employees, she generally

apprises Leiser of promising candidates and they jointly make the hiring decision. (D&O 11; Tr 163-64, 171-72, 232-33, 241-49.)

The Company advertises only when it needs employees. (Tr 309.) The Company advertised for ironworkers in local newspapers in December 2004, as well as January, February, April, May, June, September, and November 2005. (D&O 14; Tr 72-75, 265, GCX 2, 13, 14, 20-29.) Generally, the advertisements sought either “experienced structural steel erectors . . . with welding certification a plus, but not required” (GCX 20-29), or a “prefer[ence]” for “steel erection and welding experience and/or certifications” (GCX 13, 14). During periods when the Company advertised for candidates it received approximately 30 applications in a week. (D&O 10; Tr 172, 247.)

B. The Company Hires David Coleman Without Knowing that He is a Union Organizer; the Company Declines to Sign a Union Contract; the Company Discharges Coleman at an Employee Lunch After Learning that He is a Union Organizer; the Company Tells Coleman at the Jobsite that He Was Discharged Because of His Union Activity and that It Would Not Hire Any Applicant Who Was Affiliated With a Union

In December 2004, union organizer David Coleman learned of a steel erection job that was being constructed by the Company. (D&O 11, 12; Tr 56-57.) He went to the jobsite and spoke to Leiser about a job. (D&O 11, 12; Tr 57-58.) Leiser informed Coleman, “You realize we’re not a [u]nion company.” (D&O 11,

12; Tr 59.) Coleman replied, “[N]o problem.” (D&O 11, 12; Tr 59.) Coleman then filled out a job application that did not list past union employers or his union experience. Coleman’s application listed four employers, including two that he had not worked for. (D&O 1, 11, 12; Tr 58-59, 90-93, RX 1.)

Leiser hired Coleman, who began working on December 30. (D&O 11, 12; Tr 60-61.) That day, Leiser commented that Coleman was “outwork[ing]” him. (Tr 65.) On another occasion Leiser told Coleman that he was “doing great.” (Tr 66.) Foreman Tom Hall told Coleman that Leiser thought he had a lot of potential and wanted to train him personally. (Tr 66.)

On January 11, Richard Christopherson—the Union’s president, assistant business agent, and a union organizer—went to Coleman’s jobsite. Christopherson spoke to Leiser, who had been previously described to him by Coleman, about the Company’s becoming a signatory to the Union’s contract. Christopherson told Leiser that the Union could supply quality ironworkers. Leiser complained about an earlier attempt to work with a union in a different state and stated that he was not interested in working with the Union. Christopherson then left the job site. (D&O 16-17, 66-67, 339-40, CPX 2, 3.)

On January 20, 2005, Coleman had lunch at a local restaurant with Leiser and approximately four other employees. (D&O 1, 13; Tr 68.) After lunch, Coleman told Leiser, “[T]his is where our relationship goes south.” (D&O 1, 13; Tr 70-71, GCX 11, 12 p. 13.) Coleman then handed out union cards and told Leiser, “I’m an organizer, man.” (D&O 1, 13; Tr 70-71, GCX 12 p. 13.) Leiser responded, “See ya.” (D&O 1, 13; Tr 70, GCX 12 p. 13.) Coleman asked, “I’m fired?” (D&O 1, 13; GCX 12 p. 13.) Leiser replied, “Yep. Enjoy, [g]ood while it lasted.” (D&O 1, 13; GCX 12 p. 13.) After discussing Coleman’s union background, Leiser said, “You got a guy at the back office that sent you out here? Let him know that he fucked up any chance he ever [h]ad of getting me on there.” (GCX 12 p. 14.) Coleman replied, “We haven’t done anything to you.” (GCX 12 p. 14.) Leiser then said, “It’s in front of me right there, fucking low, in my book that’s treason.” (GCX 12 p. 14.) Coleman then returned separately to the jobsite to retrieve his tools and return Leiser’s hardhat. (D&O 1, 13; Tr 70-72.)

Upon returning to the jobsite, Coleman spoke to coworker Jim Wills, who complimented Coleman for having worked very hard. (GCX 12 p. 17.) Coleman spoke with Leiser, asking, “[S]o [I have to] leave the job?” (GCX 12 p. 18.) Leiser replied, “[Y]ou have to, I mean fuck you already got a job . . . I don’t know why you guys can’t just leave me the hell alone. Live and let live.” (GCX 12 p.

18.) Leiser further noted, “I thought you was a pretty decent fuckin guy, you know you come out here and you work . . . [a]nd then you come out here and you lied to me, you lied to me in the beginning, I build relationships on trust.” (GCX 12 pp.

18- 19.) Coleman then asked, “[If] I walk in and say hey [Leiser] I’m a union ironworker why don’t you give me a shot, I’ll work for whatever you want to pay me, just give me a shot and see what you think. Would you have hired me?”

(GCX 12 p. 19.) Leiser replied, “No.” (GCX 12 p. 19.)

C. The Company Informs Union Organizer Richard Christopherson that the Company Has Plenty of Work and that His Status as a Union Organizer Would Adversely Affect His Chances of the Company’s Hiring Him

Following Coleman’s discharge, the Company advertised for ironworkers in late January and early February. (D&O 5; GCX 14, 21(a).) On February 1, 2005, Union Organizer Richard Christopherson telephoned the Company’s office and spoke to S. Leiser. (D&O 11; Tr 19-23, GCX 3, 4.) In a conversation that Christopherson recorded, he informed S. Leiser that he was calling about an advertisement for ironworkers. (D&O 11; GCX 3, 4 p.1.) S. Leiser confirmed that the Company was taking applications and noted that it had “quite a bit of work.” (D&O 11; GCX 4 pp. 1-2.) After Christopherson supplied a Kansas City address and asked her to send an application for his “buddy,” S. Leiser asked why they had

not gone through the Union. (D&O 11; GCX 4 p.2) Christopherson replied, “I am in the Union, I’m a union organizer, would that make a difference?” (D&O 11; GCX 4 p.2.) S. Leiser responded, “[S]ure it would,” however, she agreed to send the applications. (D&O 11; GCX 4 p.2.)

D. Union Organizers Richard Christopherson and Michael Bright Apply to the Company for Jobs; the Company Does Not Hire Them

As of February 21, Union Organizer Christopherson had not received the applications he had requested 3 weeks earlier from the Company. (D&O 11; Tr 23-26.) He called the Company’s office and spoke to secretary Tracy Thompson. (D&O 2, 11; Tr 23-26.) Christopherson explained that he had not received the applications requested earlier and asked if the Company was still hiring. (D&O 2, 11; Tr 23-24, GCX 6.) After Thompson confirmed that the advertised positions were still available, Christopherson explained that he and Bright were both union organizers and that they still wanted to apply for work. (D&O 2, 11; GCX 6.) Shortly thereafter, Christopherson and Bright received the applications. They returned the applications on February 24. (D&O 11; Tr 24-26, GCX 7.)

Both Christopherson and Bright applied for ironworker positions. (D&O 11; GCX 7, 9.) Christopherson’s application listed an ironworker apprenticeship, 24 years of ironwork experience, various certifications, and his current position as a

union organizer. (D&O 11; Tr 26-30, GCX 7, 8.) Similarly, Bright's application listed his ironworker apprenticeship, 28 years of ironwork experience, various certifications, and his current position as the Union's business agent and organizer. (D&O 11; Tr 45-50, GCX 7, 9.)

The Company never contacted Christopherson or Bright. (D&O 11; Tr 52.) Between February 27 and December 21, 2005, the Company hired approximately 13 employees, with approximately 9 hired between June and December. (D&O 5; GCX 30.)

E. The Company Interrogates Applicant Travis Williams About His Union Affiliation; the Company Hires Williams without Knowing that He is a Union Member; the Company Threatens and Suspends Williams After He Solicits For the Union

In February 2005, union member Travis Williams went to a company job site where he learned from employee Wills that the Company was hiring. After secretary Thompson confirmed that the Company was hiring, Williams submitted an application for an ironworker position that listed three previous nonunion employers and described himself as self-employed. (D&O 13; Tr 106-12, GCX 15.) On his application Williams listed his numerous skills, including welding and electrical work, but excluded ironworking skills and an apprenticeship program that would have revealed his union affiliation. (D&O 13; Tr 107-12, GCX 15.)

When Williams did not hear from the Company, he called Thompson, who said that the Company was still hiring. Thereafter, Thompson called Williams and asked him to come in for an interview with Leiser. (D&O 13; Tr 112.)

On March 31, Williams met with Leiser at a jobsite. (D&O 13; Tr 113-15, GCX 16, 17.) After discussing Williams' welding experience, Leiser asked, "[Are] you affiliated with any [u]nions around here?" (D&O 13; GCX 17 pp. 1-3.) Williams replied, "No, no unions." (D&O 15; GCX 17 p.3.) Leiser told Williams that he would give him a "shot," and would contact him with the wage rate after talking to his wife. (D&O 12, 13; Tr 114-16, GCX 17 pp. 5-11.) The next day Williams accepted a job offer from Thompson. After taking a drug test, and a safety orientation class, Williams began working at a company jobsite on Thursday, April 7. He worked again on Friday, April 8. (D&O 1, 13; Tr 106, 116-20.)

During his lunch break on Monday, April 11, Williams put on a long-sleeved T-shirt that said "ironworkers" and his regular hardhat, which displayed several union stickers including one depicting a nonunion company as a rat with someone urinating on it. (D&O 12, 13; Tr 119-20, 122-23.) He informed coworker Brian Muting that he was a member of the Union and wanted to organize the Company. Muting declined Williams' offer to take a union authorization card.

(D&O 2, 12, 13; Tr 126.) Williams had a similar encounter with another coworker. (D&O 2, 12, 13; Tr 120, 126.)

Williams went back to his vehicle, put on a company hardhat, changed into his workshirt, and tried to return to work. (D&O 12, 13; Tr 120.) Muting stopped Williams and said that he, Muting, needed to call Leiser first to determine what Leiser, who was working on another job site, wanted to do. (D&O 12, 13; 121-22.) Muting also told Williams, “[Leiser] is probably going to do to you what he did to the last person.” (D&O 12, 13; Tr 120.)

Muting called Leiser and said, “They did it again. He’s a member of the [Union].” (D&O 12, 13; Tr 120-21.) After speaking to Leiser, Muting informed Williams that he should report the next morning to the job site where Leiser was working. (D&O 12, 13; 121.) Muting said that Leiser wanted to talk to Williams and handed him the phone. (D&O 2, 12, 13; Tr 121.) Leiser said, “You weaseled your way in, didn’t you? . . . That’s all right. I know how to take care of people like you. You just be on my job at 7 o’clock in the morning and don’t worry about what you’ll be doing. You’ll do what I tell you. You’ve got 15 minutes to get off that job.” (D&O 2, 12, 13; Tr 121.) Williams then left. (D&O 2, 12, 13; Tr 121-22.)

Williams, apprehensive about what Leiser would do, asked Coleman to

accompany him to the job site the following morning. (D&O 12; Tr 122.) On April 12, Williams and Coleman met at Leiser's jobsite at 6:30 a.m. Williams had his union hardhat on. (D&O 2, 12, 13; Tr 122-23.) Leiser and other employees arrived around 7 a.m. Williams told them he was a member of the Union and was there to help organize the Company. Williams offered them authorization cards and told Leiser he was ready to start working. (D&O 2, 12, 13; Tr 123-24.) Leiser said, "Well, the reason I want you here is to have a little chat." (D&O 2, 12, 13; Tr 124.) Leiser told Williams that he was asked to leave the jobsite the day before because "[I] didn't want [you] talking about any of that [u]nion bullshit to those guys and that there was a guy on that job that could—that probably would have killed [you]." (D&O 2, 12, 13-14; Tr 124.) Williams told Leiser he was there to work, but Leiser declined, stating, "[I am not] going to work [you] with . . . that sticker on [your] hardhat." (D&O 2, 12, 13-14; Tr 124.) An employee who was with Leiser joined in, saying "[W]hy don't we work the Union guy with [another employee] and see what the hell the Union guy[] can do." (Tr 124.) Leiser responded, "[I] don't work with liars. [I] don't run [my] business that way." (D&O 2, 12, 13-14; Tr 124.) Williams told Leiser he was going on strike and left the jobsite. (D&O 12, 13-14; Tr 124-28.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On February 28, 2007, the Board (Chairman Battista and Members Schaumber and Walsh) issued its Decision, finding, in agreement with the administrative law judge, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Coleman, suspending employee Williams, and refusing to hire applicants Christopherson and Bright because of their union membership and involvement in union activities. (D&O 6.)²

The Board also found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act by telling employees that it had discharged David Coleman and suspended Travis Williams because of their union affiliation and protected activities, telling employees that it would not hire applicants who are affiliated with the Union or who engage in union activity, telling applicant Richard Christopherson that his union membership and status as a union organizer would adversely affect his chances of the Company's hiring him, interrogating Williams about his union affiliation, and threatening Williams with

² On March 5, the Board issued a corrected order that added the missing signatures of Chairman Battista and Member Walsh. (Corrected order.)

retaliation and physical violence because of his union activities.³

Disagreeing with the administrative law judge, the Board (Member Walsh dissenting) found that the Company did not unlawfully prohibit Williams from wearing union logos at work or unlawfully discharge him. (D&O 3-4, 8-9.) Rather, the Board found, the Company demonstrated “special circumstances” overriding the employee’s right to wear union insignia, noting that the rat sticker was vulgar and obscene and stressing that the Company’s restriction was narrowly tailored to prohibit only the rat sticker. (D&O 3.) The Board further found that Williams was not unlawfully discharged, but, rather, went on “strike” rather than comply with the Company’s valid request to remove the vulgar union sticker. (D&O 4.)

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 6-7.) Affirmatively, the Board’s Order requires the Company to offer Coleman

³ Member Battista, dissenting, found that Leiser did not threaten Williams with physical violence. (D&O 7-8.)

reinstatement, to offer reinstatement to Bright and Christopherson, and to make them, as well as Williams, whole for any loss of earnings and benefits due to the discrimination against them. The Order also requires the Company to post copies of a remedial notice. (D&O 7.)

SUMMARY OF ARGUMENT

The Supreme Court concluded in *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995), that union members, including paid organizers, who seek employment with the intent of organizing an employer's work force—a process known as salting—are “employees” under the National Labor Relations Act and entitled to its protection. Here, the evidence fully supports the Board's finding that the Company discriminated against union “salts” by discharging employee David Coleman, threatening and suspending employee Travis Williams, and refusing to hire applicants Richard Christopherson and Michael Bright. Those findings are buttressed by several additional unfair labor practice violations that the Company does not contest before this Court.

The timing of Coleman's discharge, immediately after company owner Leiser observed his union activity and learned that he was a union salt, provided key evidence of the Company's unlawful motivation. Moreover, Leiser admitted,

in an uncontested violation, that he would not have hired Coleman if he had known of Coleman's union background, thus providing a nexus between Coleman's union activity and the underlying motive for the discharge. Given the timing and context of the discharge, the Board reasonably found that the Company's reliance on discrepancies in Coleman's job application was a pretext for his unlawful discharge.

Similarly, the timing of Williams' suspension, immediately after Leiser learned of his union activity and union affiliation, provided strong evidence that his suspension was unlawfully motivated. Moreover, the Company's separate violation of threatening Williams provided a nexus between Williams' union activity and the underlying motive for his suspension. The Board reasonably rejected the Company's claim that Leiser removed Williams from the job site to protect him from a fellow employee because Leiser never expressed this concern on the day he removed Williams from the job site. Rather, the next day Leiser admitted to Williams that he was ordered off the job site to stop him from talking about "that [u]nion bullshit" and threatened him with physical violence.

Applying the Board's standard in *FES*, 331 NLRB 9 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002), the Board reasonably found that the Company unlawfully refused to hire union applicants Christopherson and Bright. The evidence fully

supports the Board's finding that the Company was hiring, that the two men had the relevant experience, and that union animus contributed to the Company's refusal to hire them. The Company's animus is fully demonstrated by the numerous violations it committed.

There is no merit to the Company's claim that the Board's traditional make-whole remedy is inappropriate. The Court is without jurisdiction to consider the Company's claim that the Board's make-whole remedy constitutes a windfall because it was never presented to the Board.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER, WHICH REMEDY SEVERAL VIOLATIONS OF THE ACT

In its opening brief to this Court, the Company does not contest the Board's findings that company owners Leiser and S. Leiser committed numerous violations of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). Specifically, those violations included telling employees that the Company had discharged employee David Coleman and suspended employee Travis Williams because of their union affiliation and protected activities (D&O 6, 15), telling employees that the Company would not hire applicants who are affiliated with the Union or who engage in union activity (D&O 6, 15), telling applicant Richard Christopherson that his union membership and status as a union

organizer would adversely affect his chances of the Company's hiring him (D&O 7, 15), and coercively interrogating then-applicant Williams about his union affiliation (D&O 6, 15). The Company's failure to contest these findings constitutes a waiver of any defense and warrants summary enforcement of the Board's Order with respect to these violations. *See Pub. Serv. Co. of Oklahoma v. NLRB*, 318 F.3d 1177, 1178 n.3 (10th Cir. 2003).

Moreover, the uncontested violations "do not disappear by not being mentioned in [the Company's] brief. They remain, lending their aroma to the context in which the [remaining] issues are considered." *NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982). *Accord Midnight Rose Hotel & Casino, Inc.*, 198 Fed. Appx. 752, 758 (10th Cir. 2006), 2006 WL 2848103*5 (10th Cir. October 6, 2006) (unpublished), and cases cited; *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1036-37 (10th Cir. 2003).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S DETERMINATION THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT IN ITS TREATMENT OF DAVID COLEMAN AND TRAVIS WILLIAMS

A. Applicable Principles

Section 7 of the Act guarantees employees the right to "self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

...” 29 U.S.C. § 157. Section 8(a)(1) of the Act protects that right by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the[ir Section 7] rights” An employer therefore violates the Act when it engages in conduct that threatens, coerces, or otherwise interferes with its employees’ right to self-organization. *See NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1034 (10th Cir. 1996).

In determining whether an employer has violated Section 8(a)(1), the Board does not consider whether an employee actually felt intimidated, but only “whether the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of their rights under Section 7.” *Id.* *Accord Lear Siegler, Inc. v. NLRB*, 890 F.2d 1573, 1580 (10th Cir. 1989). In making that assessment, the Board is guided by the totality of the circumstances, “taking into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). “A reviewing court must recognize the Board’s competence in the first instance to judge the impact of utterances made in the context of the employer-

employee relationship.” *Id.* at 620. *Accord Webco Indus. v. NLRB*, 217 F.3d 1306, 1315-16 (10th Cir. 2000).

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate “in regard to . . . tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.” Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging or taking an adverse employment action against an employee for engaging in activities in support of union representation. *See MJ Metal Prod., Inc. v. NLRB*, 267 F.3d 1059, 1065 (10th Cir. 2001).⁴ When a union has its members seek employment with the intent of organizing the employer’s work force, a process known as salting, the union members are entitled to the same protection under the Act as any other employee who engages in union activity. *See NLRB v. Town & Country Elec.*, 516 U.S. 85, 87-88, 98 (1995).

The critical inquiry in cases where an employer takes adverse action against employees is whether the employer’s actions were motivated by union animus. *See MJ Metal Prod.*, 267 F.3d at 1065. The Board’s General Counsel has the

⁴ An employer who violates Section 8(a)(3) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

burden of persuasion to show that an employee's statutorily protected activity was a substantial or motivating factor in an employer's adverse employment action. Once the General Counsel satisfies that burden, the Board will find a violation of the Act unless the employer shows by a preponderance of the evidence, as an affirmative defense, that it would have taken the same action even in the absence of the protected activity. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), *approving Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). *Accord MJ Metal Prod.*, 267 F.3d at 1065.

The Board may infer unlawful motivation by relying on circumstantial evidence, as "proof of an employer's specific intent to discriminate is unnecessary and the evidence may provide a presumption of intent." *MJ Metal Prod.*, 267 F.3d at 1065. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 597, 602 (1941). Such circumstantial evidence includes "the employer's knowledge of the employee's union activities, the employer's commission of other unfair labor practices, the timing of the employer's action, and the credibility of its explanations of the reasons for the discharge." *MJ Metal Prod.*, 267 F.3d at 1065. *Accord Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1551 (10th Cir. 1996).

If the employer's stated reason for the action is pretextual—that is, it did not exist or was not in fact relied upon—then 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. Thus, the employer necessarily has failed to carry his burden. *Wright Line*, 251 NLRB at 1084. See also *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1034 (10th Cir. 2003) (“the [Board] may properly consider the ‘credibility of [the company’s] explanation of the reasons for the discharge,’ and ‘a flimsy or unsupported explanation may affirmatively suggest that the employer has seized upon a pretext to mask an antiunion motivation’”) (citations omitted).

The Board's findings of fact as well as its application of law to particular facts are “conclusive” if supported by “substantial evidence on the record considered as a whole.” Section 10(e) of the Act (29 U.S.C. § 160(e)). Accord *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Webco Indus.*, 217 F.3d at 1311. That standard gives the Board “‘the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that could satisfy a reasonable factfinder.’” *Webco Indus.*, 217 F.3d at 1311 (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998)). Accordingly, where, as here, the Board has made a “‘plausible inference from the evidence, [the Court] may not overturn its findings,

although if deciding the case de novo [the Court] might have made contrary findings.’’ *MJ Metal Prod.*, 267 F.3d at 1065 (quoting *Webco Indus.*, 217 F.3d at 1311). *Accord Universal Camera Corp.*, 340 U.S. at 488.

The Court’s review of the Board’s credibility determinations is even more limited. Because they are “particularly the province” of the Board, this Court will not substitute its judgment on a witness’s credibility ““absent extraordinary circumstances.’’ *Ready Mixed Concrete Co.*, 81 F.3d at 1551 (citation omitted).

B. The Company Discharged Employee Coleman for His Union Activity

1. Coleman’s union activity was a motivating factor for his discharge

Ample evidence supports the Board’s finding (D&O 1, 14) that the Company’s discharge of David Coleman was unlawfully motivated. Factors supporting the Board’s inference of unlawful motivation include Coleman’s overt union activity, Leiser’s knowledge of that activity, the timing of the discharge, and Leiser’s statements when discharging Coleman.

Coleman’s union activity was open and Leiser’s response was swift. It is undisputed that Coleman engaged in protected activity when he distributed union authorization cards in front of Leiser. Nor is there any dispute that Leiser heard and observed Coleman and thus was well aware of Coleman’s union activity. Leiser took swift retribution, immediately discharging Coleman. Leiser told

Coleman, “See ya.” (D&O 1, 13; Tr 70, GCX 12 p. 13). Then, in response to Coleman’s question, “I’m fired?” (D&O 1, 13; GCX 12 p. 13), Leiser stated, “Yep. Enjoy, [g]ood while it lasted.” (D&O 1, 13; GCX 12 p. 13.)

The timing of Coleman’s discharge provides strong evidence of unlawful motivation. *See M.J. Mechanical Serv., Inc.*, 324 NLRB 812, 813 (1997), (discharge found unlawful where employer discharged two employees after learning that they were unions salts), *enforced mem.* 172 F.3d 920 (D.C. Cir. 1998). As this Court has explained, “the timing of events is an important factor in determining the validity of an inference that there has been a discriminatory firing.” *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1302 (10th Cir. 1981). *See also MJ Metal Prod.*, 267 F.3d at 1066.

Moreover, though highly persuasive, the Board did not, as the Company claims (Br 19, 21), rely solely on timing to find unlawful motivation. Rather, the Board further relied on Leiser’s own unlawful and undisputed statement to Coleman that he would not have hired Coleman if he had known Coleman was a union organizer. In these circumstances, the Board was warranted in finding (D&O 14) a nexus between the protected activities and the motive underlying the adverse action, and the General Counsel amply demonstrated that Coleman’s union activity was a motivating factor for Leiser’s decision to discharge him. That

finding is further supported by the other uncontested violations the Company committed during the union's salting campaign.

2. The Company's asserted reason for discharging Coleman was a pretext

The Company claims (Br 9-10, 18-23) that it lawfully discharged Coleman because he falsified his employment application by listing two nonunion contractors that he had not worked for, and by failing to list his union work history.⁵ The Board reasonably found that Leiser's reliance on Coleman's job application actually was a pretext for discrimination.

The Company's reliance on Coleman's application as its asserted reason for Coleman's discharge is undermined by two undisputed facts. First, Coleman's discharge was contemporaneous with Leiser's learning of Coleman's status as an organizer and observing his union activity. There is no evidence that Leiser first reviewed Coleman's application. Instead, as the Board found (D&O 1), "as soon as Coleman told Leiser that he was a union organizer, Leiser terminated him." Second, shortly after discharging Coleman, Leiser told Coleman that he would not

⁵ The Company refers (Br 10, 20) to Coleman's answer on cross-examination—"that is correct"—to suggest that his application contains many misrepresentations and omissions. There is no evidence, however, that the application contains anything other than the above-stated inaccuracies and omissions. (Tr 103.)

have hired Coleman in the first place had he known that Coleman was a union ironworker. Leiser's concession constitutes both an independent violation of the Act and confirmation that Coleman's union status, not any discrepancy in his application, led Leiser to discharge him. Indeed, Leiser's profanity-laced encounter at lunch, that he considered organizing activity "treason" (GCX 12 p. 14), as well as Leiser's complaint that Coleman already had a job and that the Union should just "leave [him] the hell alone" (GCX 12 p. 18), leaves little doubt that when Leiser discharged Coleman he was focused solely on Coleman's union activity, not any discrepancies in Coleman's application.

Under these circumstances, the Board was warranted in finding (D&O 1), as it has in other similar cases, that the Company's "discharge of Coleman was not motivated by Coleman's falsification of his employment history." *See C.J. Taylor Co.*, 342 NLRB 997, 1001 (2004) ("upon learning of [employee's] organizational objectives, [employer] seized upon the falsification of his application as a pretext in order to justify his termination"); *Solvay Iron Works*, 341 NLRB 208, 208 (2004) (rejecting as pretextual the employer's defense that it refused to hire an applicant because of misrepresentation on application). *See also Interstate Builders*, 351 F.3d at 1034 (employer's comments demonstrated that employer discharged union salt for his organizing efforts, not for its asserted reason).

Moreover, since an employer must establish a legitimate reason that “persuasively shows” that the employee “would have been terminated even in the absence of his union activities” (*Id.* at 1035), the Board was not compelled, as the Company suggests (Br 19, 21), to simply accept at face value Leiser’s explanation for the discharge.

Since the Company’s reliance on Coleman’s job application was a pretext, the Board (D&O 1 n.21) reasonably declined to address whether Coleman’s discharge would have been lawful had the falsified job application been the real reason for the discharge.⁶ Nevertheless, the Company’s suggestion (Br 19-20) that Coleman’s application left him untrustworthy to his fellow employees rings hollow. There is no evidence that any fellow employees knew the application contained discrepancies, and they had no reason to distrust an employee who was

⁶ See *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.2d 1110, 1112-13 (7th Cir. 2002) (Br 21) (finding that union salt can lie if the lie “concerns merely his status as a salt, union organizer, or union supporter and not his qualifications for the job,” and noting that the Board had found discharge of salt lawful where the employee had misrepresented his driving record in a manner that would have otherwise precluded employment).

well qualified for his position and performing well. As the Board found (D&O 14), “it is undisputed that [Coleman] was praised for doing good work by Leiser.” Thus, Leiser complimented Coleman for “outwork[ing]” him (Tr 65), and for “doing great” (Tr 66). In addition, a foreman informed Coleman that Leiser thought Coleman had a lot of potential and wanted to personally train him (Tr 66).

Likewise, the Company’s contention (Br 22-23), that the Board should have excused its unlawful discharge of Coleman because Coleman sought to provoke his own discharge, is utterly devoid of merit. The Company’s argument amounts to rank speculation about Coleman’s motivation. In any event, regardless of Coleman’s intent, it would not deprive him of the Act’s protection. *See M.J. Mechanical Services*, 324 NLRB at 813. As the Seventh Circuit explained in *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.2d 1110, 1112 (2002) (Br 22-23), whether “the purpose of salting is . . . to organize . . . [or] to precipitate the commission of unfair labor practices by startled employers . . . is neither here nor there, as the Supreme Court has made clear that the Labor Board can condone salting and the Board has done so.”

There is also no merit to the Company’s claim (Br 10, 30) that Coleman declined a subsequent offer to return to work. The Board specifically credited Coleman’s denial (D&O 13; Tr 246-47) over Leiser’s claim (D&O 13; Tr 178-79)

that he had subsequently offered Coleman the opportunity to return to work. The Company has offered no extraordinary circumstances that would warrant reversal of that credibility determination. In any event, the fact that the Company might have offered to reinstate Coleman to his former position, does not speak to the relevant Board finding that Coleman was unlawfully discharged in the first place.

C. The Company Threatened Employee Williams for His Union Activity, Suspended Williams, And Threatened Him With Physical Violence

The Board reasonably found (D&O 12) that on April 11, company owner Leiser unlawfully threatened employee Travis Williams with reprisals and suspended him, and that the following day Leiser threatened Williams with physical violence.

There is no dispute that Williams engaged in protected union activity on April 11 when he informed coworker Muting that he was a member of the Union and offered him and another coworker authorization cards. Nor is there any dispute that Leiser, informed by Muting, was well aware of Williams' status as a union organizer. Indeed, on April 11, immediately after Leiser learned of Williams' union activity, an admittedly angry and yelling Leiser (Br 10-11, 24) told Williams in a phone conversation that Williams had "weaseled" his way in and that Leiser knew "how to take care of people like [him]." (D&O 2, 12, 13; Tr

121, 186.) After telling Williams to meet him the next day, Leiser ordered Williams to immediately leave the jobsite. (D&O 2, 12, 13; Tr 121.)

As the Board found (D&O 15), Leiser's statements and actions would reasonably lead Williams to believe that they were linked to his union activity and that he faced reprisals for such activity. Indeed, Williams asked Coleman to accompany him when he met with Leiser the next day.

Ample evidence also supports the Board's finding (D&O 14) that the Company was unlawfully motivated when it suspended Williams on April 11 by ordering him off the jobsite. Factors supporting the Board's inference of unlawful motivation include Williams' union activity, the Company's knowledge of his union activity, the timing of the suspension, and statements made to Williams when he was suspended. Leiser's swift retribution against Williams, immediately ordering him off the job site after learning of his union activity, provides strong evidence of unlawful motivation. Moreover, Leiser's concurrent threat—which constitutes an independent violation of the Act—that, “I know how to take care of people like you” (D&O 2, 12, 13; Tr 121), leaves little doubt that the suspension was connected to Williams' protected activity. That finding is further supported by the Company's commission of other unfair labor practices it does not contest before this Court.

The Board also reasonably found (D&O 2, 12, 13-14) that Leiser's statement to Williams the day after he ordered Williams off the jobsite, that "[I] didn't want [you] talking about any of that [u]nion bullshit to those guys . . . there was a guy on that job that could—that probably would have killed [you]" (D&O 2, 12, 13-14; Tr 124), would reasonably lead Williams to believe that Leiser was threatening him with physical violence for having engaged in union activity. That conclusion is particularly appropriate given, as the Board found (D&O 2; Tr 121), that the comment came one day after Leiser told Williams that he knew "how to take of people like [Williams]."

The Company (Br 29-30) simply misstates the record evidence by claiming that Williams was not suspended on April 11, but voluntarily left the jobsite. That claim is contrary to the Company's admission (Br 10-12, 24) that on April 11 Leiser ordered Williams to leave the job site. Moreover, the Company's claim erroneously intertwines the events of April 11, when Williams was ordered to leave the jobsite, and April 12, when Williams refused to remove his hardhat and voluntarily left the site.

Nor is there any record support for the Company's claim (Br 25) that it did not suspend Williams because "he was going to be paid for the travel to [Leiser's jobsite.]" Although Leiser testified (Tr 185-86) to his complaint that Williams cost

him time and money, the Company offered no evidence that Williams was paid for his travel time or was told that such payment would be made. In any event, any such payment would not detract from the finding that he was unlawfully removed from the jobsite due to his union activity.

The Board expressly rejected the Company's claim (Br 10-12, 24) that Leiser removed Williams from the jobsite to "promote safety and a non-hostile environment." No such concern was expressed to Williams at the time of his suspension. Instead, Leiser threatened Williams, saying, "I know how to take care of people like you." (D&O 2, 12, 13; Tr 121.)⁷

Moreover, the next day Leiser threatened Williams with physical violence, responding to Williams' question about why he had been suspended by saying, "[T]here was a guy on that job that could—that probably would have killed [you]."

⁷ Although the Board found that Williams was not unlawfully terminated on April 12 when Williams refused to remove a union hard that contained a disparaging message, there is no inconsistency with the Board's finding that Williams was unlawfully suspended on April 11. The record contains no support for the Company's bald assertion (Br 8) that Williams' hardhat contributed to Leiser's decision to suspend Williams the previous day. The men were working at different sites and there is no evidence that anyone had informed Leiser about the hardhat prior to Williams' suspension.

(D&O 2.) The standard for determining whether a threat occurred is an objective, reasonable one. Thus, Leiser’s failure to explain the allegedly hostile environment, led the Board to find (D&O 2) that “a reasonable employee would not interpret Leiser’s statement as merely explaining a benevolent attempt to remove Williams from harm’s way.” To the contrary, Leiser’s statements justified the Board’s finding (D&O 1) that “to a reasonable employee in Williams’ situation, Leiser’s words would convey that Williams’ union activity could lead to physical harm.”

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO HIRE APPLICANTS RICHARD CHRISTOPHERSON AND MICHAEL BRIGHT BECAUSE OF THEIR UNION AFFILIATION

A. An Employer Violates the Act by Refusing To Hire an Applicant Because of the Applicant’s Union Activities

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by refusing to hire applicants because of their union sentiments, membership, or activities. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941); *Cobb Mech. Contractors, Inc. v. NLRB*, 295 F.3d 1370, 1375 (D.C. Cir. 2002). Since, as shown above, union salts are entitled to protection under the Act, an employer violates the Act if it refuses to hire such applicants simply because of their union affiliation. *See NLRB v. Town & Country Elec.*, 516

U.S. 85, 87-88, 98 (1995); *Willmar Elec. Serv., Inc. v. NLRB*, 968 F.2d 1327, 1329-31 (D.C. Cir. 1992).

The Board's familiar burden-shifting analysis developed for discriminatory discharge cases (see above pp. 24-26) is also applied in discriminatory refusal-to-hire cases. Since such cases raise issues not found in the typical discriminatory discharge case, the Board in *FES*, 331 NLRB 9 (2000), *enforced*, 301 F.3d 83 (3d Cir. 2002), reconsidered and clarified the elements required to establish a discriminatory refusal to hire.

To establish an unlawful refusal to hire, the General Counsel must show the following: (1) that the employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) that union animus contributed to the decision not to hire the applicants. *Id.* at 12-13. *See Interstate Builders*, 351 F.3d at 1035-36.

In reviewing the Board's decision (as shown above pp. 19-20), the Court gives substantial deference to the Board's findings of fact and credibility determinations, upholding its factual determinations if they are supported by substantial evidence on the record as a whole, and upholding its credibility findings absent extraordinary circumstances.

B. The Company Refused to Hire Applicants Christopherson and Bright

1. The Board reasonably found that the factors required to establish a refusal-to-hire violation were present

Ample evidence supports the Board's finding that the Company refused to hire Christopherson and Bright because of their union affiliation. The evidence shows that the necessary factors for finding a refusal-to-hire violation are present.

First, the Company does not dispute that it was hiring when it received Christopherson's and Bright's applications toward the end of February 2005. Indeed, they filed applications based on company advertisements, and the Company twice confirmed the need for employees in phone conversations with Christopherson. As the Board found (D&O 15), "[S.] Leiser told Christopherson that [the Company] was looking for welding experience and [Secretary Thompson] told Christopherson that they were still looking to fill the [advertised] positions."

Second, Christopherson and Bright were qualified applicants. As the Board found (D&O 15), "[b]oth Christopherson and Bright have completed their 3 year apprenticeship and have over 20 years of ironworker experience and have welding and other certifications." Indeed, as the Board further found (D&O 15), they appeared more qualified on the basis of their claimed experience than any other

applicant hired by the Company between December 2004 and the date of the hearing in early 2006.

Third, as the Board found (D&O 15), the Company's union animus is amply demonstrated by the numerous violations the Leisers committed, many of which are not contested before this Court. Indeed, as the Company concedes (Br 25), Leiser admitted that he would not hire a union member. Moreover, Leiser's swift retribution against Coleman and Williams after learning that they were union salts, his express and unlawful statement to Coleman that the Company would not have hired him if his union status were known, Leiser's interrogation of then-applicant Williams about his union affiliation, and S. Leiser's unlawful statement to Christopherson that his known union status would adversely effect his ability to get hired, virtually compels an inference that union animus was the reason for the Company's not hiring known union organizers Christopherson and Bright.

The Board's finding of animus is not undermined by the Company's claim (Br 7, 25) that it had previously hired employees who were also union members. As the Board explained (D&O 15), these instances "all involved other unions or tenuous or dated relationships." For example, S. Leiser claimed to have hired a union member (Tr 287), but she later acknowledged that the application made no reference to a union apprenticeship and that she did not know whether the

references listed were union employers (Tr 320-21). S. Leiser also referred to an employee who had a union welding card. The card, however, was more than 5 years old and at the time of the employee's hire, he was apparently working for a large nonunion employer. (Tr 322-23.) The Company did not, as the Board found (D&O 15), "cite an instance wherein it hired a member or affiliate of the Union in this case wherein the Union was attempting to organize its employees."

Nor is the Board's finding of animus undermined by the Company's apparent job offer (Br 14-15, 25-26) in June, 2005 to five union applicants who had applied in May. An employer does not have to discriminate against all union members before the Board can find unlawful motivation. *MJ Metal Prod.*, 267 F.3d at 1065. Moreover, as the Company acknowledged in its brief in support of exceptions to the Board (Br 19 n.2, Tr 284-85), the apparent offer came only after it had received at least one unfair labor practice charge filed by the Union claiming, among other things, that the Company had unlawfully refused to hire all seven union applicants, including Christopherson and Bright. (CPX 1.)

Accordingly, when the Company allegedly made the June offer, it was well aware that its conduct toward all seven union salts was under scrutiny.⁸

2. The Company has failed to show that it would have refused to hire Christopherson and Bright absent their union status

As an initial matter, there is no merit to the Company's contention (Br 26-27) that Christopherson and Bright were not "bona fide applicants." Their applications listed over 2 decades of experience and extensive training. Moreover, both Christopherson (Tr 30) and Bright (Tr 47) expressed a willingness and ability to work for the Company. The Company's reliance on *Hartman Bros. Heating & Air-Conditioning*, 332 NLRB 1343 (2000), *enforced* 280 F.3d 1110 (7th Cir. 2002) (Br 27), to support its claim that Christopherson and Bright were not bona fide

⁸ The initial charge, filed on June 7, was withdrawn by the Union, not dismissed by the Board, as represented by the Company's brief. (Br 26 n.10, CPX 1, Tr 284.) S. Leiser testified (Tr 284-85) that the Company offered the five May union applicants jobs prior to receiving the Union's second charge. The second charge, filed on June 20, continued, however, to assert that the Company had unlawfully refused to hire all seven union applicants. (GCX 1(a).) The only company-documented evidence regarding a union application is a memo dated June 30, after the filing of the second charge. That memo noted that "suspected" union plant Ben Morgan had contacted the Company to inform them that he was working and not interested in a current job, but would like to have his application kept on file. (GCX 19.)

applicants is disingenuous at best. As the Company recognizes in a footnote (Br 27 n.11), the Board majority expressly stated that it did not rely on the judge's conclusion that applicant and union organizer Kereszturi was not a bona fide applicant. Rather, the Board held that the employer had proven that it sought an employee with less experience than Kereszturi and that the organizer-applicant was overqualified with 26 years experience. 332 NLRB at 1344 n.9.

The Company's claim that it met its burden of proof is belied by the evidence. Contrary to the Company's claim that it had already filled the positions when it received their applications (Br 12-13, 27-28), Christopherson and Bright submitted their applications on approximately February 24, prior to the Company's hiring employees on February 27 (Steve Kozubek), March 3 (Todd Skinner), and March 17 (David Byrd) (GCX 30). The Company hired three others in April, including Jeffrey Barnum (April 4), Travis Williams (April 4) and Joe Taylor (April 28), and approximately five other employees between July and September. (GCX 30.) Moreover, despite seeking experienced welders, Leiser hired Williams over known union applicants Christopherson and Bright, notwithstanding the

absence of relevant experience on Williams' application. (GCX 17 p.5, Tr 215-16.)⁹

Finally, there is no merit to the Company's repeated assertion (Br 5, 27) that an employer must either hire union organizers who apply or risk committing an unfair labor practice. Quite simply, an employer can avoid an unfair labor practice violation by applying nondiscriminatory hiring criteria. Thus, for example, in *Hartman Bros. Heating & Air-Conditioning*, 332 NLRB 1343 (2000), enforced 280 F.3d 1110 (7th Cir. 2002) (Br 27), the Board held that the employer had established a nondiscriminatory reason for declining to hire an experienced union organizer when it proved that it preferred applicants with less experience who were easier to train. Thus, the Board dismissed that part of the complaint alleging that

⁹ The Company does not challenge the Board's rejecting (D&O 15), on credibility grounds, S. Leiser's claim that applications were valid for only 30 to 60 days. The only reference in the Company's brief to such a policy is in its Facts section (Br 13). The Company has not argued in its brief that the applications were no longer valid; therefore, this issue is not before this Court. *See* Fed. R. App. Proc. 28(a)(9) (party must raise contentions and reasons for them with citations to authority, citations to the record, and statement of the applicable standard of review in the argument section of the brief); *Cf. Transamerica Leasing, Inc. v. Inst. of London Underwriters*, 430 F.3d 1326, 1331 n.4 (11th Cir. 2005) (deeming waived an issue raised in the appellant's "Statement of the Issues" but not argued in the text of its brief). In any event, the Company has shown no extraordinary reason, let alone any reason, that would warrant reversal of that credibility determination.

the employer failed to hire applicant-organizer Kereszturi. 332 NLRB at 1344 n.9. *See also Int'l Union of Operating Engineers, Local 150 v. NLRB*, 325 F.3d 818 (7th Cir. 2003) (employer had valid nondiscriminatory reason for declining to hire union applicants).

IV. THE BOARD'S REMEDIAL ORDER IS WITHIN THE BOARD'S BROAD DISCRETION

The Board's Order consists of a standard remedial order, requiring the Company to offer Coleman reinstatement, offer reinstatement to Bright and Christopherson, and to make them, as well as Williams, whole for any loss of earnings and benefits due to the discrimination against them. (D&O 6-7.) The Company argues (Br 10, 29-30) that the Board erred by failing to find that the backpay period for Coleman and Williams ended on April 12 because they declined an offer to work. The Company also claims (Br 30) that "[a]ny backpay award constitutes a windfall and is not required or justified." The first claim is premature and the second claim is not properly before this Court.

The Company's claim regarding the backpay period is premature because the Board acted (D&O 3) in accordance with its usual practice, long approved by the courts, of "order[ing] the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the

amounts of backpay, if any, due” the discriminatees. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902 (1984). See *Nathanson, Trustee In Bankruptcy v. NLRB*, 344 U.S. 25, 29-30 (1952) (“Once an enforcement order issues the Board must work out the details of the back pay that is due and the reinstatement of employees that has been directed.”).

As shown above, contrary to the Company’s claim, the credited evidence shows that Leiser did not offer to reinstate Coleman on April 12. Thus, the amount of backpay, if any, will need to be calculated in a compliance proceeding. As to the backpay calculations for Williams, the Board, in agreement with the Company, found that Williams was not unlawfully discharged on April 12. Accordingly, the Board’s remedy properly requires the Company to make Williams whole for any loss of earnings due to his unlawful suspension on April 11, with the particular details left to compliance.

The Company’s bald assertion (Br 30) that the Board’s Order constitutes a “windfall” is not properly before this Court because it was never presented to the

Board, as required by Section 10(e) of the Act (29 U.S.C. § 160(e)).¹⁰ Section 10(e) is “[a] limitation which Congress has placed upon the power of courts to review orders of the Labor Board” *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 45, 666 (1982) (“Court of Appeals lacks jurisdiction to review objections that were not urged before the Board”).

Here, the Company filed exceptions to the administrative law judge’s recommended remedy that required the Company to make all of the discriminatees whole, to offer instatement to Christopherson and Bright, and to offer reinstatement to Coleman. (Exceptions 33-37.) The exceptions, however, offered no indication to the Board of the basis for the objection, let alone the grounds it now claims—that the Board’s remedial order was improper for policy reasons and/or based on the particular facts of this case. To the contrary, the only

¹⁰ That section provides, in relevant part, that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e).

argument it offered in its brief in support of exceptions was the claim that the backpay period for Coleman and Williams ended on April 12. The Company's failure to raise any windfall claim before the Board precludes this Court from considering it. *See NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 460 (1st Cir. 2005) (employer's general objection to Board's remedy "is wholly insufficient to put the Board on notice of the specific arguments that [the employer] now attempts to advance"), and cases cited; *NLRB v. Monson Trucking Inc.*, 204 F.3d 822, 825-28 (8th Cir. 2000).

In any event, the Company's claim that the discriminatees are not owed a make whole remedy because they are salts is without merit. Contrary to the Company's contention (Br 28), the Board's remedy is consistent with Section 10(c) of the Act (29 U.S.C. § 160(c)), which "broad[ly] command[s] . . . that upon finding that an unfair labor practice has been committed, the Board 'shall' order the violator to 'take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies' of the Act." *NLRB v. J.H. Rutter-Rex Mfg. Co., Inc.*, 396 U.S. 258, 262 (1969) (quoting Section 10(c)). The legitimacy of reinstatement with backpay as a remedy for an unlawful discharge or refusal to hire is "beyond dispute." *Id.* at 263. Indeed, since the Supreme Court's decision in *Town & Country*, the Board has continued to hold, with court approval,

that a union salt is protected under the Act, and is therefore eligible for backpay.

See Tualatin Elec., Inc. v. NLRB, 253 F.3d 714, 171 (D.C. Cir. 2001); *NLRB v.*

Ferguson Electric Co., Inc., 242 F.3d 426, 436 (2d Cir. 2001).

CONCLUSION

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

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ORAL ARGUMENT STATEMENT

The Board believes that this case involves the application of well-settled principles to straightforward and undisputed facts and that argument would therefore not be of material assistance to the Court. However, If the Court believes that argument is necessary, the Board requests that it be permitted to participate.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEISER CONSTRUCTION, LLC	*
	*
Petitioners/Cross-Respondents	* Nos. 07-9519,
	* 07-9525
	*
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 17-CA-23177
	*
Respondent/Cross-Petitioner	*
	*
and	*
	*
IRON WORKERS LOCAL UNION NO. 10,	*
AFFILIATED WITH INTERNATIONAL	*
ASSOCIATION OF BRIDGE, STRUCTURAL,	*
ORNAMENTAL & REINFORCING IRON	*
WORKERS, AFL-CIO	*
	*
Intervenor	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,137 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 12th day of September, 2007

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Intervenor

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the Board's brief in the
above-captioned case have this day been served by first-class mail upon counsel at
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