

**Nos. 09-2426, 09-2468**

---

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

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**and**

**COAL, ICE, BUILDING MATERIAL, SUPPLY DRIVERS, RIGGERS, HEAVY  
HAULERS, WAREHOUSEMEN AND  
HELPERS, LOCAL UNION NO. 716 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,  
WAREHOUSEMEN, AND HELPERS OF AMERICA**

**Intervenor**

**v.**

**SPURLINO MATERIALS, LLC**

**Respondent/Cross-Petitioner**

---

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

---

**JULIE BROIDO**  
*Supervisory Attorney*

**ELIZABETH A. HEANEY**  
*Attorney*  
*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1743

**RONALD MEISBURG**

*General Counsel*

**JOHN E. HIGGINS, JR.**

*Deputy General Counsel*

**JOHN H. FERGUSON**

*Associate General Counsel*

**LINDA DREEBEN**

*Deputy Associate General Counsel*

*National Labor Relations Board*

---

## TABLE OF CONTENTS

<b>Headings</b>	<b>Page(s)</b>
Statement of subject matter and appellate jurisdiction .....	2
Statement of the issues .....	3
Statement of the case.....	4
Statement of the facts.....	5
I. The Board’s findings of fact.....	5
A. The Company’s business; the Union begins on organizing campaign; drivers Eversole, Stevenson, and Bales become active union supporters.....	5
B. Company officials tell employees that by seeking union representation, they had “blown it for themselves,” and that the Company would not stand to have a union .....	6
C. The Union wins the election; General Manager Matney warns that things are going to get worse .....	7
D. The parties begin negotiations, with Eversole, Stevenson, and Bales serving on the Union bargaining committee; disregarding its seniority-based assignment system, the Company bypasses the three union supporters and dispatches less senior employees to the Stadium Project .....	8
E. Without notifying or bargaining with the Union, the Company creates the new positions of portable plant driver and alternate driver, and unilaterally establishes selection criteria; the Company rejects union activists Eversole, Stevenson, and Bales for the portable plant driver job.....	11

**Headings-Cont'd**

**Page(s)**

- F. The Company inadvertently includes union authorization cards with employees' paychecks; Stevenson initially refuses to return his copies, but ultimately does so at a meeting in which the Company denies his request for a union representative; the company suspends and discharges Stevenson over the incident ..... 13
- G. Without notifying or bargaining with the Union, the Company hires subcontractors for the Warehouse Project, depriving unit employees of overtime pay and job opportunities ..... 15
- II. The Board's conclusions and order ..... 17
- Summary of argument ..... 19
- Standard of review ..... 20
- Argument ..... 21
- I. Substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act in bypassing prominent union supporters for dispatches to the Stadium Project ..... 21
  - A. The Act prohibits employer discrimination against employees for engaging in protected union activity ..... 21
  - B. The Board reasonably found that the Company bypassed Eversole, Stevenson, and Bales because they supported the Union ..... 24
    - 1. The Company's knowledge of the driver's union activities and its union animus support the Board's finding of unlawful motive ..... 24
    - 2. The Company discriminated against the three union supporters by manipulating its established seniority-based dispatch procedure so as to bypass them for higher paying assignments to the Stadium Project ..... 26

**Headings-Cont'd**

**Page(s)**

- 3. The record does not compel the conclusion that the Company would have disregarded its established dispatch procedure absent the three drivers' union activities .....28
  
- II. The Company violated Section 8(a)(5) and (1) of the Act by unilaterally creating new positions at the portable batch plant and unilaterally implementing a new evaluation system, and violated Section 8(a)(3) and (1) of the Act by failing to select prominent union supporters for the new portable plant driver position.....29
  - A. An employer violates the Act where, as here, it unilaterally changes employees' terms and conditions of employment during negotiations, without timely notifying the union and bargaining to an overall impasse.....30
    - 1. The Company's unilateral creation of the portable plant driver and alternate plant driver positions changed the employees terms and conditions of employment .....32
    - 2. The Company further violated the Act by unilaterally implementing a new selection system .....33
    - 3. The Company did not bargain over its decision to create new positions and implement a new evaluation system.....34
    - 4. The PLA did not give the Company carte blanche to act unilaterally .....36
  - B. The Company violated Section 8(a)(3) and (1) of the Act by failing to select Eversole, Stevenson, and Bales for the portable plant driver position .....38
    - 1. The Company knew about the three drivers' union activities, and its union animus motivated its refusal to select them .....38

**Headings-Cont'd**

**Page(s)**

- 2. The Board reasonably rejected the Company’s assertion, which is based solely on discredited testimony, that it would not have selected the three drivers even absent their union activities .....39
- III. The Company violated Section 8(a)(1) of the Act by denying Stevenson his right to union representation during an investigatory interview, and also violated Section 8(a)(3) and (1) of the Act by suspending and then discharging him for supporting the Union .....43
  - A. Substantial evidence supports the Board’s finding that the Company unlawfully denied Stevenson his right to the presence of a union representative during his investigatory interview.....44
  - B. The Board reasonably found that the Company suspended and discharged Stevenson because he supported the union .....47
    - 1. The Company’s animus and knowledge of Stevenson’s union activities support the Board’s finding of unlawful motive.....47
    - 2. Stevenson’s refusal to turn over the documents furnished the excuse rather than the reason for his discipline.....48
- IV. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining unit work .....52

**Headings-Cont'd**

**Page(s)**

A. An employer violates the Act by unilaterally subcontracting bargaining unit work without timely notifying the union and bargaining to an overall impasse .....52

B. The Company was required to bargain over its subcontracting decision .....54

C. The Board reasonably found that the Company unlawfully presented its action as a fait accompli .....55

D. The Company cannot justify its failure to bargain .....58

Conclusion .....60

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s)</b>
<i>ATC Vancom of Cal. v. NLRB</i> , 370 F.3d 692 (7th Cir. 2004) .....	20
<i>Abbey's Transportation Serv., Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988) .....	23
<i>Acme Die Casting</i> , 315 NLRB 202 (1994) .....	54,56
<i>Allied Mechanical Serv.</i> , 346 NLRB 326 (2006) .....	29
<i>Beverly California Corp. v. NLRB</i> , 227 F.3d 817 (7th Cir. 2000) .....	21
<i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991) .....	58
<i>Central Transport, Inc. v. NLRB</i> , 997 F.2d 1180 (7th Cir. 1993) .....	23,54,57
<i>Duffy Tool &amp; Stamping, LLC v. NLRB</i> , 233 F.3d 995 (2000) .....	30,31
<i>FedEx Freight East, Inc. v. NLRB</i> , 431 F.3d 1019 (7th Cir. 2005) .....	passim
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964) .....	30,52
<i>Gannett Co., Inc.</i> , 333 NLRB 335 (2001) .....	36

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>Glomac Plastics, Inc.</i> , 234 NLRB 1309 (1978).....	45
<i>Hawthorn Melody, Inc.</i> , 275 NLRB 339 (1985).....	36
<i>Huck Store Fixture Co. v. NLRB</i> , 327 F.3d 528 (7th Cir. 2003).....	28
<i>Hugh H. Wilson Corp. v. NLRB</i> , 414 F.2d 1345 (3d Cir. 1969).....	23
<i>Indulac, Inc.</i> , 344 NLRB 1075 (2005).....	31,33
<i>Irwin &amp; Lyons</i> , 51 NLRB 1370 (1943).....	37
<i>Jet Star, Inc. v. NLRB</i> , 209 F.3d 671 (7th Cir. 2000).....	23
<i>Justak Brothers &amp; Co. v. NLRB</i> , 664 F.2d 1074 (7th Cir. 1981).....	23,40
<i>Keystone Lamp Manufacturing Corp.</i> , 284 NLRB 626 (1987).....	31,34
<i>L.S.F. Transportation, Inc. v. NLRB</i> , 282 F.3d 972 (7th Cir. 2002).....	20,21,51
<i>Microimage Display Division of Xidex Corp. v. NLRB</i> , 924 F.2d 245 (D.C. Cir. 1991).....	39
<i>MJS Garage Management Corp.</i> , 314 NLRB 172 (1994).....	29
<i>NLRB v. Bestway Trucking, Inc.</i> , 33 F.3d 177 (7th Cir. 1994).....	22

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Dorothy Shamrock Coal Co.</i> , 833 F.2d 1263 (7th Cir. 1987) .....	25
<i>NLRB v. Emsing's Supermarket, Inc.</i> , 872 F.2d 1279 (7th Cir. 1989) .....	57
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969) .....	46
<i>NLRB v. Great Dane Trailers, Inc.</i> , 388 U.S. 26 (1967) .....	29
<i>NLRB v. Henry Colder Co., Inc.</i> , 907 F.2d 765 (7th Cir. 1990) .....	23
<i>NLRB v. Illinois Bell Telephone Co.</i> , 674 F.2d 618 (7th Cir. 1982) .....	45,47,48
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962) .....	31
<i>NLRB v. O'Hare-Midway Limousine Service</i> , 924 F.2d 692 (7th Cir. 1991) .....	22
<i>NLRB v. Rain-Ware, Inc.</i> , 732 F.2d 1349 (7th Cir. 1984) .....	23,41,51
<i>NLRB v. Roll &amp; Hold Warehouse &amp; Distribution Corp.</i> , 162 F.3d 513 (7th Cir. 1998) .....	36,56,57
<i>NLRB v. Shelby Memorial Hospital Association</i> , 1 F.3d 550 (7th Cir. 1993) .....	23
<i>NLRB v. So-White Freight Lines, Inc.</i> , 969 F.2d 401 (7th Cir. 1992) .....	23

<b>Cases-Cont'd</b>	<b>Page(s)</b>
<i>NLRB v. Transportation Management Corp.</i> , 462 U.S. 393 (1983) .....	22
<i>NLRB v. WPIX, Inc.</i> , 906 F.2d 898 (2d Cir. 1990) .....	32
<i>NLRB v. Weingarten, Inc.</i> , 420 U.S. 251 (1975) .....	44,47
<i>Naperville Ready Mix, Inc. v. NLRB</i> , 242 F.3d 744 (7th Cir. 2001) .....	53
<i>New Process Steel, L.P. v. NLRB</i> , 564 F.3d 840 (7th Cir. 2009), <i>cert. granted</i> , 130 S.Ct. 488 (Nov. 2, 2009).....	2
<i>Overnite Transportation Co.</i> , 330 NLRB 1275 (2000).....	54
<i>Porta-King Building System, Inc. v. NLRB</i> , 14 F.3d 1258 (8th Cir. 1994) .....	31,32
<i>RBE Electronics of S.D., Inc.</i> , 320 NLRB 80 (1995) .....	56,58
<i>Road Sprinkler Fitters Local Union, No. 699 v. NLRB</i> , 676 F.2d 826 (D.C. Cir. 1986).....	53,58
<i>Ryder Truck Rental v. NLRB</i> , 401 F.3d 815 (7th Cir. 2005) .....	21,28,50
<i>S.C. Johnson &amp; Son, Inc. v. Louisville &amp; Nashville R. Co.</i> , 695 F.2d 253 (7th Cir. 1982) .....	43
<i>Safeway Stores</i> , 270 NLRB 193 (1984).....	34

**Cases-Cont'd**

**Page(s)**

*Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De P.R. v. NLRB*,  
414 F.3d 158 (1st Cir. 2005).....53,55

*Southwestern Bell Telephone Co.*,  
227 NLRB 1223 (1977).....46,47

*Torrington Industries*,  
307 NLRB 809 (1992).....53

*Union Tribune Publishing Co. v. NLRB*,  
1 F.3d 486 (7th Cir. 1993) .....40

*W.W. Grainger, Inc. v. NLRB*,  
860 F.2d 244 (7th Cir. 1988) .....53

*Wright Line, a Division of Wright Line, Inc.*,  
251 NLRB 1083 (1980), *enforced on other grounds*,  
662 F.2d 89 (1st Cir. 1981).....22

**Statutes :**

**Page(s)**

**National Labor Relations Act, as amended**

(29 U.S.C. § 151 et seq.)

Section 7(29 U.S.C. § 157) ..... 18

Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....passim

Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....passim

Section 8(a)(3)(29 U.S.C. § 158(a)(3)).....passim

Section 8(a)(5)(29 U.S.C. § 158(a)(5)).....passim

Section 8(d)(29 U.S.C. § 158(d)).....30

Section 3(b)(29 U.S.C. § 153(b)).....2

Section 10(a)(29 U.S.C. § 160(a)) .....2

Section 10(e)(29 U.S.C. § 160(e)) .....3

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

---

**Nos. 09-2426, 09-2468**

---

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner/Cross-Respondent**

**and**

**COAL, ICE, BUILDING MATERIAL, SUPPLY DRIVERS, RIGGERS,  
HEAVY HAULERS, WAREHOUSEMEN AND  
HELPERS, LOCAL UNION NO. 716 A/W INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, CHAUFFERS,  
WAREHOUSEMEN, AND HELPERS OF AMERICA**

**Intervenor**

**v.**

**SPURLINO MATERIALS, LLC**

**Respondent/Cross-Petitioner**

---

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

---

**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER  
AND APPELATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce, and the cross-petition of Spurlino Materials, LLC (“the Company”) to review, a Board order issued against the Company. The Union has intervened in support of the Board.

The Board had subject matter jurisdiction over the unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Decision and Order issued on March 31, 2009, and is reported at 353 NLRB No. 125.<sup>1</sup>

The Board’s Order, which is final with respect to all parties, was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)). In *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 130 S.Ct. 488 (Nov. 2, 2009), this Court conclusively held that the two-member quorum has the authority under Section

---

<sup>1</sup> “D&O” refers to the Board’s decision and order, which is attached to the Company’s brief. “Br.” refers to the Company’s brief. “A” refers to the appendix filed with the Board’s brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

3(b) to issue decisions. Accordingly, the Company's contrary contentions (Br. 35-39) must be rejected.<sup>2</sup>

The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)); the unfair labor practices occurred in Indianapolis, Indiana. The Board filed its application for enforcement on June 2, 2009, and the Company filed its cross-petition for review on June 8, 2009. The application and the cross-petition are timely; the Act imposes no time limits on the institution of proceedings to review or enforce Board orders.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act in bypassing prominent union activists for dispatches to a higher paying project?

2. Whether substantial evidence supports the Board's finding that the Company:

a. violated Section 8(a)(5) and (1) of the Act by unilaterally creating the portable plant/alternate driver positions and unilaterally instituting a new selection system; and

b. violated Section 8(a)(3) and (1) of the Act by failing to select prominent union supporters for the portable plant driver position?

---

<sup>2</sup> The Supreme Court heard oral argument in *New Process Steel* on March 23, 2010.

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by denying union activist Gary Stevenson his union representation rights during an investigatory meeting, and violated Section 8(a)(3) and (1) of the Act by suspending and discharging him?

4. Whether the Company violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting bargaining-unit work?

### **STATEMENT OF THE CASE**

This case came before the Board on a consolidated complaint issued by the General Counsel pursuant to charges filed by the Union. (A 1-12.) On December 17, 2007, following a hearing, the administrative law judge issued a decision finding that the Company committed numerous unfair labor practices, including unilaterally creating new positions and selection criteria, and discriminatorily failing to select union supporters for those positions; failing to accord an employee his union representation rights during an investigatory meeting preceding his suspension, and discharging that employee because of his union activity; and unilaterally subcontracting unit work. (D&O 7-27.) The General Counsel, the Union, and the Company filed exceptions to the judge's decision.

On March 31, 2009, the Board (Chairman Liebman and Member Schaumber) issued a Decision and Order adopting most of the judge's findings. (D&O 1-5.) Specifically, the Board, contrary to the judge's recommendation,

found that the Company discriminatorily failed to dispatch union supporters Ron Eversole, Matthew Bales, and Stevenson. (D&O 2.)

## **STATEMENT OF THE FACTS**

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

#### **A. The Company's Business; the Union Begins an Organizing Campaign; Drivers Eversole, Stevenson, and Bales Become Active Union Supporters**

The Company, which manufactures and sells ready-mix concrete, has three separate plants in Indiana. Jim Spurlino is the owner of the Company, and the Weissman Group, a human resources consulting firm, handles the Company's personnel matters. This case arises out of events that occurred primarily at the Company's Kentucky Avenue plant, where it employs 15 concrete truck drivers. (D&O 8.)

In late 2005, the Union started an organizing campaign at the Kentucky Avenue location. (D&O 9.) On December 6, 2005, the Union filed a petition for an election, seeking to represent the Company's drivers, dispatchers, and batchmen. (D&O 9; A 113.) Drivers Eversole, Stevenson, and Bales were active and open union supporters during and after the campaign. They were members of the union organizing committee who also served as union observers at the election. (D&O 23; A 140, 146, 175, 178, 199, 200, 203.) All three were outspoken about their union support, with Eversole plainly informing the Company's general

manager, Gary Matney, that he was “for the Union.” (A 146.) Thus, the Company was “fully aware” of their support for the Union. (*Id.*)

**B. Company Officials Tell Employees That by Seeking Union Representation, They Had “Blown It for Themselves,” and that the Company Would Not Stand To Have a Union**

During the union campaign, General Manager Matney met numerous times with several different drivers in an attempt to dissuade them from joining the Union. (D&O 9-10.) At one such meeting, Matney warned Eversole: “You guys are messing up a good thing that could have happened here, and now you’ve blown it for yourselves.” (D&O 10-11; A 147.) Overall, Matney met with Eversole more than 10 times during the campaign and repeated the same message, stating that he did not want the Union in, and that the Company would not stand to have the Union. (D&O 10; A 148-50.)

Matney also met with union supporter Stevenson, trying to convince him and Eversole to circulate an anti-union petition in order to stop the election. (D&O 10; A 150, 177, 214-16.) In encouraging Stevenson to get the petition signed, Matney implored: “we need to try to get rid of this [U]nion.” (D&O 10; A 176.)

Matney cautioned union supporter Bales that the Company had gone through union organizing several times, and that it had “prolonged [bargaining] long enough that the Union walked away from the table.” (D&O 10; A 198.) Matney similarly warned driver Terry Mooney that if employees voted for the Union,

negotiations would not start for another 18 months, and the Company would drag them out and just pay the fines. (D&O 10; A 184-85, 187.) Matney also stated that, in his experience, union employees were bad and did not like to do any work. (D&O 10; A 186.)

Operations Manager George Gaskin also spoke with employees about the Union. For example, he told Eversole that if things “go the way [Eversole] wants [them to go], the shit is going to get real ugly around here.” (A 151.)

**C. The Union Wins the Election; General Manager Matney Warns that Things Are Going To Get Worse**

On January 13, 2006, the election was held, which resulted in the Union’s certification as the drivers’ exclusive collective-bargaining representative. (D&O 10.) The next workday after the election, General Manager Matney entered the break room and told the drivers that “the Union makes [him] want to do mean things.” (D&O 11; A 179.) A few days later, he repeated this prediction, telling Stevenson that “it is just going to get worse now.” (D&O 11; A 179.)

Matney made similar statements to driver Kenneth Cox. Matney said that he wished the election had ended differently, that drivers were going to “lose a lot of stuff that . . . [the Company] was going to offer,” including “bonuses and more money and vacations,” and that “things at the plant were going to get a whole more [sic] uglier.” (D&O 11, A 169-70.) Matney later told Cox that Eversole was the “ringleader.” (D&O 11; A 171.)

**D. The Parties Begin Negotiations, with Eversole, Stevenson, and Bales Serving on the Union Bargaining Committee; Disregarding Its Seniority-Based Assignment System, the Company Bypasses the Three Union Supporters and Dispatches Less Senior Employees to the Stadium Project**

In early 2006, the parties commenced negotiations for an initial collective-bargaining agreement. Eversole, Stevenson, and Bales were members of the union bargaining committee. Human Resources Consultant Mary Rita Weissman, Operations Manager Gaskin, and General Manager Matney were present on behalf of the Company. (D&O 15; A 156.)

In February 2006, pursuant to a Project Labor Agreement (“PLA”) that the Company had signed with Baker Concrete, Inc., the Company started delivering ready-mix concrete to a job site at the Indiana Stadium and Convention Center (“the Stadium Project”). (D&O 11; A 57.) Pursuant to the PLA, to which the Union is a signatory, drivers who worked at the Stadium Project were paid higher hourly wages than their regular wages (\$21.85 versus \$17.50). (D&O 12; A 57, 119-21.)

Before the election, the Company had an established policy of dispatching employees to customers based on their seniority. (D&O 11; A 12-13, 114-18.) Pursuant to this policy, each plant maintained a separate call-in list that listed drivers in order of seniority based on dates of hire, with the most senior drivers at the top of the list and new hires at the bottom. (D&O 11; A 117.) In making

assignments, dispatchers would start at the top of the list and go down, skipping only drivers who were on leave or otherwise unavailable. (D&O 11.) When drivers returned to the facility after completing their initial assignments, the Company ordinarily sent them out again in the order of their return. At all times relevant to this case, the dispatch order was as follows: Eversole, Mooney, Cox, Stevenson, Bales, Mark Sims, Steve Miller, Eric Kiefer, Randy Poindexter, Keith Payne, Wayne Thomerson, Carlos Quesada, and John Pinatello. (D&O 12; A 13.)

When the Stadium Project started, which was around the time that Eversole, Stevenson, and Bales joined the union bargaining committee, the Company altered its dispatch system. Although drivers continued to arrive at the Kentucky Avenue plant by seniority, if the more junior drivers were headed to the Stadium Project, the Company loaded their trucks first, bypassing the three more senior union activists. As a result of this change, the Company gave fewer of the higher-paying Stadium Project dispatches to Eversole, Stevenson, and Bales despite their greater seniority. (D&O 12; A 154, 181, 201.)

Thus, if the first load of the day was for the Stadium Project, the Company bypassed Eversole, who was first on the seniority list, in favor of other less senior drivers. (A 160.) However, if the first job was not at the Stadium Project, then the Company would load Eversole's truck first, but only to dispatch him to lower paying jobs. The Company only sent Eversole to the Stadium Project if it was

scheduled to pour a large slab of concrete. (A 161.) The Company did not dispatch Eversole to the Stadium Project until March 16, five weeks after it started, and on a day when every other driver was also sent to the site. (D&O 12; A 155.)

The Company also dispatched other less senior drivers to the Stadium Project instead of union activists Stevenson and Bales, who were fourth and fifth in seniority, respectively. (A 180-81, 201.) The Company did not dispatch Stevenson to the Stadium Project for more than a month after it started. (D&O 12; A 182.)

In contrast, the Company dispatched Eric Kiefer, who was seventh on the seniority list and “neutral” regarding the Union, to the Stadium Project at least three times a week; when Kiefer was headed to the Stadium Project, the Company often loaded his truck before Eversole’s, even though the latter was first in seniority. (A 163-65.) Kiefer frankly admitted that the Company “loaded [him] around all the drivers that were above [him].” (A 165, 168.) Similarly, the Company gave driver Kenneth Cox, who served as an election observer for the Company, and who the Company viewed as “on their side,” “special loads” in preference to Eversole, the most senior driver. (D&O 12; A 169, 172-73.)

**E. Without Notifying or Bargaining with the Union, the Company Creates the New Positions of Portable Plant Driver and Alternate Driver, and Unilaterally Establishes Selection Criteria; the Company Rejects Union Activists Eversole, Stevenson, and Bales for the Portable Plant Driver Job**

In May 2006, the Company set up a portable batch plant at the Stadium Project because its closest plant (Kentucky Avenue) was approximately 4-5 miles away. (D&O 12.) Operations Manager Jeff Davidson was primarily responsible for overseeing the portable plant, with Gaskin and Matney also playing a role. (D&O 12.)

The Company decided to staff the portable plant by creating a new portable plant driver position. (D&O 13.) On May 12, the Company posted a notice on the bulletin board in the break room asking drivers to provide written notice if they were interested in working at the portable plant. The notice also asked drivers to list their rear discharge truck experience, but it did not provide any other details about the job. (D&O 13; A 15.) Thirteen drivers, including Eversole, Stevenson, and Bales, signed the notice indicating their interest in the position. Later that day, the Company informed the Union that it had sought volunteers for the new position. (D&O 13; A 27.)

On May 22, the Company informed the Union that it would select drivers for the portable plant driver position based on their “skills, qualifications, and past performance.” (A 30.) This announcement marked the first time that the

Company said it was going to use a formal evaluation process. (D&O 13.)

Previously, the Company's practice was to assign drivers based on their seniority.

When Stevenson inquired about the position, Operations Manager Davidson told him that drivers would be selected based on a driving test involving a rear-discharge truck, the type used at the Stadium Project. However, Davidson did not offer the test to Eversole or Bales. (D&O 13; A 157, 202.) The Company also did not select Stevenson for the position even though he performed well on the test and was "one of the better" drivers. (D&O 14; A 183.) Instead, Davidson selected Mooney, who outright refused to take the driving test, and Kiefer, who encountered difficulties with it, never getting the truck out of first gear and damaging the brakes. (D&O 13, 14; A 166, 189-90.)

Davidson also said that he wanted "skilled" drivers for the position. However, the four drivers he selected -- Mooney, Kiefer, Thomerson, and Pinatello -- lacked any experience driving a rear-discharge truck. All four drivers had less experience than Eversole, who had trained Kiefer and Thomerson, and Thomerson and Pinatello were recent hires. (D&O 13; A 158, 162.)

When the Company created the portable plant driver position, it also announced that those drivers would lose their seniority on the call-in list. Thus, on days when the portable plant was closed, and the portable plant drivers returned to the Kentucky Avenue plant, they often had no work due to their loss of seniority.

(D&O 20-21; A 167, 191.) Although Davidson later offered the portable plant driver job to Eversole and Bales, they turned it down because they did not want to lose their seniority. (D&O 14.)

Thereafter, Davidson created the position of alternate portable plant driver. (D&O 14.) The Company did not tell the Union about its decision to create the new position, and did not bargain over the change. In creating the position, Davidson determined that the alternate drivers would keep their seniority status on the call-in list since they were only back-ups and would continue to work primarily out of the Kentucky Avenue plant. Davidson did not offer the position to either Eversole, Stevenson, or Bales, and instead selected three other, less experienced drivers. (D&O 14; A 134, 159, 204.)

**F. The Company Inadvertently Includes Union Authorization Cards with Employees' Paychecks; Stevenson Initially Refuses To Return His Copies, but Ultimately Does So at a Meeting in Which the Company Denies His Request for a Union Representative; the Company Suspends and Discharges Stevenson over the Incident**

On August 25, the Company sent employees their paychecks, together with a letter explaining how it was handling union dues checkoffs. Attached to the letter were copies of signed union authorization cards, from which the Company had erroneously neglected to redact employees' social security numbers. When the Company discovered this error, it attempted to retrieve the cards. (D&O 16; A16.)

Stevenson received his paycheck, along with his copy of the letter and cards, which he placed in his truck. As Stevenson was preparing to deliver an order, batch man Larry Davis asked him to return the documents. Stevenson declined, stating that he had thrown them in the dumpster. Davis told Stevenson not to lie, and Stevenson responded that he was not giving anything back. Stevenson then left to make his delivery. (D&O 16; A 16-18, 192-94.)

When Stevenson returned, Operations Manager Davidson summoned him to the office for a meeting that Davis also attended. Davidson asked Stevenson for the documents, explaining that the Company needed them back because they contained confidential information. (D&O 16; A 16.) Stevenson stated that he did not have the documents and that he had left them at the jobsite. (D&O 16; A 16.) Davidson stated that he would go to the jobsite to look for the papers, but if he did not find them, the Company would “have to take further action.” (D&O 16; A 206.) At that point, Stevenson asked if he could call his union representative so he could find out if he had to give the papers back. (D&O 16; A 195, 206.) Davidson continued to question Stevenson about the documents. Ultimately, Stevenson removed the papers from his pocket and placed them on the table. (D&O 16; A 207.)

Following discussions with Human Resources Consultant Weissman, Company Owner Spurlino decided to suspend Stevenson, a decision that

Operations Manager Gaskin announced the next day. (D&O 17; A 196.) On September 5, Weissman interviewed Stevenson and his representative by phone. During the meeting, Stevenson admitted that he originally did not reveal the whereabouts of the documents, but explained that he was upset when he saw that the Company had disclosed employees' social security numbers. (D&O 17; A 53-56, 220.) Stevenson added that he did turn over the documents a few minutes after Davidson requested them. (D&O 17; A 53-56.)

On February 22, 2007, the Company told Stevenson that it was discharging him because he had "committed a serious violation of Company expectations." (D&O 17; A 45.)

**G. Without Notifying or Bargaining with the Union, the Company Hires Subcontractors for the Warehouse Project, Depriving Unit Employees of Overtime Pay and Job Opportunities**

In early October 2006, Lithko Contracting awarded a bid to the Company to provide all of the ready-mix cement for the AirWest Distribution Warehouse ("the Warehouse Project"). (D&O 18; A 224-27.) Such a large-scale project, which required continuous pours over a three-week period, promised unit employees an opportunity for overtime work, as well as the prospect of the Company hiring additional coworkers who would join the unit. (*Id.*)

The anticipated starting date was late October, but pouring was delayed until spring due to poor weather. (D&O 22.) During this time, the Company did not tell

the Union about the Warehouse Project or bargain over its potential impact on unit employees. (*Id.*) Instead, in mid-May 2007, the Company met with Lithko to discuss anticipated pour dates. (D&O 18.) Lithko stated that it wanted an “aggressive” pouring schedule of continuous pours from midnight to 7:00 or 8:00 a.m., to start in two weeks. (D&O 18; A 52, 228, 235-36.) The Company told Lithko it would be able to perform the job as requested, but it did not contact the Union to discuss the impending project or its impact on unit employees. (D&O 18-19; A 235.)

On June 6, as expected, Lithko contacted the Company to say that the large pours had to start on June 11. (D&O 18; A 237.) That same day, the Company, without notifying the Union, contacted two companies, McIntire and Buster Cement Products, and asked to use their drivers and trucks to complete the interior slab pours. (D&O 22; A 233.) Both subcontractors agreed to this arrangement, for which the Company paid them \$100 per hour. (D&O 19.)

At the time that the Company made its decision to subcontract the Warehouse Project work, the parties were far from reaching agreement on the terms of an initial collective-bargaining agreement, and there was no impasse in negotiations. (D&O 15; A 141.)

On June 7, after the Company had already hired the subcontractors, Human Resources Consultant Weissman contacted Union Vice President Steve Jones to

tell him that the Company was getting ready to pour concrete at the Warehouse Project, and that it would be using leased drivers and trucks to perform the work. (D&O 19-20; A 46, 221.) On June 8, the Union's attorney, Neil Gath, objected to the Company's hiring of subcontractors to perform unit work as a unilateral change, and informed Weissman that the Company was required to bargain over its decision. (D&O 20; A 47-48.) Weissman responded that the Company did not have to bargain and was "free to do what [it] want[ed]." (D&O 20; A 239.)

By the time that Operations Manager Davidson met with the Union to discuss the Warehouse Project on Monday, June 11, the subcontracted drivers had commenced pouring the concrete nine hours earlier. (D&O 20; A 223.) Over the next several days, subcontractors continued to perform work that could have been assigned to unit employees. (D&O 20.)

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

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber), in disagreement with the judge, found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to dispatch Eversole, Stevenson, and Bales to the Stadium Project because they supported the Union. (D&O 2.) The Board also found, in agreement with the judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally creating the portable plant driver and alternate

driver positions, and by implementing a new evaluation system to select drivers for those positions. (D&O 1, 20-21.) The Board, also like the judge, additionally found that the Company violated Section 8(a)(3) and (1) of the Act by failing to select the three prominent union supporters for the portable plant driver position.<sup>3</sup> (D&O 1, 20.) The Board, agreeing with the judge, further found that the Company violated Section 8(a)(1) of the Act by failing to give Stevenson his union-representation rights during an investigatory meeting, and violated Section 8(a)(3) and (1) of the Act by suspending and later discharging him because of his union activities. (D&O 1, 24-25.) Finally, the Board agreed with the judge that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting unit work at the Warehouse Project. (D&O 1, 21-22.)

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 the rights guaranteed them by Section 7 of the Act. (D&O 4.) Affirmatively, the Order requires the Company to notify and, on request, bargain with the Union prior to implementing any changes in employees' terms and conditions of employment, and to make employees whole for any loss of earnings or other benefits suffered as a result of the Company's

---

<sup>3</sup> The Board, however, found it unnecessary to pass on the judge's recommended finding that the Company also violated the Act by refusing to select the three union activists for the alternate driver position. (D&O 2 n.9, 24.)

unlawful conduct. (D&O 4.) The Order further requires the Company to reinstate Stevenson to his former, or a substantially equivalent, position. (D&O 4.) Finally, the Order requires the Company to post a remedial notice. (D&O 4.)

### **SUMMARY OF ARGUMENT**

This case involves the Company's unlawful response to its employees' selection of the Union as their collective-bargaining representative. Dissatisfied with the election results, the Company undermined the Union at every opportunity by retaliating against employees who supported the Union, and by ignoring its bargaining obligations. First, the Company discriminated against the three key union leaders when it frequently bypassed them for dispatches to the coveted and higher paying Stadium Project assignments. The Company then defied the Union by unilaterally creating new positions and instituting a new selection system to staff them. Next, the Company continued its path of retaliation by refusing to select the three union supporters for those positions.

The Company ultimately succeeded in ridding itself of one of the three activists, Union Bargaining Committee member Stevenson. Following an investigatory interview during which he was unlawfully denied his statutory right to union representation, the Company discharged him, ostensibly for initially refusing to return union authorization cards from which the Company had erroneously neglected to redact employees' social security numbers. However,

Stevenson returned the cards a few minutes into the unlawful investigatory interview; his initial reaction caused the Company no harm. In these circumstances, the Board reasonably inferred that the Company seized on the incident as a pretext to mask its true motive, which was to eliminate a union activist.

Following Stevenson's unlawful discharge, the Company continued its refusal to bargain with the Union. Faced with a demand for significant manpower at the Warehouse Project, the Company, without giving the Union reasonable advance notice and the opportunity to bargain, hired subcontractors to perform unit work, and then belatedly presented its action to the Union as a *fait accompli*. This unilateral action resulted in a loss of possible overtime pay for the employees, and a missed opportunity to expand the unit by hiring more drivers.

### **STANDARD OF REVIEW**

The standard governing this Court's review of Board unfair labor practice findings is well-established. This Court asks only if the Board's decision is "supported by substantial evidence and whether its legal conclusions have a reasonable basis in law." *L.S.F. Transportation, Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir. 2002). The substantial evidence test "requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree that *could* satisfy the reasonable fact finder." *ATC Vancom of Cal. v. NLRB*, 370 F.3d

692, 695 (7th Cir. 2004) (emphasis in original). Moreover, this Court “refuses to interfere with the Board’s choice between two permissible views of the evidence, even though [it] may have decided the matter differently, had the case been before [it] *de novo*.” *L.S.F. Transportation*, 282 F.3d at 980.

This Court owes “particular deference” to the Board’s credibility decisions, and will not disturb them absent “extraordinary circumstances.” *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005). *See also Beverly California Corp. v. NLRB*, 227 F.3d 817, 829 (7th Cir. 2000) (attacks on credibility findings are “almost never worth making”).

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT IN BYPASSING PROMINENT UNION SUPPORTERS FOR DISPATCHES TO THE STADIUM PROJECT**

#### **A. The Act Prohibits Employer Discrimination Against Employees for Engaging in Protected Union Activity**

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) prohibits employer “discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their statutory rights. Thus, an employer violates this section of the Act by

discriminating against employees because of their union activities. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1025 (7th Cir. 2005).

In determining whether an employer's action against an employee is unlawful, the critical question is the employer's motivation. *NLRB v. Bestway Trucking, Inc.*, 33 F.3d 177, 180 (7th Cir. 1994). The Supreme Court approved the Board's test for resolving the question of motive in *Transportation Management*, 462 U.S. at 397, 401-03. *See Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 89 (1st Cir. 1981). Under that test, if substantial evidence supports the Board's finding that the employees' union activity was "a motivating factor" in the employer's decision to take action against an employee, the Board's conclusion that the decision was unlawful must be affirmed, unless the record, considered as a whole, compelled the Board to accept the employer's affirmative defense that the employer would have made the same decision even in the absence of the union activity. *Transportation Management*, 462 U.S. at 401-03. *Accord FedEx Freight East*, 431 F.3d at 1025.

Because an employer rarely admits unlawful discrimination, questions of motive are usually resolved by inferences drawn from the record as a whole. *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 695-96 (7th Cir. 1991). Further, "the Board is free to rely on circumstantial as well as direct

evidence.” *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 408 (7th Cir. 1992). Such circumstantial evidence can include the employer’s knowledge of its employees’ union activity, manifestations of union animus, suspicious timing, and the contemporaneous commission of other unfair labor practices. *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000); *NLRB v. Shelby Memorial Hospital Ass’n*, 1 F.3d 550, 562 (7th Cir. 1993); *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993); *Abbey’s Transportation Serv., Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988). Other circumstantial evidence includes the presentation of implausible or shifting explanations for the adverse action. *See Shelby Memorial Hospital*, 1 F.3d at 562; *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Further, the Board is under no obligation to accept at face value an employer’s asserted explanation “if there is a reasonable basis for believing it ‘furnished the excuse rather than the reason for [its] retaliatory action.’” *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted). Indeed, “the policy and protection of the [Act] does not allow the employer to substitute ‘good’ reasons for ‘real’ reasons when the purpose of the discharge is to retaliate for an employee’s concerted activities.” *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969).

**B. The Board Reasonably Found that the Company Bypassed Eversole, Stevenson, and Bales Because They Supported the Union**

The Company's knowledge of Eversole's, Stevenson's, and Bales' union activities, and its avowed union animus, strongly support the Board's finding (D&O 23) that the Company bypassed them when assigning higher-paying dispatches to the Stadium Project because they were union advocates. Substantial evidence -- dispatch tickets and driver testimony -- also shows that the Company failed to make dispatches to the higher paying Stadium Project jobs based on the established seniority system; instead, the Company manipulated the system to bypass the three more senior union supporters.

In its defense, the Company contended before the judge only that it did not bypass the more senior union activists -- a claim that the judge reasonably rejected given the dispatch tickets and driver testimony showing otherwise. Accordingly, the Board also properly found that the Company could not justify its actions by citing a post-hoc rationale for bypassing the union activists that was devised by the judge and never relied on by company decision-makers.

**1. The Company's knowledge of the drivers' union activities and its union animus support the Board's finding of unlawful motive**

Eversole, Stevenson, and Bales were open and ardent union supporters, soliciting signatures on union authorization cards, serving as the Union's observers

at the election, and representing the Union during collective-bargaining negotiations. Given the visible nature of these activities, the Board properly found (D&O 23) that, at the time the Company made the disputed dispatches, it knew that the three were strong union supporters. *See FedEx Freight, Inc. v. NLRB*, 431 F.3d 1019, 1029 (7th Cir. 2005) (employee's open and vigorous union activity supports finding that employer was aware of his involvement).

Not surprisingly, the Company's brief fails to mention the numerous antiunion statements that General Manager Matney made, both before and after the election, which display an undeniable antagonism towards employees' union activities. Prior to the election, Matney forecast nothing but misfortune if the Union won, telling employees that "you've blown it for yourselves." (A 147.) After the election, Matney's comments grew increasingly antagonistic. He bluntly warned employees that "the Union makes [him] want to do mean things" and that "it is just going to get worse now." (A 179.) Such statements demonstrate "manifest hostility" toward union activities, and do much to cast in a suspicious light the Company's failure to dispatch the three union supporters to the higher-paying Stadium Project. *See NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1267 (7th Cir. 1987) (employer's statement that he "wouldn't allow a union in the shop" demonstrated animus).

**2. The Company discriminated against the three union supporters by manipulating its established seniority-based dispatch procedure so as to bypass them for higher paying assignments to the Stadium Project**

The Board reasonably adopted the judge's credibility-based finding (D&O 2, 12) that the Company -- disregarding its established policy of dispatching drivers based on their seniority -- frequently bypassed the three more senior union activists in dispatching drivers to the Stadium Project. This evidence includes the drivers' dispatch records, as well as their testimony, which show that the Company manipulated the dispatch procedure to give priority to drivers who were not union activists, despite their lower seniority levels.

As the Board emphasized, the drivers' dispatch tickets (A 31-44) show that the Company failed to adhere to its established procedure of dispatching according to seniority. (D&O 12.) Thus, the dispatch records from February 16 to March 24 show that Mooney received 50 trips, Kiefer 44 trips, and Cox 41 trips -- in total, approximately 45% of all Stadium Project dispatches. (D&O 12; A 31-44.) In contrast, during that same period, Eversole received only 11 dispatches, Stevenson received just 13, and Bales received only 31. (*Id.*) Given their relatively higher seniority, this disparity shows an outright manipulation of the dispatch system.

As the Board also explained (D&O 12), the drivers' testimony supports the dispatch records; they consistently testified that the Company, in making dispatches to the Stadium, loaded other, less senior drivers ahead of the three union

activists. Thus, Eversole testified that although he was first in seniority, the Company did not load his truck if the first dispatch was to the Stadium Project. (A 160.) Likewise, Stevenson and Bales, who were fourth and fifth in seniority, respectively, testified that the Company frequently loaded drivers heading to the Stadium Project ahead of them. (A 181, 201.)

Drivers who were not active in the Union also corroborated this testimony. For example, Kiefer, who was ninth in seniority, testified that he was “one of those drivers that [the Company] picked out of line . . . and loaded around other drivers,” and that the Company frequently gave him “special loads over [Eversole.]” (A 172-73.) Mooney also confirmed the Company’s departure from its established dispatch procedure, testifying that the Company bypassed more senior drivers in favor of less senior ones. (A 188.)

In short, the Company’s claim (Br. 27) that it adhered to the established procedure completely ignores the documentary evidence establishing that it manipulated the dispatch system. The Company also does not help itself by relying (Br. 27) on its dispatchers’ discredited assertions that they followed seniority. After all, the judge reasonably discredited their testimony because it could not withstand scrutiny in light of the documentary evidence and corroborating driver testimony. (D&O 12.) The Company fails to present any “extraordinary basis” for overturning the judge’s credibility ruling. *See Ryder*

*Truck Rental v. NLRB*, 401 F.3d 815, 828 (7th Cir. 2005). Absent such evidence, this Court must accept the judge’s finding that the Company deviated from its established dispatch procedure, thereby denying the three more senior union supporters lucrative assignments to the Stadium Project. *See Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 535 (7th Cir. 2003) (where Board’s order “was based on credibility determinations of the ALJ, as well as reasonable inferences drawn therefrom, [the Court] will not disrupt such determinations even if [it] might have interpreted the record differently”).

**3. The record does not compel the conclusion that the Company would have disregarded its established dispatch procedure absent the three drivers’ union activities**

The Board properly found (D&O 2) that the Company failed to prove that it would have made the disputed dispatches even in the absence of the three drivers’ union activities. The Board reasonably rejected the judge’s surmised (D&O 12), which was not based on any defense raised by the Company below, that it deviated from its seniority-based dispatch procedure because it wanted to “make a good impression at a high profile job” by sending drivers with new trucks to the Stadium Project.

As the Board explained (D&O 2), the flaw in the judge’s reasoning is that the Company never proffered a “new truck” defense below. Rather, the Company simply denied deviating at all from the regular dispatch procedure -- a claim that

the judge rightly discredited. (D&O 12; A 217-19.) It is well settled that in a case turning on employer motivation, the judge may not provide a rationale on which the employer did not in fact rely. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (court exceeds judicial review function when it speculates upon employer's motivations for discriminatory conduct); *Allied Mechanical Serv.*, 346 NLRB 326, 328 n. 14 (2006) (judge may not rely on motive for discharge that employer did not assert).

In sum, the Company cannot now rely on a post-hoc rationale -- devised for the first time by the judge -- to mask its otherwise unlawful motive. *See MJS Garage Management Corp.*, 314 NLRB 172, 181 (1994) (employer cannot rely on post-hoc rationales). Therefore, the Board properly rejected the "new truck" defense, and found that the Company's true reason for bypassing Eversole, Stephenson, and Bales was to retaliate against them for supporting the Union.

**II. THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CREATING NEW POSITIONS AT THE PORTABLE BATCH PLANT AND UNILATERALLY IMPLEMENTING A NEW SELECTION SYSTEM, AND VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO SELECT PROMINENT UNION SUPPORTERS FOR THE NEW PORTABLE PLANT DRIVER POSITION**

Although it was not alleged that the creation of the portable batch plant violated the Act, the Company did act unlawfully when it unilaterally created the positions of portable plant driver and alternate plant driver and implemented a new

selection system to staff those jobs. Further, in filling the unilaterally created portable plant driver job, the Company again discriminated against Eversole, Stevenson, and Bales, failing to select them for the position. As we show below, substantial evidence supports the Board's findings that the Company's unilateral changes violated Section 8(a)(5) and (1) of the Act, and that its failure to select the three key union supporters for the new position violated Section 8(a)(3) and (1) of the Act.

**A. An Employer Violates the Act Where, as Here, It Unilaterally Changes Employees' Terms and Conditions of Employment During Negotiations, Without Timely Notifying the Union and Bargaining to an Overall Impasse**

As this Court recognizes, “[w]hen a union wins an election to be the exclusive bargaining representative of a group of workers, the employer becomes duty-bound to bargain in good faith . . . .” *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 996 (2000). This obligation arises from Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)), which makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of his employees.” *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 209-10 (1964). Moreover, Section 8(d) of the Act (29 U.S.C. § 158(d)) defines the bargaining obligation as requiring parties to “meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Under Section 8(d), the creation of new positions and selection criteria -- the topics at issue here -

- are mandatory subjects of bargaining. *See, e.g., Indulac, Inc.*, 344 NLRB 1075, 1081 (2005) (creation of new position); *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 640 (1987) (implementation of new evaluation system).

An employer's unilateral change in mandatory bargaining subjects violates Section 8(a)(5) and (1) of the Act, for such unilateral action "is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal" to bargain.<sup>4</sup> *NLRB v. Katz*, 369 U.S. 736, 743 (1962). *Accord Duffy Tool & Stamping*, 233 F.3d at 996. Moreover, where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to maintain the status quo encompasses a duty to refrain from implementing changes unless and until an overall bargaining impasse has been reached. *Id.* at 996-97. In the instant case, it is undisputed that the parties were far from an overall impasse when the Company made the unilateral changes at issue.

Moreover, the rule against unilateral changes plays a critical role where, as here (as well as in *Katz* and *Duffy Tool & Stamping*), a newly certified union is bargaining for an initial agreement. Particularly in this context, the rule serves as an important tool for furthering the Act's overriding goal of labor peace. *Id.* at 997. This is so because unilateral action -- especially in this context -- "detracts

---

<sup>4</sup> A violation of Section 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1) of the Act, cited above p. 21. *See Porta-King Bldg. Sys., Inc. v. NLRB*, 14 F.3d 1258, 1261 (8th Cir. 1994).

from the legitimacy of the collective-bargaining process by impairing . . . [the union's] ability to function effectively, and by giving the impression to members that . . . [it] is powerless." *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (internal quotation marks omitted).

As we show below, the Company completely disregarded its bargaining obligation when, without providing advance notice and an opportunity to bargain, it unilaterally created new positions within the bargaining unit and implemented a new selection system for filling those positions. The record plainly shows that the Company, far from bargaining to an overall impasse as it was required to do (*see p.* 31 above), simply presented its actions to the Union as a *fait accompli*.

**1. The Company's creation of the portable plant driver and alternate plant driver positions changed the employees' terms and conditions of employment**

Substantial evidence supports the Board's finding (D&O 21) that the Company violated the Act when it unilaterally created the positions of portable and alternate plant driver. It is undisputed that the Company's unilateral actions substantially impacted the drivers' terms and conditions of employment. Thus, the new positions involved different rates of pay and different benefits, and drivers who accepted the portable plant driver position lost their seniority at the Kentucky Avenue plant. As a result, when the portable plant was not operating, the

Company unilaterally relegated portable plant drivers to the bottom of the Kentucky Avenue call-in list, thereby depriving them of dispatches.

The Company does not help itself by asserting (Br. 29) that the portable plant driver position merely involved transfers to another facility. Even if true, the law is settled that transferring employees without bargaining is an unlawful unilateral change. *See, e.g., Indulac, Inc.*, 344 NLRB 1075, 1077 (2005) (transfer relates to an employee's terms and conditions of employment and is a mandatory subject of bargaining). Therefore, as the Board correctly found (D&O 21), although the portable plant assignments "clearly were new positions," even if they had been transfers, the Company still was not relieved of its bargaining obligation.

**2. The Company further violated the Act by unilaterally implementing a new selection system**

At the unfair labor practice hearing, company officials variously asserted that in selecting drivers for the portable plant driver position, they relied on some or all of the following criteria: a driving test, formal written evaluations, attendance records, truck cleanliness, and experience. (A 122, 128-31.) It is undisputed, however, that before unilaterally creating the new position, the Company had never used those criteria to select drivers. (D&O 21; A 132.) Instead, as shown above pp. 8-9, the Company's established practice was to rely solely on seniority in assigning work. Therefore, the Company's unilateral decision to implement a new selection system, which (according to the testimony

of company officials) was based on new criteria, represented a substantial change in the drivers' terms and conditions of employment. Accordingly, as the Board reasonably found (D&O 21), the Company compounded its unlawful conduct, and further violated Section 8(a)(5) and (1) of the Act, by unilaterally implementing a new evaluation system to select drivers for the new position that it had just unilaterally created. *See, e.g., Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 648 (1987) (unilateral implementation of formal written evaluation system where none had existed was unlawful); *Safeway Stores*, 270 NLRB 193, 195 (1984) (unilateral implementation of formal evaluation system constituted a "material, substantial, and significant change" in employees' working conditions).

**3. The Company did not bargain over its decisions to create new positions and implement a new evaluation system**

In challenging the Board's findings, the Company baldly asserts (Br. 30) that it provided the Union with advance notice regarding its staffing plans for the portable plant and then bargained to impasse over its proposal. As we now show, the Board (D&O 20-21) reasonably rejected these assertions.

First, the Company forgets that the parties never reached an overall impasse -- an event that is a necessary predicate to implementing a bargaining proposal unilaterally. As shown above pp. 31-32, the law is quite clear that when parties are bargaining for an agreement, an employer cannot make unilateral changes absent an overall bargaining impasse. Here, the parties had only begun to negotiate for a

first contract when the Company took unilateral action. Thus, the Company was not privileged to establish unilaterally the new jobs and selection criteria.

In any event, the Company did not even take the initial steps that good faith bargaining requires. The Company cites no support for its cavalier claim (Br. 30) that the parties bargained to impasse on the specific issue -- a claim that, in any event, would not have privileged its unilateral action. *See* cases cited above pp. 31-32. And, contrary to its further assertion (Br. 30), the Company did not notify the Union of either unilateral decision in a way that would have provided a genuine opportunity for negotiations. Indeed, the Company never informed the Union of its decision to create the alternate portable plant driver position; Operations Manager Davidson simply approached employees and asked if they were interested. (D&O 14, 20; A 143.)

The Company also did not provide the Union with any specifics regarding the criteria upon which it purportedly relied in selecting portable plant drivers. In response to the Union's inquiry, the Company provided only the general assertion that it would rely on applicants' "skills, qualifications and past performance." (A 28-30.) Union Vice President Jones corroborated this lack of notice, testifying that the Company did not discuss how it would test or evaluate applicants. (A 143.) As the judge correctly observed (D&O 21), the Company's general and vague statements "did not amount to notice that driving tests would be given, and . . . did

not equate to notice that formal evaluations would be prepared on applicants.” See *Gannett Co., Inc.*, 333 NLRB 335, 358 (2001) (notice must contain “sufficient information to engage in meaningful bargaining”); *Hawthorn Melody, Inc.*, 275 NLRB 339, 344 (1985) (employer’s notice is not sufficient where information is vague and lacks detail).

In sum, the record establishes that the Company presented its decisions to the Union as a *fait accompli* that deprived the Union of a meaningful opportunity to bargain. See *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513, 518-519 (7th Cir. 1998) (employer unlawfully presented new policy as a *fait accompli*).

**4. The PLA did not give the Company carte blanche to act unilaterally**

Contrary to the Company’s assertion (Br. 29), the PLA did not excuse the Company from bargaining with the Union over its creation of the new positions and selection criteria. The Company bases its assertion on its mistaken belief (Br. 29 n.18) that its creation of the new positions removed those drivers from the unit and placed them in a separate unit covered by the PLA. However, as the Board reasonably found (D&O 21), the drivers who worked at the portable plant remained in the unit.

The record amply supports the Board’s finding. Thus, portable plant drivers did not even work exclusively at the portable plant. Rather, there were numerous

days when the portable plant was closed and portable plant drivers returned to work at the Kentucky Avenue plant. Likewise, other drivers based at Kentucky Avenue received dispatches to the portable plant on an as-needed basis; the Company never contended that those dispatches stripped those drivers of their unit status. The portable plant drivers also remained under the same supervision, used the same dispatchers, and performed the same work as other drivers based at Kentucky Avenue. Moreover, it is undisputed that the portable plant positions were temporary, and that management fully expected those drivers to return to their regular assignments at Kentucky Avenue. *Cf. Irwin & Lyons*, 51 NLRB 1370, 1373 (1943) (employees temporarily assigned to a logging camp because their regular camp was not operating are not members of bargaining unit at the temporary camp). Thus, the Board was well warranted in finding (D&O 20-21) that the portable plant drivers remained within the unit, and therefore that the Company was required to bargain with the Union over their terms and conditions of employment.

In any event, the Company's further assertion (Br. 29) that the PLA gave it unfettered discretion over its drivers' terms and conditions of employment must be rejected. To begin with, the Company is hardly in a position to rely on the PLA, given its refusal to arbitrate a grievance filed by the Union under the PLA concerning the assignment of drivers. (D&O 20.) As the Board noted (D&O 20),

the Company's refusal "foreclosed a neutral third party from analyzing the validity of its interpretation of the PLA."

Moreover, in this forum, the Company points to nothing in the PLA that privileged its unilateral actions. Although the Company (Br. 10) cites the PLA (A 57-112) language stating that its provisions "control construction of the [Stadium] Project and take precedence over and supersede" any conflicting terms in "national, area or local agreements," the PLA does not even address the creation of jobs to staff a portable plant. Thus, there is no merit to the Company's assertion that the PLA relieved it of its duty to bargain with the Union over its creation and staffing of the portable plant and alternate driver positions.

**B. The Company Violated Section 8(a)(3) and (1) of the Act by Failing To Select Eversole, Stevenson, and Bales for the Portable Plant Driver Position**

**1. The Company knew about the three drivers' union activities, and its union animus motivated its refusal to select them**

Compelling evidence of knowledge and animus strongly support the Board's finding (D&O 23-24) that the Company discriminated against Eversole, Stevenson, and Bales by failing to select them for the portable plant driver position. The record belies the Company's claim (Br. 31) that Davidson, who chose the drivers, lacked direct knowledge of the discriminatees' union activities. As shown above p.5, all three individuals served as union observers at the election and as members

of the union bargaining committee -- open and visible activities that occurred just a few months before the Company created the new position. In fact, Davidson testified that he knew about Stevenson's role on the union bargaining committee. (A 135.)

Moreover, as shown above pp. 25-28, the Company previously displayed its animus when it bypassed the three union supporters in assigning higher-paying dispatches to the Stadium Project, and when General Manager Matney uttered inflammatory antiunion statements to the employees. *See Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 252 (D.C. Cir. 1991) (employer's action "must be viewed in the context of [its] other unfair labor practices"). The Board was therefore well warranted in finding (D&O 23) that the Company similarly did not select Eversole, Stevenson, and Bales for the portable plant driver position because of their union activities.

**2. The Board reasonably rejected the Company's assertion, which is based solely on discredited testimony, that it would not have selected the three drivers even absent their union activities**

In challenging the ample evidence of antiunion motive summarized above, the Company relies (Br. 31-32) solely on Operations Manager Davidson's testimony that the selection process was based on objective considerations, such as job performance and the drivers' qualifications. (A 128.) However, the Board reasonably adopted the judge's decision to discredit Davidson's testimony, finding

it to be “laced with inconsistencies, contradicted by driver testimony, and unsupported by any underlying documents.” (D&O 23.) Indeed, because Davidson’s testimony was shifting and “wholly unreliable” (D&O 14), the Board reasonably inferred that the selection process on which he claimed to rely was a sham meant to conceal the Company’s unlawful motive and to create the appearance that company officials had objectively evaluated the applicants’ skills and qualifications. *See Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981). As we show below, the Board reasonably discredited Davidson’s testimony regarding the Company’s selection process because it suffered from several glaring defects.

First, the Board emphasized (D&O 8, 13-14) that Davidson’s testimony was rife with inconsistencies. For instance, at one point, he claimed that drivers only needed an A or B grade for safety and attendance; however, he later amended this list to also include on-time delivery, personal productivity, and customer service. Davidson then contradicted this statement entirely by testifying that the evaluation had no areas in which an A or B were “absolute requirements.” (D&O 14; A 211-13.) Thus, far from supporting the Company’s claim that it applied objective criteria, Davidson’s inconsistent testimony bolsters the Board’s finding (D&O 24) that the criteria on which he claimed to rely were a pretext to mask the Company’s unlawful motive. *See Union Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490-91

(7th Cir. 1993) (once animus is established, employer's shifting explanations for adverse employment action suffice to support finding of pretext); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("shifting explanations" show unlawful motive).

The Board also reasonably discredited as false and therefore pretextual Davidson's further assertion (A 129-30) that he selected only the most qualified drivers. Two of the drivers he chose, Thomerson and Pinatello, were inexperienced new hires. (D&O 13.) The three other drivers he selected -- Mooney, Kiefer, and Thomerson -- had no experience driving a rear discharge truck, the only kind used at the portable plant. (D&O 13.) By contrast, Eversole was the driver with the most experience, and he had trained Kiefer and Thomerson. Bales was also an experienced driver. (A 202.) In fact, Davidson described Eversole and Bales as "qualified" drivers. (D&O 13.) Stevenson was likewise an experienced driver, having worked at the Kentucky Avenue plant for over eight years. (A 174.)

Moreover, although Davidson claimed that the Company based its selections on a desire to put its "best foot forward" (A 129), neither Mooney nor Kiefer received glowing evaluations. To the contrary, the Company had described Mooney's work as "sometimes below standards," and it had accused Kiefer of not applying himself. (D&O 13; A 19, 22.)

The Board (D&O 24) also reasonably discredited Davidson's further testimony (A 133) that another supposed neutral criterion -- the driving test -- played a key role in the selection process. Davidson hired Mooney even though he refused to take the test; by contrast, Davidson did not even offer the test to Eversole and Bales, despite their expressed interest in the position. (A 157, 202.) And Davidson selected Kiefer despite his sub-par performance on the test. (D&O 14; A 166.) By contrast, Davidson rejected Stevenson even though the instructor administering the test considered him to be "one of the better" drivers. (D&O 14; A 183.)

Finally, the Company's failure to provide documents supporting Davidson's claim that he actually applied neutral selection criteria further bolsters the Board's finding that the Company did not present a "well based, logical" explanation for its actions. (D&O 23.) For example, Davidson claimed that he did not hire Stevenson because he had problems with attendance and truck cleanliness. (A 205.) However, the Company did not produce any documents showing either that it had any policy regarding attendance and truck cleanliness, or that Stevenson struggled in those areas. (D&O 14.) Likewise, Davidson claimed (A 210) that he rejected Bales because he had safety issues and an attitude problem, yet again, the Company could provide no supporting documents. Davidson also claimed (A 208-09) to have reviewed job applications and attendance records, but the Company

failed to offer any such documents into evidence.

Before this Court, as below, the Company does not set forth any other rationale for rejecting Eversole, Stephenson, and Bales, aside from Davidson's completely untrustworthy and constantly shifting assertions -- testimony that the Board found (D&O 14) to be a "hopeless muddle" and "wholly unreliable." Moreover, on review, the Company does not even begin to meet its heavy burden of establishing any basis for disturbing the judge's well-founded determination to discredit Davidson's testimony. *See* cases cited above, p. 21. Thus, the Board (D&O 24) properly rejected as pretextual the Company's stated reasons for not hiring the three union activists as portable plant drivers, and reasonably inferred that the Company's true motive was an unlawful one. Accordingly, substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by rejecting them for the position.

**III. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DENYING STEVENSON HIS RIGHT TO UNION REPRESENTATION DURING AN INVESTIGATORY INTERVIEW, AND ALSO VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING AND THEN DISCHARGING HIM FOR SUPPORTING THE UNION**

A few months after the election, the Company, in an effort to explain how it was deducting union dues, mistakenly gave Stevenson and other employees copies of union authorization cards containing employee social security numbers.

Although Stevenson, who was upset about the Company's disclosure of this

confidential information, initially would not return his copy, he relented a few minutes after being called into an investigatory interview with company officials. As we show below, the Company violated Section 8(a)(1) of the Act by denying Stevenson's request for union representation during the interview. The Company then violated Section 8(a)(3) and (1) of the Act by suspending and discharging him over the incident. The Board reasonably found that the Company seized on this incident, which caused it no harm, as a pretext to get rid of a key union activist.

**A. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Denied Stevenson His Right to the Presence of a Union Representative During His Investigatory Interview**

In *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 252-53 (1975), the Supreme Court approved the Board's rule that an employer violates Section 8(a)(1) of the Act (cited above p. 21) by denying an employee's request for union representation during an investigatory interview which the employee reasonably believes might result in disciplinary action. As the Court explained, "[r]equiring a lone employee to attend an investigatory interview . . . perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided 'to redress the perceived imbalance of economic power between labor and management.'" *Id.* at 262 (quoting *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965)). This Court has long recognized that rule, explaining that "[c]learly a union employee has a right to the presence of a union officer at an

investigatory interview.” *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618, 622 (7th Cir. 1982). The Board, applying the settled rule explained above, reasonably found (D&O 25) that the Company’s interview was investigatory, that Stevenson reasonably believed that the interview would lead to discipline, and that Stevenson requested, but was denied, union representation.

As the Board noted, the purpose of the interview was “clearly investigatory.” (D&O 25.) Stevenson was called alone to Operations Manager Davidson’s office - - the locus of managerial authority -- where Davidson subjected Stevenson to repeated questioning about the authorization card incident.

As the Board further found (D&O 25), Stevenson also had an objectively reasonable belief that disciplinary action would result from his interview with Davidson. Davidson, clearly infuriated with Stevenson, ominously warned of “further action” if the documents were not produced, specifically threatening that if he did not give the papers back immediately, Davidson was going to “call the cops” and have Stevenson arrested for stealing property. (A 197, 206.) *See Glomac Plastics, Inc.*, 234 NLRB 1309, 1310 (1978) (employer’s warning to employee during interview that “something . . . severe would happen” gave employee reasonable fear that interview would lead to disciplinary action).

The Company’s claim (Br. 25) that Davidson was simply instructing Stevenson fails to consider the blatant disparity in power between the two. As this

Court has noted, “[i]n determining what an employee reasonably might have inferred from a communication, the Board must consider the economic dependence of the employees on their employer, and the concomitant tendency of the employee ‘to pick up intended implications . . . that might be more readily dismissed by a more disinterested ear.’” *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1030 (7th Cir. 2005) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Given Davidson’s undeniable authority over Stevenson, Stevenson reasonably believed that this closed-door questioning, accompanied by a threat to call the police, would lead to discipline.

The Board also reasonably found (D&O 25) that Stevenson asked to have a union representative present at his interview. The Company’s claim (Br. 25) that Stevenson did not specifically request “union representation” holds him to an unnecessarily high standard. An employee need not articulate a request for a *Weingarten* representative with legal precision. Rather, the request need only put the employer “on notice of the employee’s desires.” *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1223 (1977). Therefore Stevenson’s requests to “have some union representatives here with [him]” and to make a phone call were more than sufficient to alert the Company that Stevenson had invoked his right to have a representative present. *See NLRB v. Illinois Bell Co.*, 674 F.2d 618, 621 (7th Cir. 1982) (finding employee’s request to “have someone from the union” present

during an investigatory interview sufficient to trigger right to representation); *Southwestern Bell Co.*, 227 NLRB at 1223 (an employee’s request to “have someone there that could explain to [him] what was happening” is sufficient request of *Weingarten* right).

Undeterred by Stevenson’s request, Davidson continued his questioning, making no effort to locate a union representative for Stevenson. Thus, the Company violated Section 8(a)(1) of the Act by continuing the interview, despite having clear notice of Stevenson’s request for representation. *See Illinois Bell*, 674 F.2d at 622 (employer violates Section 8(a)(1) of the Act by denying employees’ request for representation at an investigatory interview).

**B. The Board Reasonably Found that the Company Suspended and Discharged Stevenson Because He Supported the Union**

**1. The Company’s animus and knowledge of Stevenson’s union activities support the Board’s finding of unlawful motive**

As shown above p. 23, substantial evidence supports the Board’s finding (D&O 24) that Stevenson was an open and active union supporter, that the Company knew about his union activities, and that the Company’s considerable union animus caused it to seize upon a minor incident as an excuse to rid itself of him.

Although it is undisputed that Stevenson engaged in visible union activities,

the Company asserts (Br. 24) that Company Owner Spurlino, who made the discharge decision, was not “directly familiar” with his union involvement. Stevenson’s high-profile union activities, and Spurlino’s position as the majority owner of a relatively small business, render this claim disingenuous. *See FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1029 (7th Cir. 2005) (employee’s open and vigorous union activity supports finding that employer was aware of his involvement).

The Company’s claim also conveniently ignores the evidence that Davidson, Matney, and Weissman, key players in the decision to suspend and discharge Stevenson, were well aware of his union activities. Indeed, Weissman and Matney, who reported directly to Spurlino, sat opposite Stevenson at the bargaining table, and Matney singled him out to predict dire consequences following the Union’s election victory. Moreover, Davidson, who also reported directly to Spurlino, admitted that he knew about Stevenson’s union sympathies and his participation on the bargaining committee. (A 135.) Thus, Stevenson’s union activity was not a secret, and those involved in his discipline were well aware of it.

**2. Stevenson’s refusal to turn over the documents furnished the excuse rather than the reason for his discipline**

The Company claims (Br. 16, 24) that it discharged Stevenson for “dishonesty and insubordination” -- specifically, for initially refusing to return

documents enclosed with employees' paychecks that explained the Company's handling of union dues deductions. Those documents consisted of union authorization cards from which the Company had failed to redact employees' social security numbers. As the Board noted (D&O 24), however, Stevenson -- a member of the union bargaining committee -- was understandably upset about the Company's disclosure of this confidential information. Moreover, he did return the documents just three hours later, when company officials called him into the unlawful investigatory interview described above. As shown below, the Board reasonably found (D&O 24) that although Stevenson's initial reaction might have been imprudent, the harsh punishment that the Company meted out, and the conflicting accounts proffered by company officials about their decision making process, establish that the Company seized upon the incident as a convenient excuse to get rid of a prominent union supporter.

As the Board noted (D&O 24), the dire consequences meted out for a momentary lapse of judgment is strong evidence that the Company's asserted reasons for discharging him were pretextual. While Stevenson initially refused to return the union authorization cards, he did turn them a few hours later. Thus, the Board properly found (D&O 24) that Stevenson's initial reaction, while imprudent, did not prejudice the Company or result in any harm.

Further, Stevenson's refusal to turn over the documents, which lasted only a few hours, pales in comparison to other conduct that prompted the Company to discharge employees, such as attendance problems, blatant theft of concrete, and threats to drive a truck into a building. (D&O 24; A 136-39.) There is no evidence that the Company had ever suspended and then discharged an employee for something as minor as temporarily refusing to return documents. *See, e.g., FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1031 (7th Cir. 2005) (pretext shown where employer failed to provide an example of past discharges on grounds similar to those cited in discharging the discriminatee, i.e., his stating a false reason for returning a delivery); *Ryder Truck Rental v. NLRB*, 401 F.3d 815, 826 (7th Cir. 2005) (pretext shown where employer asserted that it discharged employee for falsifying maintenance reports but had never discharged other workers for that offense).

Moreover, as the Board noted, the Company's witnesses gave "marked[ly] conflicting accounts" of the decision to suspend and discharge Stevenson. (D&O 16.) As the judge remarked, Human Resources Consultant Weissman "equivocated to the point of evasiveness" when testifying as to who decided to terminate Stevenson, claiming that she did not know and could only "guess" as to the identity of the final decision-maker. (D&O 16.) Likewise, the Board reasonably characterized Company Owner Spurlino's testimony regarding the

decision as “vague,” “evasive,” and contradictory. (D&O 16, 24.) For example, Spurlino first stated that the discharge decision was a “collective” one, but twice changed the identity of those involved. (D&O 16; A 123-26.) He was also unable to recall who was involved in the suspension decision. (D&O 16; A 127.) Thus, the Board properly concluded (D&O 17) that the Company’s “lack of candor raises suspicions about the real reasons for the suspension.” *See L.S.F. Transportation, Inc. v. NLRB*, 282 F.3d 972, 984 (7th Cir. 2002) (employer’s inconsistent testimony regarding discharge supports finding that punishment was pretextual); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (“shifting explanations” show an unlawful motive).

In sum, the evidence strongly supports the Board’s finding that the Company’s purported reason for suspending and discharging Stevenson was a pretext to disguise its unlawful desire to get rid of a key union supporter. Accordingly, the Board reasonably concluded that the Company violated Section 8(a)(3) and (1) of the Act by suspending and discharging him.

**IV. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY SUBCONTRACTING BARGAINING UNIT WORK**

**A. An Employer Violates the Act by Unilaterally Subcontracting Bargaining Unit Work without Timely Notifying the Union and Bargaining to an Overall Impasse**

As discussed above (p. 30), under Section 8(a)(5) and (1) of the Act, quoted above p. 31, an employer's obligation to negotiate in good faith over mandatory subjects of bargaining includes the duty to refrain from implementing unilateral changes in terms and conditions of employment absent an overall impasse. *See* cases cited above, p. 31-32. As shown above (pp. 32-38), the Company violated this precept by unilaterally creating the portable plant driver and alternate driver positions at the Stadium Project, and by unilaterally implementing the selection criteria for those jobs. The Board also reasonably found (D&O 21-22) that the Company further violated the same section of the Act by unilaterally hiring subcontractors to perform basic unit work -- pouring concrete -- at the Warehouse Project.

It is settled that Section 8(a)(5) and (1) of the Act requires an employer to bargain over its decision to use nonunit employees to perform unit work.

*Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964.) The allocation of work to unit employees is a term and condition of employment, and

“an employer may not unilaterally attempt to divert work away from a bargaining unit without fulfilling his statutory duty to bargain.” *Road Sprinkler Fitters Local Union, No. 699 v. NLRB*, 676 F.2d 826, 831 (D.C. Cir. 1986).

To that end, the Supreme Court has held that an employer must bargain over a subcontracting decision that does “not alter the [employer’s] basic operation,” but that involves “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment.” *Fibreboard*, 379 U.S. at 213, 215. *Accord Naperville Ready Mix, Inc. v. NLRB*, 242 F.3d 744, 754 (7th Cir. 2001). The Board, relying on *Fibreboard*, has held that subcontracting is a mandatory subject of bargaining, where, as here, it involves the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. *Torrington Industries*, 307 NLRB 809 (1992). *See also W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 248 (7th Cir. 1988) (upholding Board’s interpretation of *Fibreboard*); *Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De P.R. v. NLRB*, 414 F.3d 158, 166 (1st Cir. 2005) (hospital violated Act by failing to bargain over its hiring of subcontractors to perform work that was identical to that of unit employees).

Here, the Board properly found (D&O 22) that the Company’s use of subcontracted drivers to complete the Warehouse Project was a mandatory subject

of bargaining, and that no compelling reason excused its failure to notify and bargain with the Union over its decision. Given the Board's recognized "expertise" in determining whether an employer has met its bargaining obligation, this Court must afford the Board's decision great deference. *Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1189 (7th Cir. 1993).

**B. The Company Was Required To Bargain Over Its Subcontracting Decision**

The Board reasonably rejected the Company's argument (Br. 33) that it was not required to bargain because its subcontracting decision assertedly did not directly impact its drivers. The law is clear that "bargaining unit work is adversely affected whenever . . . [it] is given away to nonunit employees." *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000). Indeed, unilaterally subcontracting unit work while a newly certified union is struggling to obtain a first contract can make the union seem particularly vulnerable and weak. *See Acme Die Casting*, 315 NLRB 202, 210 n.22 (1994) (recognizing that a unilateral decision to subcontract unit work "can jeopardize the efficacy of a newly certified union").

Here, the Board properly found (D&O 22) that although unit drivers were not laid off or replaced, they still suffered adversely from the Company's unilateral action. Specifically, as the Board explained (D&O 22), unit drivers might otherwise have received overtime pay to perform the work that the Company

subcontracted. Moreover, if the Company had not unilaterally subcontracted the work, it might have hired additional unit employees, resulting in more jobs for drivers and an expanded unit. *See Sociedad Espanola De Auxilio Mutuo Y Beneficiencia De P.R. v. NLRB*, 414 F.3d 158, 167 (1st Cir. 2005) (union has interest in subcontracting decision because the subcontracted work could provide unit members with overtime opportunity or chance to expand the unit); *Acme Die Casting*, 315 NLRB 202, 209 (1994) (explaining that the “crux of the [employees’ subcontracting] grievance is that they lost additional overtime work that they might have enjoyed if the [employer] had left work in the plant”).

**C. The Board Reasonably Found that the Company Unlawfully Presented Its Action as a *Fait Accompli***

The evidence does not support the Company’s claim (Br. 33) that it gave the Union an adequate opportunity to meaningfully bargain over its subcontracting decision. To begin, as shown above pp. 35-36 with respect to the Company’s unilateral creation of the portable plant driver and alternate driver positions, it is undisputed that when the Company unilaterally hired the subcontractors, the parties were still in the preliminary stages of negotiating an initial collective-bargaining agreement. In this context, the Company’s obligation “to refrain from unilateral changes extend[ed] beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather, it encompassed a duty to refrain from implementation at all, absent overall impasse on bargaining for

the agreement as a whole.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). Accordingly, the Court should reject the Company’s assertion that it satisfied its bargaining duty.

In any event, the Company did not even meet its initial obligation to give the Union notice of a subcontracting proposal in circumstances that would have afforded a reasonable opportunity for bargaining. As this Court recognizes, notice of a *fait accompli* hardly suffices to give a union time to meaningfully negotiate over a change in the status quo. *NLRB v. Roll & Hold Warehouse & Distribution Corp.*, 162 F.3d 513, 519 (1998).

Here, the Company fell far short of meeting its initial duty to inform the Union of its decision in a timely manner. The Company was awarded the Warehouse Project contract in October, but all through the fall, winter, and early spring, it said nothing to the Union, even though it was apparent that a job of this magnitude was going to require special efforts. Moreover, as the Board emphasized (D&O 22), even when the Company learned from the customer in mid-May that the proposed pouring schedule would require it to make some adjustments, it still did not inform the Union of its need for extra drivers. Indeed, it was not until the afternoon of Thursday, June 7 -- *after* the Company had already hired the subcontractors -- that company officials told the Union the first big pour would start with subcontracted drivers and trucks the following Monday at

midnight. (A 239.) “One of the purposes of early notification is to allow a union the opportunity to discuss a new policy with unit employees so it can determine whether to support, oppose or modify the proposed change.” *Roll & Hold Warehouse & Distribution*, 162 F.2d at 519-20. With less than two full work days until the pour started, and the subcontracting decision already made, the Company left the Union with little or no time even to consult employees about their options - rendering meaningful bargaining impossible. *See Central Transport, Inc. v. NLRB*, 997 F.2d 1180, 1188-89 (7th Cir. 1993) (employer presented union with announcement of a *fait accompli*); *NLRB v. Emsing’s Supermarket, Inc.*, 872 F.2d 1279, 1287 (7th Cir. 1989) (giving union four-days notice of decision to close essentially provided union with notice of a *fait accompli*, making good-faith bargaining an impossibility).

The Company’s assertion (Br. 34) that it made a good-faith effort to bargain is absurd. If anything, the Company’s behavior demonstrated its intent to use subcontractors regardless of whether the Union agreed with its plan. As shown above, it is undisputed the Company did not inform the Union of its decision until *after* it had already hired the subcontractors. (A 230, 232-34.) Further, when the Union reminded the Company of its duty to bargain over the decision, the Company announced that “the [pour] procedures . . . will be followed on Monday” regardless of whether the parties met or not. (A 47-48.) The Company also

repeatedly informed the Union that that it did not have to bargain over its decision. (A 222, 239.)

**D. The Company Cannot Justify Its Failure To Bargain**

The Board properly found (D&O 22) that the Company failed to present any compelling reasons that would have excused its failure to bargain. The Company belatedly asserts (Br. 33) that subcontracting was necessary because of a “sudden business need.” This claim must be rejected for two reasons. First, as the Board noted (D&O 21), the Company did not advance it at the hearing. (D&O 21.) Rather, the Company defended its decision by contending only that it had a past practice of subcontracting work. However, as the Board found (D&O 21), the Company did not present any evidence demonstrating such a practice. On review, the Company has entirely abandoned any challenge to the Board’s finding that it lacked a past practice of subcontracting work.

In any event, although “matters may arise where the exigencies of a situation require prompt action” outside the normal course of bargaining, that limited exception is inapplicable here. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *accord Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). Simply put, the Company failed to present any evidence to justify its unilateral action based on a claim of economic exigency. To the contrary, Weissman informed the Union that the Company was not relying on a financial emergency to support its unilateral

subcontracting decision. (D&O 20; A 49.) Having failed to raise that defense below, the Company cannot rely on it now. In any case, given the Company's advance knowledge of the project's scope, it would have been "hard pressed" to make an exigency argument, as the Board noted (D&O 21-22).

In sum, the Board reasonably found that the Company's unilateral decision to subcontract unit work at the Warehouse Project violated Section 8(a)(5) and (1) of the Act.

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court grant the Board's application for enforcement, deny the Company's cross-petition, and enforce the Board's Order in full.

s/Julie Broido  
JULIE BROIDO  
*Supervisory Attorney*

s/Elizabeth A. Heaney  
ELIZABETH A. HEANEY  
*Attorney*  
*National Labor Relations Board*  
1099 14th Street, N.W.  
Washington, D.C. 20570  
(202) 273-2996  
(202) 273-1743

RONALD MEISBURG  
*General Counsel*

JOHN E. HIGGINS. JR.  
*Deputy General Counsel*

JOHN H. FERGUSON  
*Associate General Counsel*

LINDA DREEBEN  
Deputy Associate General Counsel

*National Labor Relations Board*

May 2010

h: acb/final/Spurlinobrief-finaljbeh

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD )  
)  
Petitioner/Cross-Respondent ) Nos. 09-2426, 09-2468  
)  
)  
and ) Board Case No.  
) 25-CA-30053  
COAL, ICE, BUILDING MATERIAL, SUPPLY )  
DRIVERS, RIGGERS, HEAVY HAULERS, )  
WAREHOUSEMEN and HELPERS, LOCAL )  
UNION NO. 716 a/w INTERNATIONAL )  
BROTHERHOOD OF TEAMSTERS, )  
CHAUFFERS, WAREHOUSEMEN, AND )  
HELPERS OF AMERICA )  
)  
Intervenor )  
)  
v. )  
)  
SPURLINO MATERIALS, LLC )  
)  
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 13,490 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 26th day of May, 2010

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

NATIONAL LABOR RELATIONS BOARD	:
	:
Petitioner/Cross-Respondent	:
	: Case Nos. 09-2426, 09-2468
	:
and	: Board Case No.
	: 25-CA-30053
COAL, ICE, BUILDING MATERIAL, SUPPLY	:
DRIVERS, RIGGERS, HEAVY HAULERS,	:
WAREHOUSEMEN and HELPERS, LOCAL	:
UNION NO. 716 a/w INTERNATIONAL	:
BROTHERHOOD OF TEAMSTERS,	:
CHAUFFERS, WAREHOUSEMEN, AND	:
HELPERS OF AMERICA	:
	:
Intervenor	:
	:
v.	:
	:
SPURLINO MATERIALS, LLC	:
	:
Respondent/Cross-Petitioner	:

**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and those that are not registered users will be served by First-Class mail.

Geoffrey S. Lohman  
Fillenwarth Dennerline Groth & Towe LLP  
429 East Vermont Street, Suite 200  
Indianapolis, IN 46202

Robert J. Brown, Esq.  
Thompson Hine, LLP  
2000 Courthouse Plaza, NE  
P.O. Box 8801  
Dayton, OH 45401

s/Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1099 14<sup>th</sup> Street, NW  
Washington, DC 20570

Dated at Washington, D.C.  
This 26th day of May, 2010