

Nos. 08-1578-ag, 08-1807-ag

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

**THE LORGE SCHOOL**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of the Lorge School (“the School”) to review, and the cross-application of the National Labor Relations Board to enforce, a Board order against the School. The Board had jurisdiction over the unfair-labor-practice proceedings below under Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)). The Decision and Order, issued on February 19, 2008, and reported at 352 NLRB

No. 17 (D&O 1-10),<sup>1</sup> is a final order with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

The School filed a petition for review of the Board's Order on April 3, 2008, and the Board filed a cross-application for enforcement of its Order on April 15. Both were timely filed, as the Act imposes no time limit for such filings. The Court has jurisdiction over the School's petition and the Board's cross-application pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices at issue in this case occurred in New York, New York.

### **STATEMENT OF THE ISSUE PRESENTED**

The Board and the School agree on the basic law applicable to this case: an employer commits an unfair labor practice if it discharges a supervisor for refusing to interfere with employees' rights under the Act. The issue in this case is whether the Board reasonably found, based on substantial evidence in the record, that the School committed such an unfair labor practice by discharging Cooperman for

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<sup>1</sup> Because counsel for the School did not consecutively number the pages of the Joint Appendix, record cites in this brief will be to the original record pages. "D&O" is the Board's Decision and Order, "Tr" will refer to the transcript of the hearing before the administrative law judge, and General Counsel's and Respondent's Exhibits, respectively, will be cited as "GCX" and "RX." The Board has consecutively paginated its Supplemental Appendix, filed with this Brief, but will cite the evidence therein by the original record references just described, for consistency's sake.

Where applicable, references preceding a semicolon are to the Board's findings; those following, to the supporting evidence.

refusing to help rid the School of two union representatives because of their protected activities.

### **STATEMENT OF THE CASE**

This unfair-labor-practice case came before the Board on a complaint issued by the Board's General Counsel, pursuant to charges filed by Linda Cooperman. Following a hearing, an administrative law judge issued a decision finding that the School's discharge of Cooperman had violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (D&O 8.) The School filed exceptions to the judge's decision and, on February 19, 2008, the Board (Members Liebman and Schaumber)<sup>2</sup> issued a Decision and Order, affirming the judge's finding of a Section 8(a)(1) violation.<sup>3</sup> (D&O 1-2.)

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<sup>2</sup> Members Liebman and Schaumber constitute a quorum of a three-member group of the Board, to which the Board delegated its power on December 31, 2007. (D&O 1 n.4.)

<sup>3</sup> The Board amended the judge's remedy to require reinstatement. The School does not contest the remedy before this Court.

## **STATEMENT OF THE FACTS**

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

#### **A. Background**

The Lorge School (“the School”) is a publicly funded private school serving students with emotional, behavioral, and learning issues. (D&O 3; Tr 110-11, 134-35.) Located in Manhattan, the school has students ranging in age from kindergarten through high school. (D&O 3; Tr 22, 153.) In addition to teachers and their assistants, who are supervised by an instructional supervisor, the School employs social workers, supervised by a clinical supervisor, and a security/crisis-intervention staff, supervised by a dean and an assistant dean of students. (D&O 3; Tr 21-22.) At the head of the entire School is the executive director, who reports directly to the School’s board of trustees. (D&O 3; Tr 21, 25.)

Since 2000, the United Federation of Teachers (“the Union”) has represented the School’s non-administrative employees. (D&O 3; Tr 27-28.) The parties had a collective-bargaining agreement effective July 1, 2005 through June 30, 2008. (D&O 4; Tr 27, GCX 3.) In 2006, the Union’s chapter leader at the School was teacher Christopher Piccigallo, and the School’s union delegate was teacher James Rouse. (D&O 4; Tr 266, 428-29.) Both teachers had participated in the Union’s organizing campaign and had been active in contract negotiations and grievance processing in the years since. (D&O 4; Tr 266-70, 429-30.) During their tenure as

teachers at the School – 10 years for Rouse and 6 for Piccigallo – the 2 union leaders had received only positive appraisals of their job performance. (D&O 4; Tr 90, 125-27.)

**B. New Management Takes Control of the School in the Shadow of a State Report Criticizing the School's Programs; Kasner and Cooperman Disagree on a Strategy for Improvement**

During the summer of 2006, the School experienced a significant turnover in management. First, Deborah Kasner, a social worker by training who lacked administrative certification to supervise teachers, took over as executive director. (D&O 3; Tr 20-21, 108.) Kasner had been the School's clinical supervisor as well as its contract administrator (of the collective-bargaining agreement), and David Osman replaced her in those roles. (D&O 3; Tr 26, 28, 498.) Kasner hired Linda Cooperman, who had applied unsuccessfully for the executive-director position herself, to serve as instructional supervisor beginning on July 10, 2006. (D&O 3; Tr 26, 29, 154.) Cooperman, a teacher by training who had administrative certification and experience, was not only to supervise teachers but, more generally, to oversee academics at the School. (D&O 3; Tr 36, 114, 153.) Kasner had Dr. Elaine Dawes, the retiring instructional supervisor, overlap for two weeks with Cooperman to help orient Cooperman to the job. (D&O 3; Tr 37, 159, 410, 412.) The School's remaining management staff remained unchanged: Shawn

Bradley was dean of students, and Cassandra Pierre was assistant dean of students. (D&O 3; Tr 21.)

That same summer, the New York State Department of Education completed an audit of the School and issued a report (“the State Report”) that was very critical of the School’s programs, noting several areas of noncompliance with state regulations. (D&O 3; Tr 35-36, 129, 161.) The School’s new management team immediately faced the challenge of rectifying the problems the report had identified. (D&O 3; Tr 130, 159-60.) If it failed, the state could potentially close the School. (D&O 3; Tr 129-30.)

In response to the State Report, Cooperman developed a plan, shortly after arriving at the School, to “departmentalize” the academic program for the intermediate and high-school aged students. Under her plan, the students would take classes from teachers specializing in particular subjects, rather than stay in one class where the teacher taught all of the subjects. (D&O 5; Tr 45, 121, 204-05.) Cooperman proposed to implement the departmentalization at the beginning of the new school year in September 2006. (Tr 204.) Among other benefits, she believed that the plan would enable her more effectively to supervise and improve the job performance of the School’s many relatively inexperienced teachers. (Tr 47, 204, 212-14.) Dawes, however, was skeptical that the plan could work at the School, given the special needs of its students, and Kasner shared some of her concerns.

(D&O 5; Tr 45, 104, 198, 413-14.) By Cooperman's second week at the School, Kasner had decided not to allow implementation of the departmentalization plan that coming September. (D&O 5; Tr 104-05, 198, 606.) Cooperman, however, insisted that the plan was the best way for her to perform her job. (Tr 47, 221.)

### **C. Cooperman Refuses Kasner's Direction To Help Rid the School of Rouse and Piccigallo; Kasner Fires Cooperman**

Within the first few days of Cooperman's tenure, she had a meeting with Kasner to discuss the different teachers Cooperman would be supervising. (D&O 4; Tr 169, 591.) During the meeting, Kasner received a phone call from a teaching assistant at the school. (D&O 4; Tr 170, 174.) After getting off the phone, Kasner told Cooperman that the assistant was upset because Rouse had told her that she would lose her job if she did not get certified before the end of the year. (D&O 4; Tr 176.) Kasner told Cooperman that Rouse was acting outside of his authority and warned Cooperman not to trust Rouse, asserting that he wanted their jobs, that he would try to manipulate Cooperman, and that he had created a lot of trouble for the School. (D&O 4; Tr 168, 174-75, 228.) She advised Cooperman that Rouse required close supervision. (D&O 4; Tr 90.) During the same meeting, Kasner told Cooperman that she thought Chris Piccigallo was an average teacher and was fulfilling his ambitions to be a school administrator by serving in a leadership role with the Union. (D&O 4; Tr 177.)

The following week, Kasner summoned Cooperman to her office and said, “I want you to make it difficult for James [Rouse] and Chris [Piccigallo] to stay here.” (D&O 4; Tr 178, 229.) Cooperman asked if Kasner wanted her to create a “hostile work environment” for the two teachers and Kasner replied in the affirmative. (D&O 4; Tr 178, 229.) Cooperman protested she could not do that because it would impair her efforts, as a new supervisor, to build relationships with the teachers she was to supervise. (D&O 4; Tr 178-79.) Kasner responded that Cooperman should be a team player and take direction from her, the team leader. (D&O 4; Tr 179.) She gave Cooperman a copy of the union contract so that Cooperman could familiarize herself with it before “dealing with these people.” (D&O 4; Tr 180.)

Around this same time, Cooperman observed one of Piccigallo’s classes and gave him some negative feedback. (Tr 181, 183, 434-35.) Rouse later approached Cooperman, on behalf of Piccigallo, to discuss the criticism. (Tr 183, 292.) Rouse and Cooperman also discussed Rouse’s teaching experience and some plans for the upcoming school year. (Tr 183-84, 293.)

The following day, Kasner asked Cooperman why Rouse had been in Cooperman’s office. When Cooperman explained, Kasner insisted that Cooperman had the right to evaluate Piccigallo. And when Cooperman stated that she planned to talk to Piccigallo again, Kasner asked if she was a “people pleaser.”

(Tr 184.) Kasner further opined that Rouse had been trying to be an administrator, to manipulate and manage Cooperman, and that Cooperman was allowing him to do so by discussing Piccigallo's class with him. She once again warned Cooperman to be careful not to let Rouse manage her and not to trust Rouse. (Tr 184-85.)

On Friday, July 28, Kasner held a meeting of her leadership team, attended by Cooperman, Osman, and Pierre. (D&O 5; Tr 185.) At that meeting, Cooperman brought up an issue involving Piccigallo. (D&O 5; Tr 186.) At the mention of Piccigallo's name, Osman got red in the face and stated that he would "punch" Piccigallo if the teacher were there, referring to Piccigallo with a vulgar epithet. (D&O 5; Tr 186, 466.) Kasner explained that Rouse and Piccigallo had recently walked out of a grievance meeting, refusing to have the meeting recorded and, further, that Piccigallo and Osman had recently argued over Piccigallo's refusal to accept a visiting student into his class at Osman's request. (D&O 5; Tr 187.) Cooperman should not, Kasner advised, take Piccigallo at face value. (D&O 4; Tr 65-66, 68-69.) During the ensuing discussion, Kasner and Osman said that the union leadership was a problem at the School and had to go. (D&O 5; Tr 189-90, 192.)

Cooperman stated she believed that she, as the only licensed administrator at the school, was being directed to go after Rouse and Piccigallo and said she was

not comfortable doing that. (D&O 5; Tr 190.) She asserted that the teachers had to like her or, more importantly, trust her. (D&O 5; Tr 190.) At that point, Pierre agreed that the teachers had to like Cooperman but stated that Cooperman simply did not understand the situation. (D&O 5; Tr 190.) Pierre echoed Kasner's and Osman's declaration that Rouse and Piccigallo had caused lots of problems at the School and had to go. (D&O 5; Tr 190.) Osman then stated that he could not understand why Cooperman was jeopardizing her job by refusing to follow Kasner's directives. (Tr 190, 192.) At the conclusion of the meeting, Kasner announced that the whole leadership team would attend any staff meeting Cooperman held, but denied Cooperman's request to attend the other managers' meetings. (Tr 190-91.)

After the July 28 leadership meeting ended, Cooperman approached Osman in his office to determine why he was so angry with Rouse and Piccigallo. (D&O 5; Tr 194, 223.) Osman responded that he and Cooperman were being tested as new administrators and that if Kasner said Rouse and Piccigallo had to go, then the teachers had to go. (D&O 5; Tr 194.) Cooperman then told Osman about the State Report and said that she did not know how the School could improve if they spent all their time at leadership meetings talking about Piccigallo. (D&O 5; Tr 194-95, 222.) She further told Osman that Kasner was not licensed as a school administrator and that the director was thus limited to spending no more

than 25 percent of her time on administrative work. (D&O 5; Tr 195, 222.) Later, Osman recounted this exchange to Kasner, telling her that Cooperman did not think she “fit” in her position. (D&O 5; Tr 507.)

The following Monday morning, July 31, Kasner called Cooperman into her office and, in Osman’s presence, accused her of telling Osman that Kasner was incompetent. (D&O 5; Tr 71-72, 197, 607.) Cooperman explained that she had merely told Osman that Kasner did not have the certification required to spend all of her time on administrative duties, but Kasner did not accept her account. (D&O 5; Tr 115, 197, 607.) Kasner dismissed Osman and continued the meeting, informing Cooperman that the School would not be implementing the departmentalization plan that September. (D&O 5; Tr 79, 197, 606.) Cooperman tried to suggest alterations to the plan, to address Kasner’s apparent concerns, asserting that she could best perform her job with departmentalization.<sup>4</sup> Kasner replied that Cooperman was “not getting it. I’m not letting you do anything here next year.” (Tr 197-98, 221, 251.) Kasner then asked if her decision made Cooperman want to leave the school. (D&O 5; Tr 198, 250-51.) Cooperman

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<sup>4</sup> The School erroneously asserts (Br 20) that Cooperman admitted to having told Kasner that she “needed” departmentalization or could only do her job with it. In fact, Cooperman rephrased school counsel’s leading question to that effect, replying “I did indicate to her [departmentalization] would be the *best* way to supervise the teachers, and to make them most effective in the classroom, yes.” (Tr 221 (emphasis added).)

responded that it did not. (Tr 198.)

That same Monday, in the afternoon, the administrative staff – Kasner, Cooperman, Osman, Bradley, and Pierre – had another leadership meeting, this time joined by Dr. Sandra Kahn, a management consultant for the School. (D&O 5; 199, 397-98.) During the meeting, Kasner stated that there was a member of the leadership team who was willing to take her direction on everything except for Rouse and Piccigallo. (D&O 5; 200.) Believing that Kasner was referring to her, Cooperman stated that she felt uncomfortable that she was not considered a team player because she had refused to create a hostile work environment for the union leaders. (D&O 5; 200-01.) At that point, Kahn responded that Rouse and Piccigallo had to go, and that Cooperman's refusal to assist in that goal was creating a problem for Kasner. (D&O 5; 201.) Kahn asserted that Kasner, who answered to the board of trustees, was not alone in wanting to get rid of the union leaders, who had caused much trouble and legal expense for the School. (D&O 5; 201.)

Immediately after the meeting, with the blessing of board of trustees chair Martha Bernard, Kasner fired Cooperman. (D&O 5; 122, 201-02.) By that point, Kasner purportedly believed Cooperman had made clear that she would not submit to her direction, but she did not provide Cooperman with any explanation for the discharge. (D&O 7; Tr 103, 122.) On August 2, Kasner sent a memo to the

School's staff, announcing Cooperman's departure without explanation. (GCX 6.)

On August 3, Cooperman sent a letter to another school trustee protesting her discharge. (D&O 5; GCX 8.) In that letter, Cooperman contended that Kasner had viewed her as insubordinate, and ultimately fired her, because she had refused to push certain teachers out of the School by creating a hostile work environment. (D&O 5; GCX 8.)

#### **D. The School's Relationship with Union Leaders Remains Contentious**

After Cooperman's termination, various incidents manifested the ongoing tensions between the School's and the Union's leadership. (D&O 6.) During a grievance meeting in September 2006, for example, Osman and Rouse argued over whether Osman had violated the parties' contract by speaking directly to employees about a grievance, and Osman threw a copy of the contract at Rouse, hitting him with it. (D&O 6; Tr 298-99, 450-51, 552, 613-14.) In April 2006, Barry Malloy, then Rouse's supervisor, advised Rouse to be careful about giving new employees union cards because Rouse was being watched and his actions could be misunderstood. (D&O 7; Tr 305-06.)

The following month, Osman accused Rouse of leaving the building during work without permission and Rouse denied having done so. (D&O 7; Tr 307-08.) In a conversation stemming from that incident, Rouse told Malloy that Osman was harassing him. (D&O 7; Tr 308-09.) In reply, Malloy agreed that Osman was

harassing Rouse but stated that he had not been successful in getting Osman to stop. (D&O 7; Tr 310.) In response to Rouse's request for protection, Malloy advised Rouse to avoid Osman as much as possible. (D&O 7; Tr 310-11.) Malloy said the harassment would not stop because it was directed by Kasner, who was very angry about "this NLRB thing." (D&O 7; Tr 311-12.) Finally, in a May 2007 grievance meeting, Kasner expressed anger at the Union, challenging them to solve a problem of teacher coverage if they objected to her solution. (D&O 7; Tr 96-97, 634-35.)

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

Based on the foregoing facts, the Board found (D&O 1, 7-8), in agreement with the administrative law judge, that the School violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Cooperman for her refusal to assist in causing the departure from the School of Piccigallo and Rouse because of their activities as union representatives.

To remedy that unfair labor practice, the Board's order requires the School to cease and desist from discharging or otherwise discriminating against any supervisor for refusing to discharge or discipline employees because of their union activities or, in any like or related manner, interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act (29 U.S.C. § 157). (D&O 2.) Affirmatively, the order requires the School to offer Cooperman

full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, make her whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, and post a remedial notice.

(D&O 2.)

### **SUMMARY OF ARGUMENT**

It is undisputed that an employer commits an unfair labor practice when it discharges a supervisory employee because of her refusal to interfere with protected employee rights. Applying that established principle to the facts of record in the instant case, the Board reasonably found that the School violated the Act when it terminated Cooperman for refusing to target Rouse and Cooperman because of their union activities. An examination of the relevant evidence will demonstrate that substantial evidence supports the Board's conclusion.

To summarize, that evidence shows that Kasner and her leadership team resented the Union and believed that union representatives Rouse and Piccigallo were troublemakers who created problems for the School in the course of performing their union responsibilities. During Cooperman's brief tenure at the School, Kasner and the rest of the School's leadership team repeatedly impressed on her their negative opinion of the union representatives and urged Cooperman, in her role as the representatives' direct supervisor, to create a hostile work environment for them. Cooperman's repeated refusal to do so, from the first

directive to her last meeting, and even in the face of pressure from a surrogate for the School's board of trustees, struck Kasner as a betrayal. The director explicitly stated that Cooperman's refusal to follow her lead on the Rouse/Piccigallo issue demonstrated that Cooperman was not a team player. Ultimately, she terminated Cooperman without any explanation, much less one of those now proffered by the School.

The School contends that Kasner did not fire Cooperman because of Cooperman's refusal to target Rouse and Piccigallo; that, even if she did, Kasner had valid reasons for wanting to rid the School of the union representatives; and, finally, that Kasner would have discharged Cooperman even in the absence of any protected activity. The School's arguments depend, in the end, on the Court's disregarding the overwhelming weight of credited evidence in the record. For that reason, the School urges this Court to take the extraordinary step of disregarding the Board's credibility determinations, which are based in part on the judge's first-hand assessment of the witnesses' demeanor and are subject only to limited review. That step – which this Court will take only when a credibility determination is “hopelessly incredible” – is unwarranted in this instance.

## STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.<sup>5</sup> Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion."<sup>6</sup> Thus, the Board's reasonable inferences may not be displaced on review even though the Court might justifiably have reached a different conclusion had the matter been before it *de novo* – as this Court has explained, "[w]here competing inferences exist, we defer to the conclusions of the Board."<sup>7</sup> Moreover, this Court has long had a policy of deferring to the Board's adoption of administrative law judges' credibility determinations, and will only disturb such determinations in very limited circumstances.<sup>8</sup> In other words, this Court will reverse the Board based on a factual determination – such as a determination of employer motive – only if it is

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<sup>5</sup> 29 U.S.C. § 160(e). See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Accord *NLRB v. G & T Terminal Packing Co., Inc.*, 246 F.3d 103, 114 (2d Cir. 2001).

<sup>6</sup> *Universal Camera*, 340 U.S. at 477. Accord *G & T*, 246 F.3d at 114.

<sup>7</sup> *Abbey's Transp. Svcs., Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988) (agreeing that evidence supported inference that employee's action was "last straw" justifying discharge, but upholding the Board's contrary conclusion that employer seized on minor infraction to discharge employee for protected activity). See also *Universal Camera*, 340 U.S. at 488; *G & T*, 246 F.3d at 114.

<sup>8</sup> See *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (quoting *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952)). Accord *G & T*, 246 F.3d at 114; *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 138 (2d Cir. 1990).

“left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.”<sup>9</sup>

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE SCHOOL VIOLATED SECTION 8(a)(1) OF THE ACT BY FIRING COOPERMAN BECAUSE OF HER REFUSAL TO HELP FORCE ROUSE AND PICCIGALLO TO LEAVE**

#### **I. It Is Unlawful for An Employer To Discharge a Supervisor for Refusing To Commit an Unfair Labor Practice**

The controlling law in this case is undisputed. Section 7 of the Act (29 U.S.C. § 157) confers on employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . .” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), in turn, makes it an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. Supervisors are not “employees” within the meaning of Section 2(3) of the Act (29 U.S.C. § 152(3)) but, as the School implicitly acknowledges (Br 24-25), it is an unfair labor practice for an employer to discharge a supervisor because of the

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<sup>9</sup> *G & T*, 246 F.3d at 114 (quoting *NLRB v. Katz’s Delicatessen of Houston Street, Inc.*, 80 F.3d 755, 763 (2d Cir. 1996)). See *Pergament*, 920 F.2d at 138 (Substantial-evidence standard of review applies to Board determinations of improper motive.).

supervisor's refusal to interfere with employees' protected rights.<sup>10</sup> The School does not challenge the principle that creating a hostile work environment to force an employee from his job because of his union activities would interfere with employees' Section 7 rights.<sup>11</sup>

When, as here, the employer asserts that it had a lawful reason for a challenged discharge, the Board applies its mixed-motive analysis, articulated in *Wright Line, a Division of Wright Line, Inc.*<sup>12</sup> Under that framework, the Board determines whether animus against protected activity was a "motivating factor" in the discharge. If it was, then the Board will consider the employer's affirmative defense that the discharge would have occurred even in the absence of the protected activity.<sup>13</sup> While the General Counsel has the initial burden of

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<sup>10</sup> *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 402-04 (1982), *enforced sub nom.*, *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). *Accord International Longshoremen Assoc. v. Davis*, 476 U.S. 380, 384 n.4 (1986) (citing *Parker-Robb*).

<sup>11</sup> *See, e.g., Kathleen's Bakeshop, LLC*, 337 NLRB 1081, 1081, 1089-91 (2002) (finding unfair labor practice where employer's adverse actions forced employee to resign because of his union activities), *enf'd mem.*, 2003 WL 22221353 (2d Cir. 2003).

<sup>12</sup> 251 NLRB 1083, 1089 (1980), *enf'd on other grounds*, 662 F.2d 899 (1st Cir. 1981).

<sup>13</sup> *Id. Accord NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983) (approving *Wright Line* test).

demonstrating that impermissible animus motivated the discharge, the employer bears the burden of establishing its defense.<sup>14</sup> Because employers rarely articulate an unlawful motive, the Board “may infer discriminatory motive from circumstantial evidence.”<sup>15</sup>

## **II. The School Fired Cooperman for Refusing To Help Force Rouse and Piccigallo from their Employment**

The credited evidence of record amply supports the Board’s finding (D&O 1, 7-8) that the School discharged Cooperman because she refused Kasner’s direction to create a hostile work environment for union representatives Rouse and Piccigallo.<sup>16</sup> As detailed in the following discussion, that evidence shows that Kasner harbored significant hostility towards those “troublesome” teachers, and that she believed they were trying, in their roles as union representatives, to usurp her authority. Moreover, Kasner expressed her hostility and resentment repeatedly to Cooperman, took Cooperman’s failure wholeheartedly to join her campaign against the union representatives as a betrayal of the leadership “team,” and fired Cooperman immediately following a meeting where that failure was rehashed.

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<sup>14</sup> *Id.*

<sup>15</sup> *Abbey’s Transp. Svcs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).

<sup>16</sup> The School’s arguments challenging Cooperman’s credibility are addressed below, in Part V.

Within a few days of Cooperman's arrival at the School, she met with Kasner to discuss the teachers she would be supervising. At that meeting, Kasner warned Cooperman not to trust Rouse, asserting that he aspired to their jobs and had created a lot of trouble for the School. Regarding Piccigallo, Kasner opined that he was fulfilling his own administrative ambitions in his role as a union representative. In a separate instance, Kasner discovered Cooperman was engaging in a dialogue with Rouse and Piccigallo about a performance evaluation. She accused Cooperman of allowing herself to be manipulated and of being a "people pleaser," and warned Cooperman again not to trust Rouse or cede control to him. (Tr 184.) On one particular occasion, Kasner explicitly directed Cooperman to "make it difficult" for Rouse and Piccigallo to stay at the School, confirming that she meant for Cooperman to create a "hostile work environment" for the two teachers. (Tr 178.) When Cooperman objected, Kasner admonished Cooperman to be a team player and take direction. She then made a dismissive remark about the Union, suggesting that Cooperman read the collective-bargaining agreement before "dealing with these people." (Tr 180.) So, within about the first week of Cooperman's tenure, Kasner had both implicitly and explicitly urged her to rid the School of the Union's two representatives, and had repeatedly disparaged them.

Kasner's hostility towards Rouse and Piccigallo – and her instruction to Cooperman to rid the School of them – were reinforced by other members of the School's leadership team when they met on the last Friday in July. At that meeting, in Kasner's presence, Osman became irate at the mention of Piccigallo, threatening physical violence against the teacher, whom he labeled with a vulgar epithet. Kasner did not disavow Osman's hostility towards the union leader, though she purported to explain it. Over the course of the leadership meeting, Kasner, Osman, and Pierre each described the union leaders as "trouble," or a "problem" for the School, who "had to go," and Kasner once again warned Cooperman not to take them – specifically Piccigallo this time – at face value. (Tr 65-66, 68-69, 189-90, 192.) Nonetheless, Cooperman reiterated her reluctance to target Rouse and Piccigallo.

At the conclusion of the meeting, Kasner announced that the entire leadership team would attend any staff meeting Cooperman held, but denied Cooperman's request to attend other administrators' meetings. In other words, Kasner treated Cooperman differently from the other supervisors, and signaled her distrust of Cooperman, because of Cooperman's failure to be a "team player"

(Tr 179) on the union issue. Such disparate treatment supports the Board's finding of anti-union animus.<sup>17</sup>

The following Monday afternoon, Kasner held another leadership meeting, where she announced that Cooperman would take her direction on everything but Rouse and Piccigallo, confirming that her principal problem with Cooperman was the latter's refusal to target the union representatives as ordered. When Cooperman once again objected to such targeting, Kahn asserted that the School's board of trustees backed Kasner's plan. Like Kasner and the other administrators, Kahn asserted that Rouse and Piccigallo had caused much "trouble" for the School. (Tr 201.)

Kasner fired Cooperman immediately after that leadership meeting. Although she later testified that she did so because Cooperman would not take direction from her (Tr 103), she gave Cooperman no such explanation at the time. Cooperman's understanding, as she explained in a contemporaneous letter to a member of the School's board (GCX 8), was that Kasner viewed her as insubordinate, and ultimately fired her, because of her refusal to target Rouse and Piccigallo. The evidence detailed above supports that interpretation of Kasner's motives.

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<sup>17</sup> See *Hospital San Pablo, Inc.*, 327 NLRB 300, 309 (1998); *Abbey's Transp. Svcs., Inc.*, 284 NLRB 698, 700 (1987), *enf'd*, 837 F.2d 575, 582 (2d Cir. 1988).

Contrary to the School's assertion (Br 25), the suspicious timing of the discharge – which has long been a factor the Board considers – supports the Board's finding of an unlawful motivation.<sup>18</sup> To recapitulate: Kasner informed Cooperman during a Monday morning meeting that she would not implement departmentalization in September, and she taunted Cooperman by asking if she wanted to quit, but did not fire Cooperman. Quite the opposite – Kasner explicitly promised to revisit the departmentalization question the following January, after Cooperman had more experience working at the School. While the taunting shows that Kasner may not have liked Cooperman, her comments about January demonstrate that, despite their pedagogical or other disagreements, she still fully expected Cooperman to stay at the School. Kasner's post-meeting memo corroborates this interpretation: it notes that Kasner had “made it very clear to Mrs. Cooperman that she needs to accept that we are not going to make these major changes right now” (RX 7), reinforcing the crucial point that Kasner did not plan to fire Cooperman at the conclusion of the morning meeting.

Even when Kasner received authorization to fire Cooperman later that day, she did not immediately do so. Instead, she did so after the leadership meeting,

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<sup>18</sup> See *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001); *Abbey's Transp. Svcs., Inc.*, 284 NLRB 698, 699 (1987), *enf'd*, 837 F.2d 575, 580 (2d Cir. 1988). As the School notes (Br 25), all of the timing in this case is unusually compressed due to Cooperman's very short tenure in her job. Nonetheless, the contents of the Monday meetings make it significant.

during which the only dispute involved Cooperman's continued refusal to target Rouse and Piccigallo. In other words, Kasner only fired Cooperman after Cooperman reaffirmed that refusal even in the face of pressure from the School's board (by way of Kahn).

In sum, the evidence shows that Kasner both made and condoned, throughout Cooperman's tenure, repeated statements criticizing Rouse and Piccigallo, and explicitly or impliedly directing Cooperman to rid the school of them. She insisted on Cooperman's complete loyalty to the management "team" and reacted to Cooperman's attempts to establish a good working relationship with the union representatives – Cooperman's supervisees – as a betrayal. At the time she terminated Cooperman, just after Cooperman had again refused to create a hostile work environment, Kasner provided no explanation for her action. While the School points to other issues Kasner had with Cooperman, discussed below (see Part IV), substantial evidence supports the Board's finding that Kasner was primarily motivated by Cooperman's refusal to target union representatives Rouse and Piccigallo, and not by other concerns.

### **III. The School Sought the Departure of Rouse and Piccigallo, both Highly-Rated Teachers, because of their Protected Activities**

Ample evidence supports the Board's finding (D&O 1, 8) that the School wanted Cooperman to target Rouse and Piccigallo because of their union positions and their role in enforcing the terms of the collective-bargaining agreement. The

School's thinly veiled anti-union animus was expressed on numerous occasions, and the alternative motives posited in the School's brief are themselves either illegitimate, or plainly pretextual.

As detailed above, the record is replete with examples of Kasner – and other School administrators and management in the director's presence – referring to the union representatives as “trouble,” or having caused “problems” for the School. The Board has long found that sort of label to be a transparent euphemism for employees' participation in protected activities, particularly when used in reference to union leaders or employees involved in grievance proceedings or other union activities.<sup>19</sup> In this case, not only were Rouse and Piccigallo the union leaders at the School, with a history of organizing and active participation in protected activities, but many of the School's references to “trouble” were juxtaposed with references to protected activity such as processing grievances.<sup>20</sup> Moreover, the

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<sup>19</sup> See, e.g., *United Parcel Svc.*, 340 NLRB 776, 777 & n.9 (2003) (finding anti-union animus when employer called an employee a “troublemaker” for filing grievances); *James Julian Inc. of Delaware*, 325 NLRB 1109, 1109, 1111 (1998) (noting that “[t]he Board has repeatedly found, with court approval, that, in a labor-relations context, company complaints about a ‘bad attitude’ are often euphemisms for prounion sentiments,” and finding evidence of anti-union animus in management references to aggressive union steward as a “troublemaker” with a bad attitude); *Kidd Elec. Co.*, 313 NLRB 1178, 1187 (1994) (noting that “[t]he Board frequently has found ‘troublemakers’ to be an epithet used to signify distaste for union activists,” and finding the same).

<sup>20</sup> See, e.g., Tr 174-75 (after complaining that Rouse tried to provide teachers with information about certification in accordance with the Union's responsibility

anti-union animus indicated by those contemporaneous incidents is reinforced, as the Board noted (D&O 6-7), by evidence of continuing animus after Cooperman's departure, including Osman's flying off the handle at Rouse during a grievance meeting and supervisor Malloy's admitting that Kasner and Osman were harassing Rouse because of Rouse's protected activity.

Even the School's list (Br 34-37) of "legitimate" reasons for targeting the union representatives encompasses protected activities. It includes, for example, Rouse's approaching Cooperman on Piccigallo's behalf to discuss her critiques of that teacher's performance (a steward advocating for a unit member – a quintessential concerted activity), Rouse's talking to a unit member about her certification compliance (a joint responsibility of the School and the Union under Article 7, subsection A.5 of their contract (GCX 3 p.7)),<sup>21</sup> and Rouse's and Piccigallo's walking out of a grievance meeting to protest a School-designated note-taker they considered biased (again, typical concerted action) (Tr 187, 196).

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detailed in the parties' contract, and contacted a teaching assistant about her certification); Tr 186-89 (in wake of Osman's outburst of hostility against Piccigallo, which Kasner explained in part by referencing union representatives' departure from grievance meeting because they felt the note-taker was biased); Tr 201 (Kahn stated that "the union leadership has not only caused trouble for the [S]chool, but has caused a great deal of expense, legally, for the school." But the only evidence of an incident involving Rouse or Piccigallo that might have generated legal fees is the 2004 arbitration of Rouse's grievance, RX 3).

<sup>21</sup> Rouse contacted the teaching assistant after Kasner wrote Piccigallo inquiring about the assistant's missing certification paperwork. (Tr 284, 433.)

The School also cites Kasner's statements to the effect that Rouse was trying to be an administrator, or usurp her or Cooperman's authority. Viewed in light of the entire record here, those statements are fairly read as expressions of the director's resentment of the Union's legitimate role, epitomized by her objection to Rouse and Cooperman discussing the critique of Piccigallo.

Incomprehensibly, the School (Br 34-36) also cites to multiple instances of what it apparently believes to be paranoia on Rouse's part regarding his perception that the School was harassing him because of his protected activity.<sup>22</sup> Those citations are both legally and factually unsupported. First, the School's argument implies that an employee's complaint that he is suffering retaliation for union activity is not itself protected, a bold proposition for which the School offers no authority. Second, there is uncontradicted evidence in this case that the School was *in fact* harassing Rouse because of his protected activities, whether or not every last one of the cited incidents was an instance of that harassment.

Specifically, Rouse testified that he had two conversations regarding the

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<sup>22</sup> The School cites, among others, these incidents: (1) Rouse filed a complaint with the police after Osman threw a copy of the collective-bargaining agreement at Rouse during a grievance meeting; (2) Rouse resented the fact that the School, in the past, had initially refused to hire his friend, admittedly because of his "union crap" (D&O 4 n.2; Tr 270-72); (3) Rouse perceived as harassment Osman's questioning of his smoking break – of course, Malloy essentially confirmed that that questioning was harassment; (4) Rouse complained that he thought the School undermined the Union by distributing copies of the Union's grievances.

harassment with his supervisor, Barry Malloy, Cooperman's replacement. (Tr 306-12.) According to Rouse, Malloy agreed that Kasner and Osman had deliberately targeted Rouse, stated that Kasner was angry about "this NLRB thing," and claimed not to be able to stop the harassment. The School called Malloy to testify at the hearing, but it did not question him about those statements, and he did not deny them.<sup>23</sup> (D&O 7; Tr 306-12, 688-93.)

The School also lists (Br 34-37) purported failures of job performance or professional conduct in an effort to justify Kasner's desire to rid the School of Rouse and Piccigallo. It cites to Rouse's allegedly insulting and swearing at Kasner, being inattentive to his students, participating inadequately in staff meetings, and missing training, and to Piccigallo's purportedly dissembling about his institutional knowledge to a new supervisor, speaking in an inappropriate tone to students, and being "far from an ideal teacher." Even assuming, *arguendo*, the truth of those performance-related complaints, they cannot provide a legitimate motive for targeting the union representatives. Both union representatives had – and continue to have – good performance evaluations (Tr 90, 125-27) and were

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<sup>23</sup> Incidentally, the fact that the School has been harassing Rouse undercuts its assertion (Br 25-26) that it has never taken any action against the union representatives.

well-regarded by Cooperman's predecessor (Tr 426, 596-97).<sup>24</sup> Those facts, as well as the School's failure to take any action in response to the purported long-term persistence of alleged performance issues (aside from one verbal warning to Rouse for missing a training session), all indicate that the School's sudden reliance on performance concerns is pretextual.<sup>25</sup> The same factors render suspect Kasner's repeated admonishments to Cooperman that Rouse required close supervision.

In conclusion, there is no merit to the School's contention (Br 31) that the Board failed to apply its *Wright Line* analysis in this case. Consistent with the requirements of that well-established mixed-motive analysis, the Board initially found (D&O 1, 7) that Cooperman's protected refusal to create a hostile work environment for Rouse and Piccigallo because of their union activities was the "proximate and predominant" reason for her discharge – a comparable, if not stronger, finding than the *Wright Line* "motivating factor" standard. That finding of a *prima facie* case of unlawful discharge is supported by substantial record evidence, as just described in both this and the preceding discussion (Parts II & III).

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<sup>24</sup> Kasner herself considered Piccigallo to be one of the School's better teachers (Tr 90-91), as did Osman (Tr 527.)

<sup>25</sup> See, e.g., *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 957-58 (2d Cir. 1988) (finding Board reasonably dismissed performance-based justification for discharge when employees were highly regarded and had been commended on their performance in the past).

#### **IV. The School Failed To Prove that It Would Have Discharged Cooperman in the Absence of Her Protected Refusal To Target Rouse and Piccigallo**

In constructing its *Wright Line* defense, the Company seizes upon (Br 27) the Board's acknowledgment (D&O 7) that "a variety of factors" may have contributed to Cooperman's discharge, but downplays the Board's finding, in the following paragraph, that "the proximate and predominant reason" for the termination was unlawful. Furthermore, as the School concedes (Br 31), the Board concluded its analysis with a specific finding (D&O 1, 8) that the School had not met its burden of showing that Cooperman would have been terminated even in the absence of her protected refusal. In other words, while the Board's decision acknowledged that the School had issues with Cooperman, it specifically found that she would not have lost her job in the absence of her protected activity.

The School's burden in the *Wright Line* context is to persuade by a preponderance of the evidence<sup>26</sup> and, as the following discussion demonstrates, the evidence of record amply supports the Board's finding that the School failed to satisfy that burden. The same evidence, of course, may support both an initial finding of animus and a later rejection of legitimate alleged motivations.<sup>27</sup> The

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<sup>26</sup> *G & T*, 246 F.3d at 116.

<sup>27</sup> See *Wright Line*, 251 NLRB at 1090-91 (finding same evidence of disparate treatment both helped establish *prima facie* case and defeat employer's defense). Cf. *Abbey's*, 837 F.2d at 579-80 (holding that the Board can base different

Board here considered (D&O 1) – as this Court must – the entirety of the record evidence in reaching its decision.<sup>28</sup> And, as described above, that evidence paints a picture of a director resentful of the Union, and of Cooperman’s unwillingness to take sides against the Union.

The School argues that it would have fired Cooperman even in the absence of protected activity for several different reasons, listing factors large and small – and even some irrelevant, such as Cooperman’s alleged insensitive comment to Dawes (Br 12), and incorrect, like the erroneous assertion (Br 10) that Cooperman left her last job because of problems with her supervisor.<sup>29</sup> As an initial matter, the multitude of proffered rationales tend to suggest that the School’s actual reason was unlawful, particularly given Kasner’s failure to cite any of them at the time of Cooperman’s termination, either to Cooperman or in her memo to the School’s

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inferences – here of knowledge of union activity and discriminatory motive – on the same circumstantial evidence).

<sup>28</sup> See *G & T*, 246 F.3d at 114 (This Court looks at “the record as a whole” when reviewing Board decisions).

<sup>29</sup> Kasner admitted that she had no knowledge of the alleged comment to Dawes at the time she fired Cooperman (Tr 42-43), and the record indicates that Cooperman left her last job – where she had actually been the only administrator (assistant principal) retained during a reorganization – for health-related reasons (Tr 209-10).

other employees.<sup>30</sup> Moreover, the particulars of the record evidence, discussed below, further undermine the School's effort to demonstrate, by a preponderance of the evidence, that it really would have fired Cooperman in the absence of her protected activity.

Primarily, the School asserts that it would have fired Cooperman for undermining Kasner, relying in part (Br 27) on Kasner's credited statement that she fired Cooperman for failing to take direction. But there is evidence of only one of Kasner's orders that Cooperman ever refused to follow – the order to create a hostile work environment for Rouse and Piccigallo. Similarly, Kasner's complaints that Cooperman was not a team player related to Cooperman's refusal to do her bidding and target the union representatives.

The timing of Cooperman's discharge, in particular, not only reinforces the Board's finding of unlawful motive (discussed above, Parts II & III), but also suggests that the School was not prepared to fire her for another reason. While the

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<sup>30</sup> See, e.g., *Abbey's*, 837 F.2d at 851 (finding employer's multiple, shifting proffered justifications for discharge strengthen inference that true reason was anti-union animus); *NLRB v. J. Coty Messenger Svc., Inc.*, 763 F.2d 92, 99 (2d Cir. 1985) (finding employer's varying explanations of employee's alleged absenteeism problem suggested that it was a pretextual reason for his discharge); *NLRB v. Cofer*, 637 F.2d 1309, 1313 (9th Cir. 1981) (finding employer's "failure to advise the employees of the reason for their discharge" supported finding of unlawful termination); *Mays Elec. Co., Inc.*, 343 NLRB 121, 128-30 (2004) (finding employer's belated explanations, not in discharge notice, support inference of unlawful motivation).

two administrators disagreed, for example, on departmentalization, Cooperman had acceded to Kasner's decision not to implement the plan in September, after trying to no avail to modify it in response to Kasner's purported concerns.<sup>31</sup> Kasner's response, of course, was that Cooperman did not "get[] it" and that the School would not be making any changes that fall. (Tr 198.) But she did leave open the possibility that Cooperman could implement some or all of her ideas the following January, suggesting her intent that Cooperman stay, despite the pedagogical disagreement. (Tr 606.) Clearly, Cooperman's support for departmentalization was not a deal-breaker for Kasner.

Like Kasner's decision not to pursue departmentalization in September, Cooperman's purported slights of Kasner happened before or during the wait-and-see meeting, suggesting that they were not significant enough to require termination. Kasner's purported belief that Cooperman had undermined her in speaking to Osman, for example, which the School cites as the director's "last straw" (Br 18), apparently upset Kasner enough to confront Cooperman during the meeting in question, and to taunt her about leaving the School, but not to fire her. The alleged threat to report the School to the State Department of Education also occurred at that meeting and is subject to the same rationale. Of course,

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<sup>31</sup> Because Kasner raised concerns that changing classrooms would disrupt the School's troubled student population, Cooperman suggested that the students could stay in their classrooms and the teachers could come to them. (Tr 197-98.)

Cooperman, whom the Board credited over Kasner (D&O 4), denied ever making such a threat. (Tr 206.) But even if she had, there is no evidence that a report to the State would have changed much, in practical terms, given the State's then ongoing scrutiny of the School.<sup>32</sup>

The School notes (Br 21) that Kasner called school trustee Bernard for authority to terminate Cooperman right after their final confrontation over departmentalization. But – even setting aside Kasner's stated intent, during that confrontation, for Cooperman to stay – the School does not explain why, once she had the discretion to terminate Cooperman, Kasner did not do so immediately, if Cooperman's conduct to that point had already broken the camel's back. Instead, that afternoon, Kasner convened a leadership meeting to continue planning for the upcoming fall semester, with Cooperman in attendance as part of her leadership team. Only after that second meeting, during which a discussion of routine administrative matters devolved into another confrontation over Cooperman's refusal to target Rouse and Piccigallo, did Kasner fire Cooperman.

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<sup>32</sup> Kasner testified, for example, that the School had an obligation to submit a plan to the State detailing how it was going to address the problems noted in the State Report. (Tr 129-30.)

The same timing rationale applies equally to the School's contention (Br 12-14) that Cooperman had alienated her colleagues with her bad attitude.<sup>33</sup> Moreover, the evidence that school employees found Cooperman abrasive, and particularly that Kasner knew that they did, is hardly overwhelming. As an initial matter, that evidence came primarily from Kasner, and several of the complaints she allegedly received about Cooperman's personality came from employees whom the School chose not to have testify. (Tr 599-601.) And those who did testify at the hearing did not corroborate the details of Kasner's testimony about their complaints and, in some cases, contradicted them.

For example, Kasner asserted that Bradley had told her, with respect to Cooperman, that "he didn't think it would work out," had complained that Cooperman was unreceptive to his concerns about departmentalization, and had labeled Cooperman "abrasive." (Tr 599-600, 602.) Kasner further testified that after she shared Bradley's assessment with Cooperman, Cooperman confronted Bradley about it and he, in turn confronted Kasner, angry at her for having shared his assessment with Cooperman. (Tr 602-03.) When he testified, however, Bradley failed to corroborate Kasner's story. Although the confrontations Kasner recounted would presumably have been memorable, Bradley did not confirm that

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<sup>33</sup> Moreover, as noted above (page 26), a "bad attitude"-type rationale is suspect as an alternative motive to anti-union animus.

they occurred. Nor did he mention finding Cooperman abrasive, or otherwise having a personal objection to her, communicated to Kasner or not. Indeed, Bradley not only failed to criticize Cooperman but affirmatively denied, in response to a leading question from the School's counsel, that he recalled Cooperman ever doing anything condescending. (Tr 570.) With respect to Cooperman's attitude, Bradley stated only that he had perceived an unarticulated tension between her and Kasner at a leadership meeting, which he never discussed with Kasner. (Tr 563-65, 571.) Nothing in his testimony, in other words, indicated that Cooperman had the sort of attitude problem that the School now claims.

Similarly, Kasner attributed a veritable litany of complaints to Dawes: that Cooperman was hostile, critical, abrasive, argumentative, condescending, insulting, and unreceptive to feedback, and that Dawes "could not be in the same room" with Cooperman. (Tr 38, 597-98.) Kasner further specifically stated that Dawes had criticized the way Cooperman spoke to students. (Tr 598.) By contrast, Dawes only recalled complaining to Kasner once, when she told Kasner she considered Cooperman a know-it-all for critiquing Piccigallo and the reading program he used in his class. (Tr 418-19.) Of course, that offending critique was the same one that Kasner had ratified – and had objected to Cooperman reconsidering. (Tr 184.) Dawes did not specify any other complaints she may have addressed to Kasner regarding Cooperman's character and, even after leading questions by the School's

counsel, could not recall if she told Kasner that she considered Cooperman either “condescending” or “rude.” (Tr 419-20.) Finally, Dawes did not testify to thinking – much less to telling Kasner – that Cooperman had any inappropriate interactions with students. Nor is there any other evidence in the record that Cooperman ever mishandled an interaction with a student.

In sum, Dawes did not make – or even think – many of the critiques Kasner attributed to her. And one of the few complaints Dawes confirmed relating to Kasner was about an action (the critique of Piccigallo) that Kasner had actually ratified. It was certainly not something the School can now claim would have justified Cooperman’s dismissal in satisfaction of its *Wright Line* burden.

Likewise, and contrary to the School’s implication (Br 28), Bernard did not corroborate Kasner’s testimony that Kasner told her Cooperman had alienated all of her colleagues (Tr 609). Bernard testified only that she sensed, from her conversations with Kasner, that the director was involved in a power struggle with Cooperman. (Tr 579.) As for whether Kasner ever spoke to Cooperman about her alleged attitude problem, Kasner’s testimony on that point is vague both as to the timing and as to the details of any such consultation. (Tr 601-03, 617.) The only specifics Kasner offered were those that involved Bradley’s purported, uncorroborated critique of Cooperman to Kasner.

The various remaining factors cited by the School as reasons it would have fired Cooperman, like those just discussed, either rest on flimsy evidentiary ground or are inadequate to establish a *Wright Line* defense. Kasner's suspicions of Cooperman, for example, stemmed from their different (social work/academic) backgrounds and Cooperman's application for the director's job. But the academic background would be shared by any person qualified to do Cooperman's job, and Kasner knew of Cooperman's application for her job before making the decision to interview, much less hire, Cooperman.

#### **V. The Board Properly Adopted the Judge's Credibility Determinations**

As in many fact-intensive cases, the Board's findings and conclusions here depend, in part, on the administrative law judge's credibility determinations. The Board's well-established policy is to accept a judge's credibility determinations unless the clear preponderance of the evidence shows them to be incorrect.<sup>34</sup> That deference is particularly appropriate when, as here, the judge bases a credibility determination on demeanor, because only the judge has had the opportunity to observe the witnesses on the stand.<sup>35</sup>

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<sup>34</sup> *Standard Dry Wall Prods., Inc.*, 91 NLRB 544, 545 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951). *Accord United Parcel Svc.*, 340 NLRB 776, 776 n.2 (2003); *Wright Line*, 251 NLRB at 1083 n.1 .

<sup>35</sup> *Standard Dry Wall*, 91 NLRB at 545. *See also NLRB v. Dinion Coil Co.*, 201 F.2d 484, 487 (2d Cir. 1952) ("Repeatedly, the courts have said that, since observation of . . . 'demeanor evidence' is open to a trier of the facts when

Moreover, as the School acknowledges (Br 31), this Court conducts a very limited review of the Board's credibility findings and will reverse them only in extreme circumstances.<sup>36</sup> Specifically, the Court will reject the Board's credibility determinations only when they are, facially, either "hopelessly incredible or flatly contradict[] either a so-called 'law of nature' or undisputed documentary testimony."<sup>37</sup> The Board's credibility determinations here are far from "hopelessly incredible," and the School fails to demonstrate any problem extraordinary enough to warrant their reversal.

After examining the entire record, the Board here decided to adopt (D&O 1 n.2) the judge's credibility determinations – notably, his crediting of Cooperman's testimony over Kasner's where they contradicted each other. That decision is reasonable, given that the judge was "favorably impressed" with Cooperman's demeanor on the stand, an important factor only he is qualified to assess.

Cooperman's testimony overall appears clear and consistent in the transcript of the

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witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimonial' inferences, are ordinarily unreviewable.") (citation omitted). *Accord Lin v. Gonzales*, 446 F.3d 395, 400-01 (2d Cir. 2006); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976).

<sup>36</sup> See note 8, citing *Columbia Univ. G & T*, and *Pergament*.

<sup>37</sup> *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (quoting *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 490 (2d Cir. 1952). *Accord G & T*, 246 F.3d at 114; *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 138 (2d Cir. 1990).

hearing, and the broad lines of her current assessment of what happened during her short tenure at the School is echoed in the letter she wrote to school trustee Johnson just the day after her termination. As the judge noted (D&O 4), Cooperman's version of most of the background facts of the case also corresponds to that of Kasner and other school witnesses.

Furthermore, as the judge noted (D&O 5), Kahn testified that, at the second leadership meeting, Cooperman objected to creating a "hostile work environment." (Tr 401-02.) Kahn's confirmation that Cooperman used that term of art tends to support Cooperman's credited testimony that Kasner directed her to make life difficult for Rouse and Piccigallo and specifically confirmed, in response to her question, that she should create a "hostile work environment" for the union representatives (as well as her further testimony that she repeatedly objected, in various settings, to that order).<sup>38</sup> Even though Kahn stated that she assured Cooperman the School did not desire the creation of such an environment, her testimony corroborates Cooperman's contention that they used that very particular term in discussing the issue, bolstering the Board's credibility determination.

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<sup>38</sup> The School erroneously implies (Br 14) that Cooperman reneged on her testimony that the unusual term was used in the critical Kasner-Cooperman conversation. In fact, in the transcript pages the School cites (Tr 178-79), Cooperman clarified her response to Kasner's affirmation that Cooperman should create a "hostile work environment," not the use of the term or Kasner's agreement, both of which she retestified to later without qualification. (Tr 229-30.)

By contrast, Kasner's testimony was, as discussed above (pages 36-38), partially contradicted by other school witnesses (Bradley, Dawes, Bernard) on the subject of complaints Kasner purportedly received about Cooperman. And the School chose not to present the testimony of other allegedly offended employees, such as Pierre (D&O 5 n.5) – who, like Kasner, insisted to Cooperman that the School needed to get rid of Rouse and Piccigallo. As for the memo Kasner wrote to her file (RX 7), memorializing the morning meeting where she confronted Cooperman about discussing her with Osman and informed Cooperman that she would not be implementing departmentalization that September, it undercuts the director's testimony that Cooperman essentially refused to do her job. Kasner's memo notes that Cooperman "d[id] not want to" delay departmentalization. It does not indicate that Cooperman declared, as Kasner later testified (Tr 606-07), that she required departmentalization to perform her job.

The preceding discussion demonstrates that the Board's adoption of the judge's credibility determinations was reasonable and supported by record evidence, particularly in light of the judge's reliance on Cooperman's demeanor. The School's remaining contention (Br 31-33) is that the Court should reject those determinations as irretrievably tainted because the judge admittedly read (D&O 7 n.10) transcripts of surreptitious recordings, which he later determined to be inadmissible under Board law. As explained below, that argument is flawed.

As an initial matter, the label “inadmissible” (Br 5, 23 n.9, 31-33) is inaccurate. In fact, the Board specifically declined to rely on the contested recordings and, for that reason, expressly declined to reach or adopt (D&O 1 n.1) the judge’s finding that they were inadmissible under Board law, a finding that the General Counsel had appealed to the Board.

Furthermore, the School’s contention that the Board cannot disregard the recordings because the judge considered them is patently meritless. The recordings documented meetings between Kasner and the union representatives that occurred after Cooperman’s departure from the School. They are, therefore, not central to the resolution of credibility issues between the two women during Cooperman’s tenure. And, as this brief has shown, there is substantial evidence of anti-union animus in the record without taking into consideration the conversations documented in the recordings.

Finally, relying on inadmissible evidence is not, as the School asserts (Br 31), “the same as making findings contrary to admissible evidence.” There is a material difference between considering, among several factors, evidence that is inadmissible, and making a finding that is flatly contradicted by documentary evidence. Only in the latter case will this Court reject the Board’s credibility determinations.<sup>39</sup> In other words, the instant case would not fit within the narrow

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<sup>39</sup> See notes 36 & 37, above, and accompanying text.

exception to the Court's general policy of deferring to the Board's credibility determinations even if the recordings were clearly inadmissible and even if the Board had considered them among various factors in reaching its credibility determinations. Of course, as discussed above, neither of those predicates holds true.

### **CONCLUSION**

To summarize, this brief demonstrates that, during the few short weeks of Cooperman's tenure at the School, Kasner – and other School employees in Kasner's presence – made crystal clear to her their desire to get rid of union "troublemakers" Rouse and Piccigallo because of their union activities and in spite of their strong performance as teachers. When Cooperman refused to be the instrument of the School's unlawful attack on the union representatives, Kasner fired her, in violation of Section 8(a)(1) of the Act.

For the foregoing reasons, the Board respectfully requests that this Court deny the School's petition for review, grant the Board's cross-application for enforcement, and enter a judgment enforcing in full the Board's Order in this matter.

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UNITED STATES COURT OF APPEALS  
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) 02-CA-37967  
NATIONAL LABOR RELATIONS BOARD )  
)  
Respondent/Cross-Petitioner )  
)

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,296 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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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 first-class mail the required number of copies of the Board's final brief and the Board's supplemental appendix in the above-captioned case, and has also served two copies each of the brief and the appendix upon the following counsel at the address listed below:

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