

Nos. 11-1688 & 11-1776

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

PESSOA CONSTRUCTION COMPANY

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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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Pessoa Construction Company (“the Company”) for review, and on the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Order issued against the Company. The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor

Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. On May 19, 2011 the Board issued its Decision and Order, which is reported at 356 NLRB No. 157. (A. 15-26.)¹

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board’s Order is final with respect to all parties. The Company filed its petition for review on July 1, 2011, and the Board filed its cross-application for enforcement on July 25. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders.

STATEMENT OF THE ISSUES

1. Whether substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by creating the impression that it was surveilling employee William Membrino’s union activity, and Section 8(a)(3) and (1) of the Act by implementing a new policy that he could no longer use a company vehicle to drive to and from a jobsite, and by discharging him.

¹ “A.” references are to the Joint Appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Tr.” refers to the transcript of the hearing held before the administrative law judge.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing a new policy under which employees Membrino and Nicholas Cappetta could no longer use a company vehicle to drive to and from a jobsite without providing the Union with notice and an opportunity to bargain over the new policy.

STATEMENT OF THE CASE

In September 2008, the Laborers' International Union of North America ("the Union") held its first meeting with the Company's employees as their Board-certified bargaining representative. At the meeting, employee William Membrino expressed concern that the Company was not paying employees for travel time to company jobsites. During the month following the meeting, Julio Pessoa, the Company's owner and president, talked to Membrino about his attendance at the Union meeting, implemented a new policy that he could no longer drive a company vehicle to and from a distant jobsite, and discharged him.

Based on those facts, and an amended unfair labor practice charge filed by the Union, the Board's General Counsel issued a consolidated complaint alleging, as relevant here, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by creating the impression that it was surveilling Membrino's union activity. The complaint also alleged that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by unilaterally implementing a

new policy under which he could no longer use a company vehicle to drive to and from a company jobsite, and by discharging him. Finally, the complaint also alleged that the Company violated Section 8(a)(5), and (1) of the Act (29 U.S.C. § 158(a)(5)) and (1)) by implementing the new policy regarding the use of company trucks, which also affected employee Cappetta, without giving the Union notice and an opportunity to bargain over the new policy. (A. 16; 68-69, 78-85.)

After a hearing, an administrative law judge found that the Company had committed the alleged unfair labor practices. (A. 16-26.) On review, the Board affirmed the judge's rulings, findings, and conclusions. (A. 15-16.) The facts supporting the Board's Order are summarized directly below, followed by a description of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; in July 2008, the Company's Employees Vote for Union Representation

The Company is a highway construction contractor with its principal office in Fairmont Heights, Maryland. Julio Pessoa, the Company's owner and president, oversees the Company's day-to-day operations. (A. 16; 80, 87-88, 188, 281-84, 288.) In June 2007, the Company rehired William Membrino as a truck driver at a salary of \$1000 per week. He had previously worked for the Company

from 2004 to 2006 before going to work for the State of Maryland. (A. 17; 186, 300-02, 459-61.)

In early 2008, the Union began to organize the Company's employees. (A. 340-45.) The organizing effort began after the Company changed the compensation of Membrino and its other equipment operators from a salary to an hourly wage, which lowered their pay. (A. 16-17; 219, 304-07, 728-29.) Many employees also became interested in union representation because the Company was not paying them for all of their travel time to jobsites from the Company's headquarters. (A. 372-73.) Membrino was among the employees who signed a union authorization card. (A. 17; 168, 347, 475.)

On June 2, the Union filed a petition for an election with the Board, and the Board scheduled an election for July 14. (A. 99-100.) Prior to the election, Membrino asked President Pessoa to either change his pay back to a salary or to increase his hourly wage. (A. 17; 325, 475-77.) Membrino also spoke to the Company's payroll clerk regarding payment for travel time, and she relayed Membrino's concern to President Pessoa. (A. 325-27.) Pessoa told Membrino that he could not do anything until his union "problems" were resolved. (A. 476-77, 610.)

On July 14, the Union won the Board-conducted election to represent the Company's laborers, pipe-layers, carpenters, finishers, truckdrivers, and

equipment operators, a unit of approximately 100 employees. (A. 16; 101.)

Membrino did not vote in the election because he was on leave. (A. 17; 477-78.)

On July 28, the Board certified the Union as the employees' collective-bargaining representative. (A. 16; 102-03.) In late July, President Pessoa complained to

Membrino that employees who had specifically told him "they're not going to vote for the [U]nion" went "behind [his] back and voted for [it]." (A. 17; 479.) Pessoa again denied Membrino's request to change back to being a salaried employee.

(A. 17; 479.) A few weeks after the election, the Company laid off 60 employees for economic reasons. (A. 16; 350, 612.)

B. On September 30, 2008, Membrino Attends a Union Meeting Where He Informs the Union that the Company is not Paying Employees for Travel Time; on October 1, President Pessoa Asks Employee Moltz if Membrino Had Attended the Union Meeting; On October 13, Pessoa Discusses the Union Meeting With Membrino

Union representative Stephen Lanning scheduled the Union's first postelection meeting with unit employees for September 30 to seek their input on issues it should address in upcoming collective-bargaining negotiations. (A. 17; 169, 351-56, 365, 656.) Lanning also scheduled the meeting because the Union was "having difficulty, post-layoff, of generating a great deal of worker enthusiasm" for the Union, and he hoped that the meeting would "spark" more employee interest in the Union. (Tr. 588, 632.) On September 30, Membrino

entered the office of dispatcher James Moss, where he saw and heard Moss talking with employees Michael Moltz and driver Jose Ramirez. (A. 17; 483.) Moltz is the only person, other than President Pessoa and the Company's accountant, who can sign checks for the Company. (A. 17; 655, 731-32.) Ramirez had served as the Company's designated observer during the election. (A. 18; 358, 441-42.) Moss said that he and others were going to the union meeting as spies, and asked Membrino if he would be attending the meeting. (A. 17; 483-84.)

Membrino arrived alone to the September 30 union meeting, which was attended by four other individuals from the Company—Moltz, Ramirez, foreman Augustin Remdon, who was not a unit employee, and concrete finisher Romulo Cruz Ventura. Those four had traveled together to the meeting. (A. 18; 188, 355-61, 435-39, 449-51, 481-87.) During the meeting, Membrino notified the Union that the Company was not paying employees for travel time from headquarters to its jobsites. Membrino also asked whether President Pessoa had accurately stated that he could not grant employees a wage increase because of the Union. (A. 18; 361, 489-91, 657-59.) Union representative Lanning replied that the Company was arguably violating the Fair Labor Standards Act regarding travel pay, and that it was an issue the Union needed to address in bargaining. (A. 658.) Moltz was the only other employee who spoke at the meeting. He asked questions that he had given to the Company to type for him. (A. 18 & n.5; 170, 361, 438-39, 441,

451-52, 481, 489-90.) After the other employees left, Membrino stayed to ask the union representative more questions. (A. 18; 362, 492.)

On October 1, President Pessoa asked employee Moltz if Membrino had attended the union meeting. Moltz replied affirmatively. That was the only question Pessoa asked Moltz about the meeting. Prior to Pessoa's question, Moltz had not mentioned the meeting to Pessoa, or told him that he had attended. (A. 18 & n.5; 454-57.)

On October 2, Orlando Bonillia, the Union's business agent, sent an email to company counsel stating that the Union "recently had a meeting with some [company] workers who expressed concerns." (A. 105, 659-65.) Bonillia further stated that he was forwarding an internal email that union representative Lanning had sent to him about the meeting, and that company counsel should "share it with [the Company] as a good faith effort from [the Union] to avoid filing more charges against [the Company]," and that "[the Union] would rather have a contract in place to deal with concerns without having to involve [federal agencies.]" (A. 105.) The forwarded email from Lanning stated, "[o]ne of the drivers at [the Union meeting] stated that the drivers do not get paid until they get to the jobsite. This is not legal. . . . Even a pro-company worker confirmed this. . . . Some workers have also been told that they cannot receive raises because of the [U]nion." (A. 105.)

On October 13, Membrino again asked President Pessoa if he could become a salaried employee. (A. 18 & n.6; 494.) Pessoa replied, “I heard someone was in the [union] meeting requesting travel time” and wage increases. (A. 18 & n.6; 495.) Membrino responded that he knew that Pessoa was referring to him. (A. 18 & n.6; 496.) Pessoa said that he could not afford to pay Membrino for travel time, but that he was considering leaving company vehicles at jobsites and requiring employees to drive to the jobsite in their own vehicles. (A. 18 & n.6; 496.)

C. On October 17, 2008, the Company Directs Membrino To Leave His Company Truck at Its Route 231 Jobsite Instead of the Company’s Headquarters

At the end of September, Membrino began working at the Company’s road widening project on Route 231 in Prince Frederick County, Maryland. (A. 183, 296-99, 861.) The project had started a few weeks earlier and was 35 to 40 miles from the Company’s headquarters. (A. 18; 296-99, 500, 861.) When Membrino began working at the jobsite he would first stop at the headquarters, a 5-minute drive from where he was living, get a company dump truck, and then drive the truck to the jobsite. (A. 18; 464-65, 498.) On October 17, Membrino received a notice addressed to him in his paycheck. (A. 18; 171, 496-99, 846-47.) The notice informed Membrino that “[u]ntil further notice” he was required to leave the Company’s truck at the Route 231 jobsite, and report directly to the site each morning. (A. 18; 171.) Thereafter, Membrino kept the company dump truck at

the Route 231 jobsite. He was able to arrange for a ride to and from the site. (A. 532-37.)

One other driver, Nicholas Cappetta, who had worked for the Company for two weeks, received a similar notice. (A. 18; 855.) There is no evidence that any other truck driver working at the Route 231 jobsite—including Jose Ramirez, Brian Loving, Purcell Smith, and two female drivers—ever received a notice instructing them to report directly to the jobsite and to keep their company vehicles at the jobsite. (A. 18 & n.7; 110-11, 310, 430-32, 443, 778-80.)

D. On October 23, 2008, the Company Discharges Membrino

On October 23, employees Sherman McCane and Membrino were working at the Route 231 jobsite. McCane was breaking up asphalt with his Gradall hydraulic excavator and loading the debris into Membrino's dump truck. (A. 19; 545, 549, 552, 627.) The Gradall has two cabs, one for driving on the open road, and another for operating the hydraulic arm. The Gradall can perform different tasks with different bucket attachments. (A. 19; 172, 266-76, 292-95, 546-49.) Midday, McCane needed to change the bucket so that he could perform a different task. (A. 19; 550.) McCane asked Membrino for help to change the bucket, something he had regularly done over the past several years. (A. 19; 550-51, 627-28, 640, 643-44.)

Although one person can loosen the bolts to change the bucket, the hydraulic arm on McCane's Gradall, particularly as an older piece of equipment, had a tendency to move, making the task more difficult. (A. 20; 551, 628-31.) Accordingly, McCane typically would stay in the middle cabin, hold the controls steady to prevent the arm from moving, while Membrino stood on the Gradall, next to the arm, and loosened the bolts. (A. 551, 628-31, 831.) After the old bucket was removed, McCane would use the controls to adjust the position of the arm to line up the new bucket. Membrino would then tighten the bolts and complete the installation. (A. 551, 628-31, 831.) Membrino's assistance also meant that McCane, who was in his sixties, did not have to climb up and down multiple times from the Gradall's operator's cab, which was about 5 feet above the ground. (A. 20; 631, 818, 837.)

To change the bucket on October 23, McCane drove the Gradall across a road to the area where the Company stored the buckets. Membrino drove his dump truck to the same area and pulled in behind the Gradall when McCane backed the Gradall into the side of the front hood of Membrino's dump truck. The fiberglass hood of Membrino's vehicle, which was the Company's newest dump truck, was damaged, and a tail light on the Gradall was broken. (A. 20; 176-81, 559-64, 566-74, 582, 584, 640-41, 840-41.) They then called company job

superintendents, Abilio Machado and Keith Reeder, to report the accident. (A. 20; 574-76.)

Machado, the senior superintendent, arrived first to the scene. He determined that both vehicles were useable and directed Membrino and McCane to return to work after they finished changing the bucket. Machado also took photographs of both vehicles. (A. 20; 176-81, 577-80, 598, 790, 929.) When Reeder arrived he told Membrino and McCane that they would have to fill out accident reports. He did not tell them that they had to talk to President Pessoa. (A. 20; 598, 789.) Neither superintendent questioned why Membrino's truck was behind McCane's Gradall, or stated that they had done anything wrong. (A. 20; 786-87, 927-28.)

At the end of the day, Membrino wrote and signed a statement about the accident and drew a diagram of the position of the vehicles. (A. 21 & n.10; 173, 591-94.) Membrino wrote that he “[p]ull[ed] into [the] lot to help [McCane] change the bucket on [the] Gradall, and that as he “got out of [his] truck to help,” he “heard the Gradall hit the hood of the dump truck.” (A. 21; 173.) McCane refused to write a statement, so Membrino wrote one for him, which McCane signed. (A. 21; 591, 594.) Membrino wrote, “truck in blind spot. Don't know what happened.” (A. 21; 174.) At 5:21 p.m., Superintendent Reeder faxed the statements to headquarters, along with a note stating, “[a]s much as I tried to get a

statement from [McCane], he insisted he does not know what happened.” (A. 21; 220, 797-800.)

When Membrino returned to headquarters at approximately 5:30 p.m., he talked to dispatcher Juan Infante about the accident and what had happened, and asked Infante if he had to take a drug test. Infante replied no. Membrino then left work to pick up his children. (A. 21; 599-601, 646.)

At about 6:30 p.m., Superintendent Machado called Membrino and told him that he had been discharged but stated no reason why. (A. 22; 601-02.)

Membrino then called President Pessoa, and asked, “Hey, what’s going on? I’m fired?” Pessoa replied, “I think your head is not [with] the [C]ompany [any]more. . . . [McCane] was in here talking to me. You didn’t come talk to me. So I think . . . your head is somewhere else. You need to . . . part ways.” (A. 22; 602.)

Membrino then asked, “[Y]ou’re firing me for what reason[?]” (A. 22; 602.)

Pessoa reiterated several times that Membrino’s “head was not with the [C]ompany,” and that it was time to part ways. (A. 22; 602-03.) At no point in the conversation did Pessoa ask Membrino about the accident or mention it. (A. 604, 646-48.) Membrino then drove back to headquarters, turned in his keys, and picked up his paycheck from Pessoa, who again said nothing about the accident. (A. 603-04.) Shortly after the Company fired Membrino, company mechanics

repaired the damage to the hood of Membrino's dump truck with \$509 of purchased materials. (A. 22; 189, 332-33, 714-17.)

Sometime later in the fall, the Company no longer required any of its drivers to leave company trucks at the Route 231 jobsite. Thereafter, and until July 2009 when the Route 231 job was completed, all drivers drove their trucks directly from headquarters to the Route 231 jobsite. (A. 299, 781-82, 784, 861.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Liebman, and Members Pearce and Hayes) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by creating the impression that employees' union activities were under surveillance. The Board also found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by implementing a new policy under which Membrino could no longer use a company vehicle to drive to and from a jobsite, and by discharging him. Finally, the Board found that the Company violated Section 8(a)(5), and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing the new policy regarding the use of company trucks, a policy that affected only

employees Membrino and Cappetta, without giving the Union an opportunity to bargain over the new policy. (A. 15-26.)²

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 by Section 7 of the Act (29 U.S.C. § 157). (A. 25.) Affirmatively, the Order requires the Company to offer Membrino reinstatement, and to make him and Cappetta whole for any loss of earnings or benefits they suffered from the Company's unfair labor practices, and to remove from its files any reference to Membrino's discharge. (A. 25.) The Order also requires the Company to post a remedial notice and, if appropriate, to distribute copies electronically. (A. 15, 25.)

STANDARD OF REVIEW

The Board's findings of fact are entitled to affirmance if supported by substantial evidence on the record as a whole. *See WXGI, Inc. v. NLRB*, 243 F.3d 833, 840 (4th Cir. 2001). On review, the Court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo."

² Member Hayes (D&O 1 n.3) found it unnecessary to pass on whether the unilateral change also violated Section 8(a)(5) of the Act.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); accord *WXGI*, 243 F.3d at 840. Such deference is particularly appropriate “[w]here the ‘record is fraught with conflicting testimony and essential credibility determinations have been made.’” *Overnite Transp. Co. v. NLRB*, 240 F.3d 325, 338 (4th Cir. 2001) (quoting *NLRB v. Nueva Eng’g., Inc.*, 761 F.2d 961, 965 (4th Cir. 1985)). Indeed, “[i]t is well settled that absent exceptional circumstances, the [administrative law judge’s] credibility findings, ‘when adopted by the Board are to be accepted by the reviewing court.’” *NLRB v. Air Prod. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983) (citation omitted); accord *Evergreen America Corp. v. NLRB*, 531 F.3d 321, 330 (4th Cir. 2008).

SUMMARY OF ARGUMENT

This case, despite the Company’s attempt to argue otherwise, involves the Board’s application of settled law to the credited evidence. Based on that credited evidence, the Board reasonably found that the Company violated the Act by creating the impression that it was surveilling Membrino’s union activity, by implementing a new policy under which he could no longer use a company vehicle to drive to and from a jobsite, and by discharging him. Substantial evidence also supports the Board’s finding that the Company violated the Act by implementing the new policy regarding the use of company trucks, a policy that also affected

employee Cappetta, without giving the Union notice and an opportunity to bargain over the new policy.

1. The Board reasonably found that President Pessoa's statement to Membrino that he knew someone was at a union meeting requesting travel pay, an implicit reference to Membrino's union activity, would reasonably create the impression that Pessoa was surveilling Membrino's union activity in violation of Section 8(a)(1) of the Act. That finding is consistent with several of this Court's decisions that have found an employer's unprompted references to an employee about specific union activity would reasonably lead an employee to objectively believe that his union activity was under surveillance.

2. The Board also reasonably found that the Company violated Section 8(a)(3) and (1) of the Act by informing Membrino that he could no longer use a company vehicle to drive to and from a jobsite, and by discharging him. The Board based its finding that Membrino's union activity motivated the Company's actions on evidence that the Company was aware of Membrino's key role in the Union's first postelection meeting with the unit employees, and the timing of its adverse actions, within a few weeks of the union meeting. The Board also relied on the disparate treatment that the Company displayed toward Membrino by not notifying all other drivers that they could no longer use a company vehicle to drive to and from the Route 231 jobsite, which was 35 to 40 miles from headquarters.

The Company also engaged in disparate treatment by discharging Membrino after the accident without giving him the opportunity to reimburse the Company for the repair, an opportunity that it had provided other drivers, and despite the fact that no other employee had ever been required to go speak directly to President Pessoa after an accident or be subject to discharge.

The Board further reasonably found that the Company failed to show by a preponderance of the evidence that it would have precluded Membrino from driving a company vehicle to and from its jobsite, or that it would have discharged him, absent his union activity. Regarding the Company's requirement that Membrino no longer drive a company vehicle to and from the jobsite, the Board reasonably rejected the Company's belated reliance on high fuel costs. First, the Company offered no explanation for why it rescinded the change in the fall shortly after Membrino's discharge, and did not apply it to any other subsequent driver, despite the fact that the Route 231 job continued for another six months. Second, it offered no explanation for why only one other driver, employee Cappetta, was impacted by the change. Third, it offered no evidence to establish when high fuel costs occurred in relation to Membrino's union activity.

Regarding Membrino's discharge, the Board reasonably found that the Company's purported reason for discharging him—that is, his failure to follow company policy requiring that he speak directly with President Pessoa after an

accident—was a pretext to mask its real motive because there simply was no such policy. Moreover, the Company's belated reliance on the cost of the damage to the truck is misplaced because that reason was never stated to Membrino as the basis for his discharge, and the Company's own mechanics repaired the damage for approximately \$500. The repairs therefore did not cost \$8000 as the Company now claims in its effort to rewrite the facts of this case.

3. Finally, the Board reasonably found that the Company's change in policy that Membrino and Cappetta could no longer drive trucks to the jobsite, violated Section 8(a)(5) and (1) of the Act, which prohibits an employer from making unilateral changes to its union-represented employees' terms and conditions of employment. The Company does not dispute that it made the change without providing the Union with notice and an opportunity to bargain. Nor does the Company dispute that the change was a significant change to terms and conditions of employment. The Company's weak attempts to defend against the Board's unilateral change finding must be rejected.

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CREATING THE IMPRESSION THAT IT WAS SURVEILLING EMPLOYEE MEMBRINO'S UNION ACTIVITY, AND SECTION 8(a)(3) AND (1) OF THE ACT BY CHANGING THE TRUCK USE POLICY, AND DISCHARGING HIM

In September 2008, employee Membrino was one of only a few employees to attend the first postelection meeting held by the Union as the employees' Board-certified bargaining representative. The Union was seeking employee input for upcoming collective bargaining and was also hoping to "spark" (Tr. 588) more interest among the unit employees because, after the Company's layoff of approximately 60 percent of the unit employees, it was "having difficulty" "generating a great deal of worker enthusiasm." (Tr. 632.) At the meeting, Membrino told the Union that the Company was not paying employees for travel time and was refusing to increase their wage, after the Company had converted their pay from salaries to hourly wages. Thereafter, the Union emailed company counsel to notify him that the Company was potentially violating federal law by failing to pay travel time, and that the Union hoped to address the issue in bargaining. Within a few weeks of the union meeting, and the Union's email to company counsel, President Pessoa coercively created the impression that he was surveilling Membrino's union activity, informed Membrino that he could not drive a company vehicle to and from the jobsite, and discharged him.

As we now show, an employer, such as the Company, that creates the impression of surveillance violates Section 8(a)(1) of the Act (29 U.S.C. § 158a(1)), which makes it an unfair labor practice “to interfere with, restrain, or coerce employees” in the exercise of their rights, under Section 7 of the Act (29 U.S.C. § 157), to “join . . . or assist labor organizations.” Further, the Company’s imposition of the requirement that Membrino could not drive his company vehicle to and from the jobsite, and its discharge of him, violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)), which prohibits employer “discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization”³

A. The Company Unlawfully Created the Impression that Membrino’s Union Activities Were Under Surveillance

An employer violates Section 8(a)(1) of the Act by giving an employee the impression that his union activities are under surveillance. *See NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1045 (4th Cir. 1997); *Filler Products, Inc. v. NLRB*, 376 F.2d 369, 374-75 (4th Cir. 1967). The test for a Section 8(a)(1) violation is not “whether the language or acts were coercive in actual fact,” but

³ Because an employer’s antiunion discrimination necessarily coerces employees in the exercise of their Section 7 rights, a Section 8(a)(3) violation results in a “derivative” violation of Section 8(a)(1) of the Act. *See NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 213 (4th Cir. 2005).

“whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate.” *NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 213 (4th Cir. 2005). Whether an employer’s statements or actions have a tendency to coerce is a factual question “for the specialized experience of the [Board].” *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345, 352 (4th Cir. 2001).

Here, substantial evidence supports the Board’s finding (A. 17-18; 495) that President Pessoa’s statement to Membrino on October 13, 2008, that “I heard someone was in the [union] meeting requesting travel time,” would have a tendency to coerce an employee in violation of Section 8(a)(1) of the Act, because the statement indicated that the Company was “closely monitoring the extent of [Membrino’s] union involvement.” (A. 17-18.) President Pessoa’s statement was an unprompted and specific reference to Membrino’s attendance at the Union’s first postelection meeting held on September 3, 2008, where Membrino was the only employee who raised paid travel time as an issue that he thought the Union needed to discuss with the Company. The statement informed Membrino, as the Board found (A. 17), that Pessoa was aware of both his attendance at the meeting, and of his active union participation. Although Pessoa did not specifically name Membrino, Membrino would reasonably have understood the “someone” reference as referring to him, because he was the only one who had raised the issue of paid

travel time at the union meeting. Indeed, Membrino immediately told President Pessoa that he knew Pessoa was referring to him.

This Court has repeatedly recognized in similar situations that an employer creates the impression of surveillance by recounting the substance of union activity to employees. For example, the Court has found that an employer created the impression of surveillance by telling an employee that it “had heard” the employee was trying to change the employer’s policies (*NLRB v. Kentucky Tennessee Clay Co.*, 179 F. App’x 153, 161 (4th Cir. 2006)), and by telling an employee that it “had heard” union organizers had visited him (*NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 564 (4th Cir. 1967)). Similarly, the Court has repeatedly upheld the Board’s findings that an employer created the impression of surveillance by telling an employee that it knew how many people had attended a union meeting. *NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1045-46 (4th Cir. 1997); *NLRB v. Tamper, Inc.*, 522 F.2d 781, 785 (4th Cir. 1975).

In each of those cases, as here, the employer’s statement would reasonably lead an employee to think that his employer was monitoring his union activity. Accordingly, the Board reasonably found (A. 17-18) that President Pessoa’s statement to Membrino regarding his knowledge of what was said at the union meeting would tend to interfere with an employee’s exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

Contrary to the Company's contention (Br. 28, 52-53), the Board's finding is not undermined by its claim that President Pessoa learned about Membrino's union activity through the email sent by the Union to company counsel about the meeting. As this Court has held, the fact that the source of the employer's knowledge may have come from elsewhere does not eliminate the impression of the employer's surveillance." *Kentucky Tennessee Clay*, 179 F. App'x at 161 (rejecting employer's argument that there was no impression of surveillance where the information came from another employee). That principle is particularly appropriate here where Pessoa made no reference to his source. *See United Charter Serv., Inc.*, 306 NLRB 150, 151 (1992) (unlawful impression of surveillance found where employer did not explain the source of the information referenced or show that it was voluntarily given or lawfully obtained).⁴ In these circumstances, the Company's suggestion (Br. 60-61) that the highest ranking company official's unsolicited statement to an employee about what had happened at the union meeting is akin to a "friendly conversation" borders on the frivolous.

⁴ For similar reasons, the Board's finding is not undermined by the fact that President Pessoa learned of Membrino's attendance at the union meeting from employee Moltz. Moreover, contrary to the Company's portrayal of the facts (Br. 7), Pessoa did not learn of Moltz's attendance at the union meeting from Moltz, but from another company official; he then used that knowledge to ask Moltz about Membrino's attendance at the meeting. (A. 18 & n.5.)

Nor does it matter, as the Company suggests (Br. 53), that President Pessoa's conduct was isolated, or that he did not actually personally engage in surveilling the union meeting. "It is well established that a single conversation" can create the impression of surveillance. *Kentucky Tennessee Clay*, 179 F. App'x at 161; *accord NLRB v. Grand Canyon Mining Co.*, 116 F.3d at 1045-46. Moreover, "[c]reating the impression of surveillance of union activity can be as coercive as actual surveillance." *NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 922 (11th Cir. 1982).

Finally, Section 8(c) of the Act, 29 U.S.C. § 158(c), does not immunize President Pessoa's statement, as the Company claims (Br. 46-47, 60-61). Section 8(c) of the Act provides that "[t]he expressing of any views, argument or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Employer speech that would otherwise be protected under Section 8(c) is unlawful under Section 8(a)(1) of the Act, however, where, as here, "the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights.'" *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) (quoting *Lee Lumber & Bldg. Material Corp.*, 306 NLRB 408, 409-10 (1992)). As the Supreme Court noted in *Chamber of Commerce v. Brown*, Section 8(c) "expressly precludes regulation of speech about

unionization ‘so long as the communications do not contain a threat of reprisal or force or promise of benefit.’” 540 U.S. 60, 68 (2008) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969)).

B. The Company Unlawfully Changed Membrino’s Terms and Conditions of Employment, and Discharged Him

1. An employer violates the Act by taking adverse action against an employee for his union activity

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by taking adverse action against an employee for engaging in union activity. *See WXGI Inc. v. NLRB*, 243 F.3d 833, 839-40 (4th Cir. 2001); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942-44 (4th Cir. 1995). Whether the employer’s adverse action violates the Act depends on the employer’s motive. *WXGI*, 243 F.3d at 840. To prove motive, the Board’s General Counsel has the burden of demonstrating that an employee’s statutorily protected activity was a motivating factor in an employer’s adverse employment actions. Once the General Counsel satisfies that burden, the Board will find a violation of the Act, unless the employer demonstrates, by a preponderance of the evidence, that it would have taken the same action absent the protected conduct. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983), *approving Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981); *accord RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d

442, 448 (4th Cir. 2002). If the reason advanced by the employer for its actions is a pretext—that is, if the reason either did not exist or was not in fact relied upon—it follows that the employer has not met its burden, and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084; *accord NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1047 (4th Cir. 1997).

The Board may infer motive from circumstantial or direct evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *WXGI*, 243 F.3d at 839. Among the factors supporting a finding of unlawful motivation are the employer’s knowledge of the employee’s union activities, the timing of the adverse action, and the implausibility of the employer’s asserted reasons for its actions. *See Transp. Mgmt.*, 462 U.S. at 404-05; *Grand Canyon Mining*, 116 F.3d at 1048; *FPC Holdings*, 64 F.3d 935, 943 (4th Cir. 1995). An employer’s disparate treatment of an employee when compared to other similarly situated employees provides further evidence that an employer’s actions are unlawfully motivated. *See LB&B Assocs., Inc. v. NLRB*, 232 F. App’x 270, 276 (4th Cir. 2007); *NLRB v. Rockline Indus.*, 412 F.3d 962, 968 (8th Cir. 2005); *NLRB v. Hale Container Line*, 943 F.2d 394, 399 (4th Cir. 1991). The question of an employer’s motive is one “which the expertise of the Board is peculiarly suited to determine.” *FPC Holdings*, 64 F.3d at 942 (citation omitted).

2. The Board reasonably found that the Company had an unlawful motive in taking the adverse actions against Membrino based on the Company's knowledge of his union activity, the timing of its actions, and its disparate treatment of Membrino relative to other employees

Ample evidence supports the Board's finding (A. 19, 22) that the Company violated Section 8(a)(3) and (1) of the Act in October 2008 by changing Membrino's terms and conditions of employment when it required him to leave the Company's dump truck at its Route 231 jobsite, and by discharging him ostensibly for not personally reporting the dump truck accident directly to President Pessoa on the day it occurred. In finding that the Company had an unlawful motive in taking those actions against him, the Board reasonably relied (A. 19, 22) on the Company's knowledge of Membrino's union activity, the timing of its actions, its disparate treatment of Membrino relative to other employees, and the overall circumstances.

At the outset, Membrino clearly engaged in union activity when he attended the September 30 postelection meeting held by the Union to learn of the employees' concerns prior to sitting down at the table to negotiate a collective-bargaining agreement with the Company. Moreover, Membrino actively participated in that meeting, asking the Union to seek clarification of the Company's position that it was unable to provide wage increases pending upcoming negotiations, and to address the Company's failure to pay for travel time

from headquarters to its jobsites. Significantly, as the Board noted (A. 22), the Company learned of Membrino's attendance at the union meeting the following day when President Pessoa, without any solicitation, questioned Moltz about Membrino's attendance. Then, shortly thereafter, on October 13, the Company demonstrated its knowledge of Membrino's specific union activity when President Pessoa mentioned the union meeting to Membrino, and referenced the pay for travel time issue that Membrino alone had raised.

The timing of the Company's actions also supports the Board's finding of unlawful motivation. Within one month of the September 30 union meeting—not two months as the Company falsely claims (Br. 3, 51)—the Company changed Membrino's terms and condition of employment, and discharged him. Specifically, on October 17, just over two weeks after the union meeting, and just four days after President Pessoa had spoken to Membrino about the union meeting, the Company informed Membrino that he could no longer drive a company truck to its Route 231 jobsite located about 35 to 40 miles from headquarters, and that he was now responsible for his own transportation to the site. Then, the following week, on October 23, the Company discharged Membrino. It is well settled that the timing of a discharge in context with union activity raises the inference of unlawful motivation. *See FPC Holdings*, 64 F.3d at 943.

The Company's unlawful motive is further demonstrated by its disparate treatment of Membrino. Thus, the Company employed several other truck drivers, but only one other driver, a new employee, received the same notice to leave his vehicle at the Route 231 jobsite.⁵ Rather, as truck driver Jose Ramirez credibly testified (A. 18 & n.7; 431-32, 443), after October 17, he continued to drive his truck each day from the Company's headquarters to the Route 231 jobsite. Similarly, the evidence does not show that the Company discharged any other employee, who, like Membrino submitted an accident report, but did not immediately report the accident directly to President Pessoa. To the contrary, the Company does not dispute that after Juan Carolos Martinez, who accidentally hit a piece of equipment operated by McCane which broke a windshield and a window and damaged a door, it did not discipline or discharge either Martinez or McCane, despite the fact that they did not immediately speak to President Pessoa. In fact, unlike Membrino, neither Martinez nor McCane even submitted an accident report of that incident. (A. 22; 376-77, 382, 387-90.)

⁵ As the Board reasonably found (A. 19 n.8), the fact that one other employee was an innocent bystander but nonetheless impacted by the change, does not undermine the Board's finding that the change was unlawfully motivated. *See RCN Corp.*, 333 NLRB 295, 303 (2001).

Moreover, by discharging Membrino, the Company, as the Board found (A. 22), also treated him disparately from “several other employees who instead were charged or were required to reimburse [the Company] for damage to property rather than being [discharged].” For example, the Company gave Martinez the opportunity to pay \$900 for the damage he caused. (A. 22; 191, 384-86, 390-94, 400, 420-21.) Likewise, the Company gave Purcell Smith the opportunity to reimburse the Company on several occasions where he was “clearly at fault” for the accidents. (A. 22; 195, 684-710, 872-80.) Most glaringly, and in stark contrast to Membrino, the Company continued to employ Smith despite the fact that he twice intentionally cut the wires to his vehicle’s GPS system. (A. 22; 201, 699-703, 712.)

Finally, as the Board explained (A. 21), even “assuming” the existence of a company policy that required an employee involved in an accident to immediately report directly to President Pessoa, such policy “was never communicated to [Membrino,]” and the Company discharged Membrino without even “providing . . . [him] an opportunity to defend his conduct.” Those factors further support an inference that the Company was unlawfully motivated when it discharged Membrino. *See American Thread Co. v. NLRB*, 631 F.2d 316, 322 (4th Cir. 1980) (evidence of unlawful motivation where an employer “swiftly concluded to invoke the ‘last resort’ sanction” without first considering lesser sanctions even though

the misconduct in question had never before been punished); *NLRB v. Delta Gas, Inc.*, 840 F.2d 309, 311 (5th Cir. 1988) (evidence of unlawful motivation where there was “no evidence that the [employer] even considered the use of lesser sanctions” than discharge).

In sum, the various factors set forth above provide ample evidentiary support for the Board’s finding that the Company was unlawfully motivated when it required Membrino to leave his company truck at the Route 231 jobsite, and when it discharged him. Moreover, in light of those factors, which are unambiguously set forth in the Board’s Decision and Order (A. 19, 22), the Company’s claim (Br. 45) that the Board never stated the basis for its finding of discriminatory motive is absurd. Likewise, the Company’s claim (Br. 43, 50) that the Board erred by inferring a nexus between Membrino’s union activity and his discharge is similarly unavailing given the chain of events that occurred after Membrino’s attendance at the Union meeting.⁶ Nor is there merit to the

⁶ The Company’s reliance (Br. 44, 52, 53, 57) on *Valmont Industries, Inc. v. NLRB*, 244 F.3d 454 (5th Cir. 2001), to claim that the Board misapplied the *Wright Line* burden is disingenuous at best. In that case, the Fifth Circuit simply stated that the Board cannot infer unlawful motivation based solely on the pretextual nature of the employer’s explanation for its adverse action. *Id.* at 466. Here, as shown above, the Board relied on several factors to find unlawful motivation, and relied on the pretextual nature of the Company’s purported reason for its action only in assessing whether the Company would have taken the same action absent Membrino’s union activity.

Company's specific challenges to the Board's finding that the General Counsel had met its burden of establishing discriminatory motive.

In the first place, the Company mischaracterizes this case (Br. 38-43) as one where the Board needed to establish that Membrino had engaged in protected concerted activity apart from his union activity, and it relies on cases that have no relevance here. Rather, because Membrino engaged in union activity by his attendance and participation at the union meeting, the Board did not need to address whether Membrino's individual conversations with the Company about wage and travel pay issues also constituted protected concerted activity. *See, e.g., Medco Sec. Locks v. NLRB*, 142 F.3d 733, 746 (4th Cir. 1998) (an employee can engage in protected activity that does not involve unions or collective bargaining); *NLRB v. White Oak Manor*, 452 F. App'x, 374 380 (4th Cir. 2011) (an employee can engage in protected activity by articulating a grievance to an employer without mentioning other employees).

There is also no merit to the Company's claim (Br. 27, 33-34, 61-62) that it could not have had unlawful motive toward Membrino merely because he attended the postelection union meeting. The Company has offered no explanation for why President Pessoa pointedly sought to learn only whether one particular employee—Membrino—had attended the union meeting. Moreover, in context, Membrino's participation in the union meeting was significant. The meeting was

of particular importance because it was the first meeting held by the Union after it won the election. The Union was seeking employee input on issues that it needed to address in bargaining. In addition, the Union was trying to revitalize support among a bargaining unit that had been decimated by the Company's layoffs.

Membrino stood out, not only by going to the sparsely attended meeting, but by actively participating. Indeed, Membrino's input was central to the contents of the email sent by the Union to company counsel that highlighted employee concerns, and warned of potential legal action if the Company's apparently unlawful policy regarding travel time pay was not resolved through bargaining. Employee Moltz was the only other employee to speak at the meeting, and he presumably did not support the Union given that he asked questions typed by the Company. In these circumstances, and in context of the other aforementioned factors, the Board had an ample basis its finding of an unlawful motive.

The Company's claim (Br. 30-43) that Membrino did not engage in sufficient protected activity is similarly unavailing. Membrino's participation in the union meeting, and his asking the Union to address the employees' pay for travel time concerns falls squarely within the protections of Section 7 of the Act that guarantees employees the right to "assist labor organizations, [and] to bargain collectively through representatives of their own choosing." (29 U.S.C. § 157.)

As shown, Membrino's input formed the basis for the concerns stated by the

Union in its email to company counsel, and his complaint regarding the lack of pay for travel time was even validated by a pro-company employee at the union meeting.

Regarding disparate treatment, the Company (Br. 37, 54-56) offers no coherent argument for why the Board erred in finding that Membrino was treated differently from other employees regarding the alleged company policy to immediately report accidents directly to President Pessoa. Indeed, the Company nonsensically suggests (Br. 54-55) that if only Membrino, like Martinez, had not driven a dump truck, then it would not have required him to fill out an accident report, or to speak to President Pessoa. The Company has not explained why compliance with its purported policy to see President Pessoa after an accident would depend on the equipment an employee drove or the employee's job duties. Equally absurd is the Company's claim (Br. 55) that Smith, who was not discharged for several at-fault accidents and for intentionally cutting the wires to his vehicle's GPS, is not similarly situated to Membrino simply because he was a low-boy driver and not a dump truck driver.

Likewise, the Company (Br. 24-26, 54-57) offers no viable argument to challenge the Board's reasonable finding (A. 27) that Membrino's discharge was handled differently from other incidents where the Company had discharged employees after an accident. Thus, the Company has discharged a foreman for

driving equipment into a ditch after he was warned that he was trying to operate the equipment in an unsafe manner, and other drivers for pulling down utility lines. (A. 22; 683, 722-26, 764, 806-07, 866-71, 920-22, 980-81, 1008-13). The Company does not dispute, however, as the Board explained (A. 22), that in those incidents “the economic consequences to [the Company] in either lost production time, cost of repairs, or compensation to the utilities were far greater than with respect to [Membrino’s] incident,” where the vehicles were deemed to be usable and he and McCane were instructed to resume working.

3. The Board reasonably found that the Company failed to show by a preponderance of the evidence that it would have taken the adverse actions against Membrino, even absent his union activity

Based on the Board’s reasonable finding that the General Counsel had established that the Company was unlawfully motivated when it changed Membrino’s terms and conditions of employment and discharged him, the burden shifted to the Company to establish by a preponderance of the evidence that it would have taken the same adverse actions absent Membrino’s protected activity. *See NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983), and cases cited at p. 26. Ample evidence supports the Board’s additional finding that the Company failed to carry that burden.

Regarding the Company's new requirement in October 2008 that Membrino and Cappetta leave their company vehicles at the Route 231 jobsite, the Company continues to claim (Br. 54, 65) that it made the change due to high fuel costs. Yet, it does not dispute any of the factors that the Board relied on in determining that the Company's argument failed to withstand scrutiny. For example, the Company has offered no explanation for why it failed to make the same change in working conditions for drivers of vehicles other than its dump truck drivers. (A. 18, 19.) The Company has also offered no explanation for why the October 2008 policy was discontinued after less than two months, and not reinstated despite the fact that the Company's work at the Route 231 jobsite continued into the late summer of 2009. (A. 18, 19.) Nor has the Company offered any record evidence regarding when, in relation to the change, the fuel "prices reached a level at which [the Company] determined it was wasteful for Membrino to drive his truck from the yard to the jobsite every day." (A. 18.) Accordingly, the Board reasonably found (A. 18, 19) that the Company failed to carry its burden to show that it would have changed its policy absent Membrino's union activity, and the Company in its brief to this Court fails to show otherwise.

Regarding Membrino's discharge, the Board reasonably found (A. 21) that the Company did not show by a preponderance of the evidence that it would have discharged Membrino for failing to report directly to President Pessoa after his

accident, because the asserted policy simply did not exist. Indeed, before this Court, the argument section of the Company's brief is virtually void of any challenge to that Board finding.

Thus, the Company does not seriously dispute the Board's finding (A. 21), that the credited testimony "makes it clear that [the Company] did not have a rule or policy that anyone involved in an accident resulting in damage to [the Company's] property was required to speak to either [President] Pessoa or any other management official." Indeed, neither General Superintendent Machado nor Superintendent Reeder testified that they told Membrino or McCane to report to President Pessoa after their accident. (A. 21 & n.11.) Instead, Reeder simply communicated the Company's written policy that they needed to fill out accident reports. (A. 20, 21 n.11; 579-80, 598, 789.) Likewise, dispatcher Infante similarly testified that after Membrino reported the accident he merely told Membrino to write a report. (A. 509.) Significantly, McCane did not testify that he was instructed to report to President Pessoa, but instead testified that on his own initiative he called a company secretary and asked to talk to President Pessoa. (A. 824.)

Moreover, it is undisputed that, as the Board found (A. 21; 161), the Company's handbook merely requires employees to "advise their superiors of all accidents," and that in the "case of a vehicular accident" to report "all information

immediately to [a] supervisor and the office.” Here, Membrino complied with that policy by reporting the accident to his supervisors and to dispatcher Infante, and by filling out an accident report. (A. 21.) No more needed to be done under company policy.

By reasonably finding that the Company’s asserted reason for Membrino’s discharge—his failure to follow company policy for accidents—did not exist, and therefore was not the real reason for the discharge, the Board implicitly found that the Company’s defense was a pretext to mask the Company’s unlawful motive for discharging Membrino. *See USF Red Star, Inc. v. NLRB*, 230 F.3d 102, 107 (4th Cir. 2000) (employer failed to show that it would have discharged an employee for an accident where there was no evidence that it had a uniform policy of discharging employees after an accident); *NLRB v. Nueva Eng’g, Inc.*, 761 F.2d 961, 968 (4th Cir. 1985) (employer’s proffered justification for a discharge was pretextual where there was no evidence that the employer had ever discharged an employee for the asserted reason of declining a temporary position).

Contrary to the Company’s claim (Br. 21, 63), by finding that the Company had no policy that required Membrino to speak to President Pessoa, the Board did not ignore contrary testimony from dispatcher Infante. Rather, the Board considered Infante’s testimony that he sent Membrino to talk to either President Pessoa or Michelle Rocha, a project superintendent who is President Pessoa’s

daughter, in context with his further testimony that Membrino went upstairs as directed and that he was upset. (A. 21; 510, 522-23.) The Board reasonably concluded (A. 21) that Infante was referring to Membrino's return to headquarters after President Pessoa had informed Membrino by phone that he was discharged. Otherwise, the Company would have no claim that Membrino had failed to follow its alleged policy, and, as the Board explained (A. 21), there was no reason for Membrino to be upset until after he had learned of his discharge.

Ignoring its previous claim for why it discharged him, the Company in its brief to the Court repeatedly asserts (Br. 3, 19 & n.4, 27, 36-37, 45-50, 55-59, 62-63) that it was compelled to discharge Membrino hours after the accident because an investigation had established that he had engaged in gross negligence that cost the Company \$8,000 to repair the damaged dump truck. That claim is specious because if Membrino was discharged because of the cost of the accident then the Company should have relied on that reason at the time. *See NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 601 (4th Cir. 1977) (“[w]e believe that it is extremely unlikely that the reason for [an employee’s] discharge was due to the [proffered reason] since it was not articulated as a reason for his discharge at the time he was fired”); *accord NLRB v. Hotel Emps. & Rest. Emps. Int’l Union, Local 26, AFL-CIO*, 446 F.3d 200, 208 (1st Cir. 2006); *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255 (9th Cir. 1978). Here, the Company never told

Membrino that he was discharged because of the cost of the accident, or even discussed that with him. Rather, as shown, Pessoa simply told Membrino that his failure to come see him immediately after the accident to explain himself established that his “head” was not in it and that he and the Company needed to part ways.

Moreover, the Company’s mechanics repaired the damage to the dump truck one week after Membrino’s discharge for \$509 in purchased parts, not \$8,000. The Company’s misleading reference to \$8,000 in repairs apparently comes from an estimate for outside repair that was not received until March 2009, five months after Membrino’s discharge, and for reasons that President Pessoa was admittedly unable to explain. (A. 191, 337, 714-16.) As Pessoa testified, “To tell you the truth, I don’t know” the purpose of that estimate. (A. 337.) Although the Company’s in-house repair may have decreased the dump truck’s resale value, President Pessoa was not concerned with its resale value because he had no plan to sell the truck. (A. 332-37.) As Pessoa stated, “I didn’t buy the truck to sell [it]. I buy [trucks] to use them.” (A. 336.)

The Company’s discharge of Membrino stands in sharp contrast to the facts of cases that the Company relies on. (Br. 34, 35, 36, 37, 44, 48.) In those cases, the court determined that an employer had met its burden where an employee with a poor work was discharged after he took unapproved vacation and had been

warned that such action would be considered a voluntary quit (*APX, Int'l v. NLRB*, 144 F.3d 995, 997, 1000-02 (6th Cir. 1998)) (Br. 35, 36), and where an employee with an already poor work record was discharged after he had a “rash” of mishaps that displayed an “emerging pattern of recklessness” (*TNT Logistics of North America Inc., v. NLRB*, 413 F.3d 402, 408-09 (4th Cir. 2005)) (Br. 34, 35, 37, 44, 48). Here, there is no evidence that Membrino had such a history of poor work performance.

Finally, in these circumstances, the Board (A. 21) did not need to determine who was actually at fault for the October 2008 accident because the accident was “totally irrelevant to whether or not [the Company] would have discharged Membrino but for his attendance and conduct at the September 30[, 2008] union meeting.” The judge, however, as upheld by the Board, credited Membrino over other witnesses to find (A. 19-20) that “Membrino testified to a completely plausible rationale to explain what occurred on October 23[, 2008].” The Company (Br. 16, 23, 24, 27) has offered no extraordinary basis to reverse those credibility determinations which the administrative law judge based on his

“observation of the demeanor of the witnesses.” (A. 16.) *See NLRB v. Air Prod. & Chem., Inc.*, 717 F.2d 141, 145 (4th Cir. 1983).⁷

In sum, “[e]ngaging in protected activity does not shield employees from legitimate disciplinary action by their employer . . . [but] [p]rotected activity is just that however—protected—and employers cannot single out employees who engage in such activities for adverse or disparate treatment.” *Rockline Indus.*, 412 F.3d at 970. Accordingly, the Board’s Order does not, as the Company claims (Br. 37 n.9), bar it from discharging any employee that supported the Union. Rather, “[h]aving [discharged] an employee who has engaged in protected activity, it is not enough that an employer put forth a nondiscriminatory justification for [the discharge]. It must be *the* justification.” *Id.* Here, the Board reasonably found that the Company had failed to carry that burden.

⁷ For example, as the judge noted (A. 20), although there was some testimony that one person can change the bucket on the Gradall without help, that testimony did not contradict Membrino’s testimony that the task was still difficult because of “the tendency of the boom to creep” on the older Gradall that McCane was operating, or his testimony that he regularly helped McCane, who was in his sixties, with that difficult task. Likewise, at the time of the accident and the filing of the reports, McCane never contradicted Membrino’s claim that he was helping McCane with the bucket. (A. 21.)

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING A NEW POLICY UNDER WHICH EMPLOYEES MEMBRINO AND CAPPETTA COULD NO LONGER USE A COMPANY VEHICLE TO DRIVE TO AND FROM A JOBSITE

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees” Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as “the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” Accordingly, an employer violates Section 8(a)(5) and (1) of the Act by making unilateral changes to its employees terms and conditions of employment. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962); *NLRB v. Pepsi Cola Bottling Co. of Fayetteville, Inc.*, 24 F. App’x 104, 113-14 (4th Cir. 2001). Bargaining, however, is only mandatory with respect to subjects that fall within the statutory language, and the Board’s judgment as to what is or is not a mandatory subject is entitled to considerable deference. The Board has “special expertise” in this area, and if its determination is reasonably defensible, “it should not be rejected, merely because the courts might prefer another view of the statute.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495, 497 (1979); *Retlaw*

Broadcasting Co. v. NLRB, 172 F.3d 660, 664, 669 (9th Cir. 1999) (the Board's judgment as to whether a bargaining subject is mandatory or not will not be lightly disturbed).

Here, it is undisputed that on October 16, 2008, the Company unilaterally changed its truck use policy and required Membrino and Cappetta to leave their company trucks at the Company's Route 231 jobsite. The change meant that the two employees, as the Board found (A. 19), "bore the burden of paying for the fuel necessary to reach the Route 231 jobsite, unless they were able to get a ride." The Board reasonably found (A. 19) that the Company's attempt to shift its transportation costs to those two employees was a significant change in their terms and conditions of employment, and that the Company therefore violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and an opportunity to bargain over the change. *See United Parcel Serv.*, 336 NLRB 1134, 1134-35 (2001) (unlawful unilateral change found where employer went from onsite parking to distant offsite parking).

The Company's primary contention (Br. 67-68), that it had no duty to bargain over the change based on *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 667-680 (1981), is misplaced because the principles in that case have no relevance here. There, the Supreme Court exempted from the mandatory bargaining obligation a special category of management decisions involving "a

change in the scope and direction of the enterprise.” *Id.* at 677. The Court concluded that the employer’s decision to terminate its contract with a customer and shut down part of its business qualified as such a major change, because it “altered the Company’s basic operation,” and was “akin to the decision whether to be in business at all.” 452 U.S. at 677-80, 686-88. Unlike the action at issue in that case, the Company’s decision to prohibit two employees from taking their company vehicles to the jobsite cannot be characterized as the sort of significant change in operations that the Supreme Court has exempted from bargaining in *First National*. Therefore, the Company, unlike the employer in that case was required to bargain over the change, and failed to do so.

CONCLUSION

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

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July 2012

STATEMENT REGARDING ORAL ARGUMENT

The Board believes this case involves the application of settled principles of law to largely undisputed facts, making oral argument unnecessary. If argument is held, however, the Board requests that the parties be given equal time to assist the Court in resolving the issues in this case.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1688

Caption: Pessoa Construction Company v. NLRB

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(s) Linda Dreeben

Attorney for National Labor Relations Board

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

PESSOA CONSTRUCTION COMPANY)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 11-1688, 11-1776
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	05-CA-34547

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 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.

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Dated at Washington, DC
this 16th day of July, 2012