Nos. 11-2362 & 12-1041

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GESTAMP SOUTH CAROLINA, L.L.C.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Gestamp South Carolina, L.L.C. ("the Company") to review, and on the cross-application of the National Labor Relations Board ("the Board") to enforce, a Board order issued against the Company. The Board found that the Company threatened, suspended, and discharged an employee and then discharged a second employee to punish their

union activity in violation of Section 8(a)(3) and (1) of the National Labor Relation Act ("the Act").[1] The Board had jurisdiction under Section 10(a) of the Act,[2] which empowers the Board to prevent unfair labor practices affecting commerce. The Board's Decision and Order, issued on December 8, 2011, and reported at 357 NLRB No. 130, is a final order with respect to all parties under Section 10(e) and (f) of the Act.[3] (A. 487-500.)

The Company filed a petition for review on December 12, 2011; the Board cross-applied for enforcement on January 9, 2012. Both were timely, as the Act imposes no time limits on such filings. The Court has jurisdiction pursuant to Section 10(e) and (f) of the Act.[4]

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board's determination that the Company violated Section 8(a)(1) of the Act when Supervisor Michael Fink

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[1] 29 U.S.C. §§ 151, 158(a)(3) and (1).

[2] 29 U.S.C. § 160(a).

[3] 29 U.S.C. § 160(e) and (f). References in this brief are to the appendix. "A." references are to the Board's Decision and Order. "Br." references are to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[4] 29 U.S.C. § 160(e) and (f).

threatened employee David Kingsmore that the plant's general manager would discharge him if he learned of his union activity.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act when it suspended and then discharged David Kingsmore and discharged Reggie Alexander for their union activities.

STATEMENT OF THE CASE

Acting on unfair labor practice charges from Reggie Alexander and David Kingsmore, the Board's Acting General Counsel issued a complaint alleging that the Company violated Section 8(a)(3) and (1) of the Act by threatening, suspending, and discharging Kingsmore for union activity, and by interrogating and discharging Alexander for union activity. (A. 487, 488; 297-301.) Following a hearing, the administrative law judge found merit to all allegations except the interrogation charge. (A. 488.) The Company filed exceptions to the Board, which affirmed the judge's decision in full. (A. 487; 301.) The Board modified the judge's order to provide for the electronic posting of the notice per extant Board law. (A. 487.) The facts supporting the Board's decision, as well as the Board's Decision and Order, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company and Relevant Personnel

The Company owns and operates a plant in Union, South Carolina that assembles and presses large motor vehicle parts for BMW, such as doors, hoods, and roofs. During the relevant period, the Company employed approximately 100-110 hourly production employees and 35 salaried employees. It had a three-step progressive discipline system. (A. 490; 233, 237, 240-41, 248, 391.)

Reggie Alexander worked as a supply coordinator, handling and distributing supplies throughout the plant. Supervisor Michael Sullivan processed his timecards. (A. 490; 32-33.) Before his discharge, Alexander had never been disciplined. (A. 497; 34, 225.)

David Kingsmore worked as a quality inspector, inspecting auto body parts and ensuring they passed BMW's standards. Kingsmore reported to Supervisor Alex Keller, and after Keller left the Company, to Supervisor Michael Greene. (A. 490; 86-88, 118.) Before his discharge, Kingsmore had only minor reprimands on his record. (A. 490; 122-23.)

Kingsmore and Alexander both interacted with Supervisor and Quality Engineer Michael Fink. (A. 490, 491; 34, 45, 130-31, 118, 152.) Fink works closely with two company employees who work off-site at a BMW plant. He

instructs them about their work, and they report problems to him. Fink signs their leave slips and prepares their biannual evaluations, which can impact whether they receive raises. Quality Manager Juergen Weckerman approves and has never reversed any of Fink's decisions regarding leave and evaluations. (A. 491; 161-66, 154.) Fink's position is salaried. (A. 491; 152.)

B. Discriminatees Kingsmore and Alexander Try To Bring a Union Into the Company in January and Early February 2010

In late December 2009, Kingsmore contacted the United Steelworkers ("the Union") to organize the facility's hourly employees. (A. 491; 18-19, 89, 358-59.) Alexander and Kingsmore joined the union organizing committee and attended all but one of its meetings in late January and early February 2010. (A. 491; 19, 20-21, 27-28.) They also solicited support for the Union from their coworkers after work, while on breaks, and during and after lunch times. (A. 491; 25-26, 35-36, 90-92.)

1. In early February, Kingsmore discusses his union activity with Supervisors Fink and Sullivan and General Manager Evola; Fink threatens him with discharge

In early February, Kingsmore frequently discussed unionization at work. (A. 491; 24-25, 89-98.) Kingsmore told Supervisor Fink that he was going to try to unionize the plant. (A. 491; 93, 154.) Fink warned him to be careful about unionization because if General Manager Carmen Evola, the highest-ranking plant official, found out, "[Y]ou're gone." (A. 488 n.2, 491; 93, 154.) Another day,

Kingsmore told Supervisor Sullivan that he wanted to bring in a union and asked his opinion. Sullivan opined that unions were good for employees and bad for management, and he discussed his experiences with unions. (A. 492; 95-97.)

Kingsmore and Sullivan discussed unions a second time just before Sullivan met with the Company's legal counsel about unionization. Sullivan said that he could not discuss unions with Kingsmore after the meeting. (A. 492; 97.) Later that day, Kingsmore called General Manager Evola and told him that rumors that he was pro-union were false. (A. 492; 141, 202-06.) Evola testified that, at the time, he had not heard any rumors that Kingsmore was involved in the Union "other than discussions with my attorneys." (A. 492; 207.)

2. The Company learns about the union organizing campaign and holds mandatory meetings with all hourly employees to discuss unionization

General Manager Evola learned of union activity at the plant by February 1. (A. 488 n.2, 491; 245.) In early to mid-February, management held a series of mandatory meetings with hourly employees about unionization. (A. 492; 217-21, 245-48.) Around February 11, Alexander attended one led by General Manager Evola and Kingsmore attended one led by then-Press Room Manager Dennis Blanton. (A. 492; 36-39, 98-101, 218.) At Alexander's meeting, coworkers spoke out against the union and said unionization could shut down the plant. At Kingsmore's meeting, an employee asked management who called the Union, and

said: "We're going to catch [the person who called the Union] in the parking lot and whip his ass." (A. 492; 39, 41, 83, 101.)

3. After the meeting, three employees and one supervisor all accuse Alexander of leading the union organizing campaign

Soon after the meeting with Evola, three employees came to Alexander's workstation and accused him of leading the effort to bring in the Union. (A. 492; 42, 43.) Alexander related these accusations to Supervisor Morris later that day and said "his coworkers were harassing him about 'union stuff.'" (A. 492; 43-44, 177-78.) Still later that day, Supervisor Fink went to Alexander and said, "I didn't know you were one of the ones that were trying to bring the Union in." (A. 492; 45-46.)

C. Soon After Learning of His Union Activity, the Company Suspends Kingsmore on February 17 and Then Discharges Him on February 24, Ostensibly Based on Conduct that Occurred Months Earlier

Before working at the Company, Kingsmore worked at BMW for eight years. (A. 493; 86, 346.) In August 2009, Kingsmore and Supervisor Morris went to tour a nearby BMW plant. (A. 493; 114-15, 170.) BMW admitted Morris, but denied Kingsmore entry without explanation. (A. 493; 115, 173.) Kingsmore immediately informed his then-supervisor, Alex Keller, of the incident. Later that day, Kingsmore also informed General Manager Evola, who responded that he knew BMW would not let Kingsmore in because he used to work there and said

"Well, I'm sorry I wasted your time[.]" (A. 493, 494; 115-17.) Morris also reported the incident to Keller and to his own supervisor, Axel Zimmerman. (A. 493; 173, 175.)

The next month, Kingsmore applied for a promotion to a quality supervisor position, and Human Resources Director Susan Becksted and Quality Manager Weckerman interviewed him on September 29, 2009. (A. 494; 128, 236, 254.) Becksted asked why Kingsmore left BMW, and learned that he was tired of the long commute and being away from his family. (A. 494; 254-256.) Becksted never asked if Kingsmore left BMW voluntarily or involuntarily, and Kingsmore's attempt to tour the BMW plant was not mentioned. (A. 494; 294.) Kingsmore did not receive the promotion. (A. 494; 128.)

Five months later, in early February 2010, Evola told Becksted that he had "just" learned that Kingsmore had been barred from BMW. (A. 494; 257.) Evola instructed Becksted to investigate why Kingsmore left BMW and why he was barred from the premises. (A. 494; 257.) Becksted contacted Alex Keller, Kingsmore's former supervisor, who said he had known of the BMW incident since mid-to-late 2009. Becksted reported that back to Evola. (A. 494; 258-59.)

On February 17, Becksted summoned Kingsmore to a meeting and said she believed that, contrary to what Kingsmore communicated at his September interview, he did not leave BMW because of the commute and that BMW fired

him; Kingsmore denied that. Under threat of discharge, she required Kingsmore to sign a release form authorizing her to obtain his BMW records. (A. 494; 102-05, 261-62; 343.) Becksted then suspended Kingsmore. (A. 494; 105-07, 264.)

Becksted sent the release to BMW and spoke with a BMW representative about Kingsmore for "seconds" and got no information. Becksted was unable to recall the name or title of that BMW employee, the date and time of the call, or whether she documented her investigation. (A. 494; 265-67, 273-74.)

On February 22, Becksted called Kingsmore and tasked him with securing documentation of why he left BMW, and, without explanation for her rush, gave him a deadline of February 24. (A. 495; 108-09, 269-70.) Kingsmore again denied that he had been fired, and said he would try to comply with her request. (A. 495; 109.)

BMW would only provide Kingsmore with a letter verifying his dates of employment. Kingsmore timely faxed the letter to Becksted with an explanation of BMW's refusal. Becksted discharged Kingsmore that same day, on February 24. (A. 495; 109-11, 346-47.)

D. Soon After He Is Accused of Union Leadership, the Company Discharges Alexander, Ostensibly Based on a 38-Minute Discrepancy on His Timesheet

After observing Alexander arrive late on February 9, two hourly employees asked Supervisor Sullivan whether he had a new start time. (A. 492, 493; 191,

353.) Sullivan reviewed Alexander's timesheets for February 9 and noticed a 38-minute discrepancy between Alexander's manual timesheet and an electronically-generated timesheet based on punch-in times. (A. 493; 188, 342, 343.) He advised Alexander of this mistake and told him: "Well, I'll fix it this time. Be more careful about your time." (A. 493; 48.) On February 15 before the timesheet went to payroll, Sullivan corrected Alexander's timesheet to reflect his actual start time, and Alexander was paid only for the hours he worked. (A. 492, 293; 29-30, 49-52, 187-88, 190.) Sullivan had corrected timesheets in the past without any repercussions, and no one from management mentioned the timesheet matter to Alexander until February 19. (A. 493; 53-58.)

On February 19, Alexander was called into Purchasing Director Roger Fuller's office to meet with Human Resources Director Becksted. She accused Alexander of intentionally falsifying his timesheet for 38 minutes and immediately discharged him without investigating whether Alexander's mistake was intentional. (A. 493; 59-60, 278-80.) Alexander told Becksted that he had already discussed the problem with Supervisor Sullivan, who had promised to fix it. Fuller interjected that he did not know that. Nevertheless, the Company still discharged Alexander. (A. 493; 59-60.)

E. The Company Previously Discharged Individuals for First Offenses Only Following a Comprehensive Investigation and a Full Employee Confession

The Company discharged two employees for first-time offenses: R. Gist and W. Gregory. (A. 495; 242-44.) The Company discharged Gist for failing to report a forklift accident after Becksted conducted a full investigation and Gist admitted culpability. It discharged Gregory for sanding words into vehicles, also after Becksted conducted a full investigation and Gregory admitted fault. Both employees destroyed the Company's property. (A. 495, 496; 242-44.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On December 8, 2011, the Board (Chairman Pearce and Members Becker and Hayes, with Member Hayes concurring in the result but not the majority's full rationale) issued its decision. It found that the Company violated Section 8(a)(1) by threatening Kingsmore with discharge for engaging in activities on behalf of a union. (A. 487, 498.) The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging Alexander and by suspending and discharging Kingsmore for engaging in union activity. (A. 487.)

The Board's order requires the Company to cease and desist from suspending, discharging, or otherwise discriminating against any employee for engaging in activities on behalf of the Union or any other labor organization. It also requires the Company to cease and desist from threatening any employee with

discharge or any other adverse action for engaging in activities on behalf of the Union or any labor organization. The Board ordered the Company to cease and desist 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.[5] (A. 499.)

Affirmatively, the order requires the Company to offer Alexander and Kingsmore full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights previously enjoyed. The Company must also make Alexander and Kingsmore whole for any loss of earnings or other benefits suffered as a result of the discrimination against them. The Company must remove from its files any reference to the unlawful discharge of Alexander and suspension and discharge of Kingsmore; it must notify Alexander and Kingsmore of the removals; and it must tell them that the suspension and/or discharge will not be used against them in any way. Lastly, the Company must provide relevant records to permit the Board to calculate backpay; it must post copies of the Board-provided remedial notice for 60-days, physically and electronically, and it must provide a sworn certification of compliance. (A. 487 n.3, 499.)

[5] 29 U.S.C. § 157.

SUMMARY OF ARGUMENT

When the Company learned of a fledging union campaign, it strategically sought to quash the effort by threatening a leading union advocate with discharge, and then firing him and another union leader on trumped-up charges. Substantial evidence supports the Board's determination that the Company violated Section 8(a)(1) of the Act when Supervisor Michael Fink threatened Kingsmore that "You're Gone" if the general manager found out about his union activity. Supervisor Fink's statement is attributable to the Company because it did not challenge the Board's rationale for finding Fink's supervisory status in its opening brief, and, in any event, substantial evidence supports that finding. Contrary to the Company's mischaracterization, the Board credited Kingsmore's testimony regarding Fink's threat.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act when it suspended Kingsmore and then discharged Alexander and Kingsmore for their union activities. It is undisputed that they engaged in protected union activity, and the evidence demonstrates that the Company knew of their union organizing, both factually and as a matter of law. The Company revealed its discriminatory motive with its fishy timing, its sham investigations into unproven allegations of employee misdoings, and its abandonment of its own disciplinary protocols. The Board's finding of pretext is

also well supported. The Company provided false reasons for discharging Alexander and Kingsmore; it shifted its rationale for discharging Kingsmore; and it failed to offer any valid comparative evidence for either discharge. By offering only pretextual justifications for the discharges, the Company failed to show that it would have fired Kingsmore and Alexander absent their union activity.

The Company failed to prove the factual predicate for its defense that the General Counsel must show that the decision-maker had personal knowledge of the discriminatees' union activity. The record does not show who made the decisions. Moreover, there is no requirement of direct proof of the identity of the decision-maker. Lastly, the Board properly applied the *Wright Line* legal framework to this case.

STANDARD OF REVIEW

The scope of this Court's inquiry in reviewing a Board order is quite limited. The Board's factual findings, such as whether the Company had knowledge of union activity, acted with a discriminatory motive, and offered a real or pretextual reason for discharging employees, are conclusive if "supported by substantial evidence on the record considered as a whole."[6] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a

[6] 29 U.S.C. § 160(e); *see FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995) (employer motive "is a factual issue which the expertise of the Board is peculiarly suited to determine") (internal quotations omitted).

conclusion."[7] If such evidence exists, the Court must uphold the Board's decision "even though [it] might have reached a different result had [it] heard the evidence in the first instance."[8] "The resolution of conflicts in the evidence, and inferences to be drawn therefrom, are left solely to the Board."[9] This Court accepts factual findings based on credibility determinations absent exceptional circumstances.[10]

In reviewing legal conclusions, this Court defers to the Board's interpretation of the Act "so long as its reading is a reasonable one."[11] Contrary to the Company's suggestion (Br. 16), this Court observed that "[a]lthough we ordinarily review questions of law de novo, *the NLRB's interpretation of the Act is entitled to deference if it is reasonably defensible*."[12]

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[7] *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord NLRB v. Gen. Wood Pres. Co.*, 905 F.2d 803, 810 (4th Cir. 1990).

[8] *Gen. Wood Pres. Co.*, 905 F.2d at 810.

[9] *Am. Thread Co. v. NLRB*, 631 F.2d 316, 321 (4th Cir. 1980); *accord NLRB v. Lester Bros., Inc.*, 337 F.2d 706, 708 (4th Cir. 1964).

[10] *Evergreen Am. Corp. v. NLRB*, 531 F.3d 321, 330 (4th Cir. 2008); *see also NLRB v. Mining Specialists, Inc.*, 326 F.3d 602, 605 (4th Cir. 2003) ("we owe deference to such witness credibility assessments").

[11] *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996); *accord RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002).

[12] *Indus. TurnAround Corp. v. NLRB*, 115 F.3d 248, 251 (4th Cir. 1997) (emphasis added) (citing *Holly Farms Corp.*, 517 U.S. 392).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY UNLAWFULLY THREATENED KINGSMORE WITH DISCHARGE IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

A. Section 8(a)(1) of the Act Prohibits an Employer from Threatening Employees with Discharge in Response to Their Union Activity

Section 7 of the Act guarantees to employees both the "right to self-organization, to form, join, or assist labor organizations" and the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection."[13] Section 8(a)(1) of the Act protects these rights by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[14] Threats of discharge in response to union activity are unlawful.[15] It is settled that an employer is liable for the threats of its supervisors.[16]

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[13] 29 U.S.C. § 157.

[14] 29 U.S.C. § 158(a)(1).

[15] *See NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1045 (4th Cir. 1997).

[16] 29 U.S.C. § 152(2); *Southeast Crescent Shipping Co. v. NLRB*, 194 F.3d 527, 530 (4th Cir. 1999).

B. Supervisor Fink Violated Section 8(a)(1) of the Act when He Told Kingsmore "You're Gone" if the General Manager Learned of His Union Activity

Around early February, when Kingsmore told Supervisor Fink "I'm going to try to unionize the plant," Fink replied: "be careful what you say because if [the General Manager] finds out about it, *you're gone*." (A. 491, 498; 93, 154-55, 159-60.) The Board found Fink predicted retaliation against Kingsmore if upper management learned of his protected activities because a reasonable employee would translate "you're gone" as "you're fired." (A. 491, 498.) Such a statement is a textbook unlawful threat of discharge. The Company's only defenses are that Fink was not a statutory supervisor so it is not liable for his conduct and that Fink did not make the threat. Neither have merit.

C. The Company Waived Its Right To Challenge the Board's Basis for Finding that Fink Is a Statutory Supervisor, a Conclusion that, In Any Event, Is Supported by Substantial Evidence

The Board found Fink a statutory supervisor because of his supervision of two off-site employees. (A. 491.) The Company does not contest this finding in its opening brief. Under settled law, the Company therefore waived the right to object to the Board's rationale for Fink's supervisory status.[17] The Company's passing reference to the Board's reasoning – stating, without support, that Fink's

[17] *NLRB v. Horizon Air Servs., Inc.*, 761 F.2d 22, 26 (1st Cir. 1985) (citing cases).

supervision of offsite employees is irrelevant – does not constitute an argument.[18] (Br. 33-34 n.143.) Because the Company failed to dispute the Board's rationale, it has waived the issue and may not raise it in its reply brief.

In any event, substantial evidence supports Fink's supervisory status. Section 2(11) of the Act defines a supervisor as an individual with, *inter alia*, the authority to reward other employees or to effectively recommend the reward of employees in the interest of the employer and with independent judgment.[19] Supervisor Fink exercises independent judgment in effectively recommending rewards for two off-site employees. (A. 491; 161-67.) Fink prepares their biannual evaluations, which impact whether they receive raises; his supervisor always adopts his recommendations. (A. 491; 162-66.) Because Supervisor Fink effectively recommends whether these two employees receive rewards, he is a statutory supervisor and the Company is liable for his threat of discharge, even if he does not have a direct supervisory relationship with Kingsmore or Alexander, (A. 491 (citing numerous cases)).

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[18] *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000) ("passing reference" insufficient to preserve appellate review); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) ("fleeting references" do not preserve appeal).

[19] 29 U.S.C. § 152(11); *Wal-Mart Stores, Inc.*, 335 NLRB 1310, 1310, 1315-17 (2001); *Pillsbury Chem. & Oil Co.*, 317 NLRB 261, 261 n.1 (1996); *see NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n.17 (1980) (the relevant consideration for supervisory status is "effective recommendation or control rather than final authority").

D. The Company Misconstrues the Board's Crediting of Kingsmore's Testimony Regarding Fink's Threat

In claiming that Fink did not threaten Kingsmore, the Company mischaracterizes the partial crediting of Kingsmore's testimony. (Br. 32-33.) "[I]t is the responsibility of the Board, and not this court, to resolve factual conflicts in the testimony and questions of the credibility of witnesses."[20] And, as Judge Learned Hand observed, "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness's testimony.[21] (A. 488.) Here, the Board credited Kingsmore's account of his one-on-one conversation with Supervisor Fink. (A. 491, 498; 93.) The Board made it clear whenever it did not credit Kingsmore's testimony, which was not the case with this threat. (A. 488, 489.)

Moreover, Supervisor Fink corroborated Kingsmore's testimony on the threat. As the Board observed, Fink agreed that Kingsmore initiated the union-focused conversation and repeatedly conceded that he could not recall the conversation's specifics. (A. 491; 154-55.) Fink's only contrary testimony was in response to Company questions the trial judge decried as leading. (A. 156-59.) This Court leaves it to the Board to make credibility determinations based on

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[20] *Daniel Constr. Co. v. NLRB*, 341 F.2d 805, 812 (4th Cir. 1965); *accord NLRB v. Lester Bros., Inc.*, 301 F.2d 62, 68 (4th Cir. 1962).

[21] *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *rev'd on other grounds*, 340 U.S. 474 (1951); *Jerry Ryce Builders*, 352 NLRB 1262, 1262 n.2 (2008).

conflicting testimony.[22] The Company has not met its heavy burden in urging the Court to make a contrary credibility finding.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY SUSPENDED AND DISCHARGED KINGSMORE AND DISCHARGED ALEXANDER FOR THEIR UNION ACTIVITIES IN VIOLATION OF SECTION 8(a)(3) OF THE ACT

A. The *Wright Line* Framework for Analyzing Section 8(a)(3) Discrimination

Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . ."[23] An employer violates Section 8(a)(3) and (1) of the Act by suspending or discharging employees for engaging in union activities.[24] A violation of Section 8(a)(3) derivatively violates Section 8(a)(1).[25]

To evaluate discharges, the Board applies the test from *Wright Line*,[26] which was "designed to account for the fact that employers rarely admit that they took

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[22] *WXGI, Inc. v. NLRB*, 342 F.3d 833, 841 (4th Cir. 2001); *see supra* note 20.

[23] 29 U.S.C. §158(a)(3).

[24] *Salem Leasing Corp. v. NLRB*, 774 F.2d 85, 87 n.3 (4th Cir. 1985) (citing *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 (1985)).

[25] *Id.*

[26] *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *See also NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983) (approving *Wright Line* test).

adverse action against employees with the unlawful intent to discriminate."[27] The test requires the General Counsel to demonstrate that the protected activity was a "motivating factor" in the employer's decision to lay off an employee by showing (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that anti-union animus was a substantial or motivating reason for the employer's action.[28] The employer may avoid liability only by proving as an affirmative defense that it would have taken the same action in the absence of the employee's protected activity.[29] This Court agrees with the Board that, if the reasons advanced by the employer for its actions are nonexistent or pretextual, it follows that the employer has not met its burden, and its affirmative defense fails.[30]

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[27] *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 215 (4th Cir. 2005).

[28] *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942-43 (4th Cir. 1995) (applying *Wright Line*, 251 NLRB at 1089).

[29] *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 448 (4th Cir. 2002).

[30] *Air Contact Transp. Inc.*, 403 F.3d at 215; *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985).

B. Substantial Evidence Supports the Board's Finding that the Company Suspended and then Discharged Kingsmore for His Union Activity

1. It is undisputed that Kingsmore engaged in protected union activity

By not challenging it in its brief, the Company waived its right to object to the Board's well-supported finding that Kingsmore engaged in protected union activity.[31] Kingsmore joined the union organizing committee, attended multiple union meetings, and solicited support for the Union from his colleagues, activities all safeguarded by Section 7 of the Act.[32] (A. 495; 35, 89-92.)

2. The Company had knowledge of Kingsmore's union activity

It is "perfectly proper" to establish knowledge, the second prong of *Wright Line*, via circumstantial evidence and "inferences of probability drawn from the totality of other facts."[33] Knowledge can be inferred from suspicious timing,[34] and

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[31] *See supra* note 17.

[32] 29 U.S.C. § 157; *Consol. Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001) ("Soliciting support for a union and distributing union materials are among the core activities safeguarded by § 7.").

[33] *NLRB v. Long Island Airport Limousine Serv.*, 468 F.2d 292, 295 (2d Cir. 1972); *accord NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1048 (4th Cir. 1997).

[34] *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 117 (8th Cir. 1973) (discharge following union activity constitutes evidence of employer knowledge); *Long Island Airport Limousine Serv.*, 468 F.2d at 295 (abruptness of union leader's discharge lends support to finding that employer had knowledge of his union activities).

by divisiveness among employees.[35] Both the Board[36] and courts[37] acknowledge that a supervisor's knowledge of union activities may be imputed to the employer.

Substantial evidence supports the Board's conclusion of company knowledge. Kingsmore discussed his union activities with two supervisors and a manager; their knowledge is imputed to the Company.[38] He plainly told Supervisor Fink: "I'm going to try to unionize the plant[.]" (A. 491, 496; 93, 154-55.) As shown above (pp. 5-6), Kingsmore told Supervisor Sullivan that he wanted to bring in a union; Sullivan later told Kingsmore that he could no longer talk about unionization after meeting with company attorneys. (A. 492; 95-97.) In the wake of Fink's threat of discharge and coworkers' backlash against the Union, Kingsmore told General Manager Evola that the rumors about him being involved were untrue. (A. 492; 141, 202.) Evola conceded that he discussed with his

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[35] *WXGI, Inc. v. NLRB*, 243 F.3d 833, 841 (4th Cir. 2001).

[36] *State Plaza, Inc.*, 347 NLRB 755, 756-57 (2006) (supervisors' knowledge imputed to employer unless employer proves that knowledge was not conveyed); *Dobbs Int'l Servs.*, 335 NLRB 972, 973 (2001) ("it is well-established that a supervisor's knowledge of union activities is imputed to the employer"); *cf. Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983) (no imputed knowledge where supervisors testified they did not pass on knowledge).

[37] *N. Va. Steel Corp. v. NLRB*, 300 F.2d 168, 173 (4th Cir. 1962); *see also Clark & Wilkins Indus.*, 887 F.2d 308, 310-11, 312-13 (D.C. Cir. 1989); *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 814 (3d Cir. 1986); *Texas Aluminum Co. v. NLRB*, 435 F.2d 917, 919 (5th Cir. 1970); *NLRB v. Transp. Clearings, Inc.*, 311 F.2d 519, 523 (5th Cir. 1962).

[38] *See supra* notes 36 & 37.

attorneys rumors about Kingsmore's union activity that he had heard from his supervisors and managers. (A. 496; 205, 207.)

The timing of Kingsmore's discharge also manifests employer knowledge because his alleged wrongdoing occurred five months prior to his very sudden termination.[39] (A. 496.) Management, including Evola, knew Kingsmore was barred from BMW in August 2009, and Kingsmore's unsuccessful interview for a promotion where he said that he voluntarily resigned from BMW was in September 2009, (pp. 7-8). But Evola's epiphany about the BMW incident and his request for Becksted to investigate it occurred months later, during the midst of a heated union campaign in which Kingsmore was rumored to be involved. After a cursory investigation, the Company hastily fired Kingsmore. Its rush to judgment during the height of the union organizing campaign strongly suggests company knowledge of Kingsmore's union activity. (A. 496; 205, 207, 173, 175.)

Divisiveness among company employees further supports a knowledge finding because agitated anti-union employees identify union supporters to management.[40] Anti-union emotions ran high at the Company in February 2010, and at least one employee informed General Manager Evola of union activity. (A. 496; 245.) Then, at company captive audience meetings, an employee threatened

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[39] *See supra* note 34.

[40] *See supra* note 35.

physical violence against whoever called the union in, warning that he would "catch him in the parking lot and whip his ass." (A. 496; 101.) At another, employees said a union would shut down the plant. (A. 496; 39, 41.) In such a highly-charged environment, it is reasonable for the Board to deduce that employees informed on Kingsmore to the Company. (A. 496.)

3. A threat of discharge, fishy timing, a farcical investigation, shifting rationales, and pretext all support the Board's conclusion that anti-union animus motivated the Company's discharge of Kingsmore

Because employers rarely concede an unlawful motive, the Board may rely on inference and circumstantial evidence.[41] That evidence can include: contemporaneous Section 8(a)(1) violations,[42] timing,[43] disproportionately severe discipline,[44] sham investigations into employee conduct,[45] the use of shifting

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[41] *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 449 (4th Cir. 2002); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995).

[42] *RGC (USA) Mineral Sands, Inc.*, 281 F.3d at 449 (finding 8(a)(1) statements from employer sufficient to establish anti-union animus); *NLRB v. Daniel Constr. Co.*, 731 F.2d 191, 197-98 (4th Cir. 1984).

[43] *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991) ("bare timing" of employee's discharge proved unlawful employer motivation).

[44] *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 404-05 (1983) (disproportionate discipline), *clarified by* 512 U.S. 267 (1994); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977) (same).

[45] *NLRB v. Esco Elevators, Inc.*, 736 F.2d 295, 298 (5th Cir. 1984) (discharge unlawful where supervisor did not ask employee about the incident); *Am. Thread*

rationales to justify the employer's actions,[46] the falsity of such rationales,[47] and a lack of evidence of consistent treatment by the employer.[48]

Supervisor Fink's threat of "You're Gone" to Kingsmore demonstrates that a management insider believed that General Manager Evola would have Kingsmore fired for his union activity. That threat strongly supports the Board's conclusion that antiunion animus was a motivating or substantial factor in the Company's decision to discharge Kingsmore.[49]

"Timing alone may suggest anti-union animus as a motivating factor in an employer's action[,]"[50] and the abruptness of discharges in the context of union

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Co. v. NLRB, 631 F.2d 316, 322 (4th Cir. 1980) (cursory investigation evidence of unlawful intent).

[46] *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 626 (7th Cir. 1981) (shifting explanations constitute compelling evidence of unlawful motive).

[47] *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246, 253-54 (4th Cir. 1997) ("patently untrue" reason for discharging union supporter evidence of anti-union animus); *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991) (false for employer to justify discharge on poor economy and then hire five employees); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 968-969 (4th Cir. 1985).

[48] *Babcock & Wilcox Co. v. NLRB*, 683 F.2d 858, 859-860 (4th Cir. 1982) (finding discharge for throwing a rock a pretext because employer had never discharged other employees who committed similar offenses).

[49] *See supra* note 42.

[50] *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984); *accord FPC Holdings v. NLRB*, 64 F.3d 935, 943-44 (4th Cir. 1995); *see supra* note 43.

organizing drives constitutes persuasive evidence of union animus.[51] The timeline leading to Kingsmore's discharge is telling. As shown above (pp. 7-9), the Company overlooked that Kingsmore was barred from entering a BMW plant and the supposed discrepancy with his interview statements for months. (A. 115-17, 173, 175, 257-58.) Only when Kingsmore emerged as a union leader did Evola suddenly remember the incident and tell Becksted to investigate. (A. 245, 257.) Notably, the Board drew an adverse inference from Evola's failure to testify about how he suddenly learned of the BMW incident and discredited Evola's testimony that Kingsmore never told him about it.[52] (A. 489, 494.) Despite that months-long time lag, Becksted inexplicably gave Kingsmore only two days to prove that he was not discharged from BMW. (A. 497; 108-09, 269-70, 346-47.) The warp speed demonstrates that the Company was more interested in firing Kingsmore than in fact-gathering. The not-coincidental timing shows the Company acted on anti-union animus.[53]

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[51] *Abbey's Transp. Services, Inc. v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1998) (abruptness of discharges and timing are "persuasive evidence").

[52] *See Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1138 (4th Cir. 1982) (witness's silence on important question "fairly gives rise to an adverse inference").

[53] *Montgomery Ward & Co.*, 316 NLRB 1248, 1254-55 (1995) (employer's failure to discipline employee prior to employee's participation in union campaign is evidence of unlawful animus), *enforced mem.*, 1996 WL 532744 (4th Cir.); *see Uniroyal Tech. Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998) (employer's

Indeed, the Company's charade of an investigation manifests its union animus.[54] Its investigation into Kingsmore's departure from BMW entailed one fax and one phone call that lasted "mere seconds." (A. 495; 265-67, 273-74.) Incongruously, the Company's experienced human resources director could not remember the name or title of her BMW contact, the day or time of the phone call, or even whether she documented the investigation at all. These false steps undermined Becksted's credibility and showed the Company sought a reason to discharge Kingsmore rather than the truth. (A. 494; 265-67, 273-74.)

The Company's shifting rationales for Kingsmore's discharge further belie its unlawful motive.[55] (A. 497.) Kingsmore's discharge form lists three reasons: "[f]alsification of prior work history, not supplying proper documentation from prior employer as requested, and not supplying information for reason of BMW's refusal to allow employee on property." (A. 497; 348-49.) In its brief and during trial, however, the Company claimed that Kingsmore was discharged for "misleading or false statements . . . during an interview or lying in an interview." (Br. 29, A. 283.)

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resort to flawed employment application was a pretext to disguise unlawful motivation where employer was already aware of flaw before employee became a union activist).

[54] *See supra* note 45.

[55] *See supra* note 46.

The Company's ultimate proffered reason for discharging Kingsmore is significant because it is false. The falsity of an employer's stated reasons for taking adverse action against an employee suggests that the true reason was an unlawful one.[56] There is no evidence that Kingsmore lied or misled anyone during his interview. Becksted asked Kingsmore why he left BMW and learned that he was tired of the long commute and time away from his family. (A. 494; 254-56.) The Company never obtained any evidence showing Kingsmore lied; thus, its firing of him for dishonesty was pretext. Although the Board did not rely on these documents because they were not available when Kingsmore was suspended and terminated, as it turns out, BMW's documents prove Kingsmore was truthful about his voluntary separation. (A. 495; 350, 357.)

The Company's failure to provide any evidence of consistent treatment further suggests pretext.[57] Kingsmore was the first employee ever discharged for allegedly lying in an interview or anything similar. (A. 496.) The only two employees the Company discharged for first-time offenses, R. Gist and W. Gregory, each committed more serious infractions that involved physical damage to company property. (A. 496; 242-45.) Similar treatment for more severe

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[56] *See supra* note 47; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where an employer's stated reasons for discharge are false, it can be inferred that the real motive is one that the employer desires to conceal).

[57] *See supra* note 48.

infractions does not support the credibility of an employer's decision.[58] Moreover, with those discharges, the Company fully investigated and each employee admitted his misconduct. (A. 495; 242-44.) The Board properly disregarded J. Hicks's discharge (Br. 29 n.124) because the Company failed to elicit testimony explaining his separation. (A. 495; 291-94, 421-22.) Accordingly, the Company lacks any comparative evidence to support its discharge decisions. And, the Company's claim that Kingsmore's ostensible violation mandated dismissal (Br. 25) is belied by the discretionary language in its promotion policy. (A. 490, 497; 377.)

4. Because the evidence showed pretext instead of showing that the Company would have fired Kingsmore absent his union activity, the Company failed to meet its burden

The Company defends by asserting that because other employees who resigned from BMW were not barred from its property, it assumed Kingsmore must have lied about why he left BMW. (Br. 30.) Yet, overwhelming evidence (pp. 25-30) of the Company's timing, shifting rationales for Kingsmore's discharge, the falsity of its ultimate proffered reason, and the Company's failure to provide any evidence of consistent treatment supports the Board's conclusion that the Company's defense that it fired Kingsmore for lying in an interview was pretext. It is well established in this circuit that where an employer offers a

[58] *See Babcock & Wilcox Co. v. NLRB*, 683 F.2d 858, 860 (4th Cir. 1982) (employee who inflicted bodily harm not comparable to one who threw rocks at a wall).

pretextual defense, the only possible conclusion is that the true reason for its actions is one it wishes to conceal; the employer necessarily fails to show that it would have taken the unlawful action even absent the employee's union activity.[59]

C. Substantial Evidence Supports the Board's Finding that Anti-Union Animus Motivated the Company to Discharge Alexander

Soon after Alexander was accused of union leadership by colleagues and management alike, the Company discharged him, ostensibly based on a 38-minute discrepancy on his timesheet. As discussed above, (p. 22), the Company waived any argument to the Board's well-supported conclusion that the first prong of the *Wright Line* analysis – that Alexander engaged in protected Section 7 activity – was satisfied by Alexander's union organizing activities. (A. 495; 35.)

1. The Company had knowledge of Alexander's union activity

Substantial evidence supports the Board's conclusion that the Company had knowledge of Alexander's union activities. Supervisor Fink told Alexander: "I didn't know you were one of the ones that were trying to bring the Union in." (A. 496; 46.) Alexander told Supervisor Morris that three employees had accused him of bringing in the union. (A. 492, 496; 82, 177-79.) The Company effectively

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[59] *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 215 (4th Cir. 2005); *USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 106 (4th Cir. 2000); *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985).

concedes its knowledge, stating that Alexander "denied supporting the union *when management learned of it*." (Br. 12 (emphasis added).)

Suspicious timing further validates the Board's conclusion because Alexander was discharged mere days after his colleagues and supervisors accused him of union leadership after the February 11 meeting.[60] (A. 496; 42-46, 177-78.) Moreover, after the meeting, Alexander's coworkers harassed him for his pro-union stance. (A. 496; 42.) As discussed above (pp. 24-25), such divisiveness among employees lends additional support to the Board's finding of knowledge. Lastly, as already explained (p. 23), the Board correctly imputed the knowledge of Supervisors Fink and Morris to the Company.

2. A threat, suspicious timing, a sham investigation, the imposition of disproportionately severe discipline, and pretext all support the Board's conclusion that antiunion animus motivated the Company to discharge Alexander

With respect to Alexander, the Board's conclusion of anti-union animus is supported by a contemporaneous Section 8(a)(1) violation,[61] timing,[62] disproportionately severe discipline,[63] a departure from the standard disciplinary

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[60] *See supra* note 34.

[61] *See supra* note 42.

[62] *See supra* note 43.

[63] *Am. Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980); *see supra* note 44.

system,[64] a travesty of an investigation,[65] the employer's false rationale,[66] and its failure to provide evidence of consistent treatment.[67]

To begin, Supervisor Fink's threat of discharge evidences that a management insider believed that General Manager Evola would fire an employee for his union activity, which shows antiunion animus towards any employee involved in the unionization campaign.[68]

The temporal proximity between Alexander's union activity and his discharge also raises a red flag.[69] As discussed above (pp. 7, 9-10, 31-32), Alexander was discharged on February 19, smack in the midst of his union organizing activity, and soon after he attended a captive audience meeting and was confronted by colleagues and management alike for his union activities.

Next, as this Court commented in *American Thread Co. v. NLRB*, the "imposition of the ultimate form of discipline upon a valued employee certainly is

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[64] *NLRB v. Heatilator Fireplace*, 646 F.2d 1218, 1219-20 (8th Cir. 1981) (discharge unlawful where employer did not follow its discharge policy).

[65] *See supra* note 45.

[66] *See supra* note 47.

[67] *See supra* note 48.

[68] *See supra* note 42.

[69] *See supra* note 43.

relevant evidence."[70] There, this Court found antiunion motivation behind an employee's discharge for urinating on employer grounds in a semi-concealed area.[71] It relied on "several critical facts:" the discriminatee was a good employee; no lesser sanctions were considered; the employer conducted a cursory investigation; and the employee had no opportunity to explain.[72] Similarly here, Alexander had never been previously reprimanded; the Company never considered a lesser sanction for his single timesheet discrepancy; and it discharged Alexander with only the briefest of investigations and no opportunity to explain. (A. 497; 34, 56-57, 225, 278-80.) Such disproportionally severe discipline strongly evidences discriminatory intent.[73]

In imposing the ultimate penalty for a simple timekeeping mistake, the Company overlooked the interim steps of a verbal or written warning or a suspension in its own progressive discipline system. (A. 490; 391.) The Company's decision to treat with the utmost severity a one-time mistake and to

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[70] 631 F.2d 316, 322 (4th Cir. 1980); *see also Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977) ("[I]f the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation."); *supra* note 44.

[71] *Id.* at 319.

[72] *Id.* at 321-22.

[73] *See supra* note 44; *Detroit Paneling Sys., Inc.*, 330 NLRB 1170, 1170 (2000) (Board considers insubstantial nature of alleged misconduct in determining whether management's proffered reason is its actual reason).

ignore its own progressive discipline system supports the Board's conclusion that the Company acted out of something other than logic or business sense.[74]

The Company's outcome-oriented investigation of Alexander's alleged misconduct also manifests its union animus.[75] It fired Alexander despite his unblemished employment record and without providing him any opportunity to defend himself against the serious accusation of *deliberate* falsification of a timecard, presuming that he acted with the worst possible intentions and ignoring any contrary evidence. (A. 497; 279, 60.) The Company failed to consult Alexander's timekeeper, Supervisor Sullivan, and ignored his correction of Alexander's timesheet. It also ignored Alexander's statement that Sullivan promised to fix the timesheet. (A. 497; 277-80, 282-93.) The Company's draconian punishment of a good employee shortly after his union activity came to light makes plain its unlawful motive.

Pretext also supports the Board's finding: the Company's accusation that Alexander intentionally falsified his timesheet is itself false. As shown above (pp. 9-10), the credited evidence demonstrates that Alexander made a simple error on his timesheet, which his supervisor corrected. (A. 493.) There is no evidence to

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[74] *Fairfax Hosp.*, 310 NLRB 299, 301 (1993) (employer's failure to follow disciplinary policy supports conclusion of anti-union animus), *enforced mem.*, 1993 WL 509372 (4th Cir.).

[75] *See supra* note 45.

support the Company's accusation of deliberate falsity. This Court does not require the Board to accept a less than rational explanation for the abrupt discharge of an otherwise good employee whose prounion sympathies are known to the employer.[76]

Lastly, as discussed above, (pp. 29-30), the Company's failure to provide any evidence of consistent treatment further credits the Board's finding of animus. Alexander was the only employee ever discharged for a first-time offense of such insignificance. His 38-minute error contrasts starkly with employees discharged for admitted and proven damage to company property.

3. Because the evidence showed pretext instead of showing that the Company would have fired Alexander absent his union activity, the Company failed to meet its burden

As it did with Kingsmore, the Company acted on an unproven assumption – that Alexander deliberately falsified his timesheet. The myriad reasons just explained (pp. 32-36) – the timing, falsity of the Company's reason for discharging Alexander, and lack of consistent treatment – support the Board's finding that the Company's defense was pretext. (A. 497.) As described above (pp. 21, 31-32), this Court agrees with the Board that an employer fails to meet its affirmative defense when it offers a pretextual justification for its adverse action against a prounion employee.

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[76] *Neptune Water Meter Co. v. NLRB,* 551 F.2d 568, 570 (4th Cir. 1977).

D. The Company's Remaining Contentions Lack Merit

1. This Court should reject the Company's invitation to add a "decision-maker" criterion to the knowledge requirement of *Wright Line*

The Company's main defense is that the Board had to find that the company official who decided to discharge Kingsmore and Alexander knew of their union activity. It is incorrect factually and legally. First, the Company has not proven its factual predicate that Human Resources Director Becksted, whom it claims did not know of the discriminatees' union activity, was the sole decision-maker. As the Board found (A. 496), the record does not clearly show who decided to discharge Kingsmore and Alexander. Evola initiated the Kingsmore investigation with his unexplained epiphany about the BMW incident and then directed Becksted to follow up, which she did with constant contact with him (A. 259, 264, 273), as he was the admitted ultimate authority over personnel matters (A. 201-02). As the Board observed (A. 496), given Evola's involvement in the investigation, it is illogical that Becksted would take the drastic step of firing Kingsmore without consulting Evola. Becksted and Evola also conferred about Alexander's discharge. (A. 279.)

The Company's record cites (Br. 10 n.48, 22 n.95) to Kingsmore's and Alexander's testimony do not demonstrate that Becksted acted alone. At best, Kingsmore said Becksted was involved but he did not know about others, and

Alexander did not squarely address the issue. (A. 60-61, 143.) Moreover, no management witness, including Becksted herself, declared she was the sole decision-maker, which in itself is telling.

Second, there is no "decision-maker" criterion under *Wright Line*.[77] (Br. 18-20.) As noted above (p. 23, nn. 36 & 37), this Court and others have upheld the Board's imputation of supervisors' knowledge to the employer. The Company provides little support for its invitation to this circuit to change its law. It relies almost entirely on a single case that turns on the pretext prong of *Wright Line*, not the knowledge element.[78] (Br. 18-21.) The Court denied enforcement there

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[77] *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987) (affirming inference of unlawful motive where decision-maker had no personal knowledge of protected activity); *JMC Transp., Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985) ("a supervisor's unlawful, anti-labor motivation in making a false report leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus"); *Boston Mut. Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (rejecting defense that decision-maker lacked knowledge to avoid adopting "a rule that would permit the company to launder the 'bad' motives of certain of its supervisors by forwarding a dispassionate report to a neutral superior"); *NLRB v. E.D.S. Serv. Corp.*, 466 F.2d 157, 158 (9th Cir. 1972) (imputing a supervisor's knowledge to the Company to avoid permitting a Company to "evad[e] the Act by a division of corporate personnel functions") (internal citations omitted); *NLRB v. Buddy Schoellkopf Prods., Inc.*, 410 F.2d 82, 85 (5th Cir. 1969) (employer cannot "successfully shield itself behind the ignorance" of a decision-maker when the Company has knowledge of the employee's union activity); *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962) (rejecting defense that supervisor's bias was not attributable to company president who ordered the discharge).

[78] *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338 (4th Cir. 1976).

because it found the employer had a legitimate, non-discriminatory reason for its actions; it mentioned "knowledge" only in dicta and without citation to any authority.[79]

The Company incorrectly claims that the Board "violate[d] the Board's own precedent" by not requiring decision-maker knowledge. (Br. 19 n.90.) The sole Board decision cited addresses a Section 8(a)(1) violation, not an 8(a)(3) claim, and it turned not on imputed knowledge but on whether a decision-maker with knowledge of a discharged employee's protected activity knew of the activity's concerted nature.[80] Its other citations are to an unpublished administrative law judge's opinion and a Fifth Circuit case, neither of which constitutes "Board precedent."

2. The Board properly considered the pretextual nature of the Company's asserted reason for discharge when applying the *Wright Line* legal framework

The Company wrongly claims that the Board misapplied *Wright Line* by considering pretext in its discriminatory motive analysis.[81] (Br. 27-29.) In *NLRB*

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[79] *Id.* at 1336, 1338-39.

[80] *Reynolds Elec., Inc.*, 342 NLRB 156, 157 (2004).

[81] *Union-Tribune Publ'g Co. v. NLRB*, 1 F.3d 486, 491-93 (7th Cir. 1993) (finding discharge unlawful based on pretext *plus* animus); *NLRB v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 118 (8th Cir. 1973) (finding discharge unlawful based on employer's "obvious[ly] pretextual" reasons).

v. Frigid Storage, however, this Court observed that the pretextual nature of an employer's asserted reason for discharge lent "a great deal of support" to the Board's finding of unlawful motive.[82] That employer's "proffered excuse" was "so obviously contrived" that this Court needed little else to find anti-union animus.[83] Section 8(a)(3) cases center on employer motivation,[84] a fact-based inquiry.[85] This Court does not elevate form over substance or permit the "intricacies of proof schemes" to impede the resolution of motive.[86] The Company's view that evidence of pretext can demonstrate only one *Wright Line* element (the employer failed its burden) to the exclusion of the others (animus and motive) is simply wrong.

Similarly, the Company's quibble with the Board's word choice regarding inferences of motive does not warrant reversal. (Br. 20-21.) The Board correctly

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[82] 934 F.2d 506, 510 (4th Cir. 1991).

[83] *Id.*

[84] *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 967 (4th Cir. 1985).

[85] *FPC Holdings v. NLRB*, 64 F.3d 935, 942-944 (4th Cir. 1995); *Salem Leasing Corp. v. NLRB*, 774 F.2d 85, 89 (4th Cir. 1985).

[86] *See Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 295-96 (4th Cir. 2010) (finding that courts must not get so entwined in the Title VII *McDonnell Douglas* proof scheme that they forget the scheme exists solely to facilitate determination of discrimination).

explained that the General Counsel was required to show "by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action."[87] (A. 495.) The Board held the General Counsel to the correct standard and found it satisfied.

Lastly, contrary to the Company's assertion (Br. 23-24, 28) that the Board improperly second-guessed its discharge decisions, the Board appropriately examined company decisions in the context of its past practice, including other discharges.[88] Here, the circumstances surrounding Kingsmore's and Alexander's discharges show that their supposed infractions supplied the excuse not the reason for their discharges.[89]

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[87] *See NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (7th Cir. 1998) ("[n]otwithstanding the Board's reference to the *Wright Line* language regarding evidence 'sufficient to support the inference' that antiunion animus contributed to the discharge decision . . . . we have no reason to believe that the Board labored under any misapprehension that the General Counsel was not obligated to carry the burden of persuasion on this point;" distinguishing *NLRB v. CWI of Md., Inc.* (cited by the Company, Br. 20) where the evidence was described as "relatively weak").

[88] *See id.* at 357-58 (Board did not substitute its business judgment in discrediting employer's reasons for discharge).

[89] *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (Board properly rejected employer's "excuse rather than the reason for [its] retaliatory action").

CONCLUSION

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

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National Labor Relations Board
June 2012

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-2362 **Caption:** Gestamp South Carolina, LLC v. NLRB

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(s) Linda Dreeben

Attorney for National Labor Relations Board

Dated: June 22, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GESTAMP SOUTH CAROLINA, LLC	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	Nos. 11-2362, 12-1041
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent/Cross-Petitioner	)	11-CA-22595

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2012 I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dated at Washington, DC
this 22nd day of June, 2012