Oral Argument Not Yet Scheduled

Nos. 12-2111 & 12-2203

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner/Cross-Respondent

v.

RELCO LOCOMOTIVES, INC.

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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SUMMARY OF THE CASE

The Board seeks enforcement of its Order issued against Relco Locomotives, Inc. ("the Company"). In this case, the Company discharged four employees—Jeffery Smith, Ronald Dixon, Timothy Kraber, and Dane See —for engaging in union and other protected activities under the Act. The Company also maintained overbroad employment policies and coerced employees to sign one of these policies.

The first issue is whether substantial evidence supports the Board's findings that the Company's terminations of Smith and Dixon were motivated by their union activity. The second issue is whether substantial evidence supports the Board's finding that the Company violated the Act by terminating Kraber and See for engaging in activities protected by Section 7 of the Act. The final issue is whether substantial evidence supports the Board's finding that the Company maintained overbroad employment policies and coerced employees to sign one of these policies in violation of Section 8(a)(1). These findings are supported by substantial evidence and therefore the Board's Order should be enforced.

The Board respectfully requests oral argument and submits that 15 minutes per side should be sufficient to address the issues in this case.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board ("the Board") to enforce, and the cross-petition of Relco Locomotives, Inc. ("the Company") to review, the Decision and Order of the Board that issued against the Company on April 12, 2012, and is reported at 358

NLRB No. 32. (JA.923–39.)[1] The Board filed its application for enforcement on May 4, 2012. The Company filed its cross-petition for review on May 18, 2012. Both filings were timely; the National Labor Relations Act ("the Act"), 29 U.S.C. § 151 *et seq.*, imposes no time limit on such filings.

The Board had subject matter jurisdiction over the proceeding under Section 10(a) of the Act, as amended (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board's Order is final with respect to all parties. The Court has jurisdiction over this case under Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Albia, Iowa, where the Company does business, and Section 10(f) of the Act (29 U.S.C. § 160(f)), which allows the Company to file a cross-petition for review.

[1] "JA." references are to the joint appendix. "Br." references are to the Company's brief. "Add." references are to the addendum filed with this brief, which contains both exhibits that were omitted from the joint appendix and exhibits contained in the joint appendix that are highlighted for the Court's convenience. Where applicable, references preceding a semicolon are to the Board's decision; those following are to the supporting evidence. The Board issued a corrected version of its decision on August 15, 2012 (JA.922), not August 30, 2012 as the Company's brief (Br.1) states.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating employees Jeffery Smith and Ronald Dixon in retaliation for their union activity.

Rockline Indus., Inc. v. NLRB, 412 F.3d 962 (8th Cir. 2005).

York Prods., Inc. v. NLRB, 881 F.2d 542 (8th Cir. 1989).

NLRB v. Wal-Mart Stores, 488 F.2d 114 (8th Cir. 1973).

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by terminating Timothy Kraber and Dane See for engaging in concerted activity protected by Section 7 of the Act.

Woodline Motor Freight, Inc. v. NLRB, 843 F.2d 285 (8th Cir. 1988).

Every Woman's Place, 282 NLRB 413 (1986), *enforced mem.*, 833 F.2d 1012 (6th Cir. 1987).

NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining overbroad non-disclosure agreements and by coercing employees to sign the revised agreement.

Lafayette Park Hotel, 326 NLRB 824 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

Handicabs, Inc. v. NLRB, 95 F.3d 681 (8th Cir. 1996).

Heck's, Inc., 293 NLRB 1111 (1989).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Brotherhood of Railroad Signalmen ("the Union"), the Board's Acting General Counsel issued a complaint alleging that the Company committed several violations of the Act. An administrative law judge held a hearing and, on March 28, 2011, issued a decision and a recommended order finding that the Company violated the Act as alleged. (JA.925–39.) The Company filed exceptions and, on April 12, 2012, the Board issued its Decision and Order affirming, as modified, the findings and recommended order of the administrative law judge. (JA.923–25.)

I. THE BOARD'S FINDINGS OF FACT

A. Background and Relevant Company Policies

The Company is engaged in the business of leasing, selling, and rebuilding locomotives. (JA.925; 407.) Mark Bachman is the Chief Operations Officer at the Company, while his brother Doug Bachman is the Chief Administration Officer.[2] (JA.926; 407, 410–11.) Together, they manage the Company. (JA.926; 410–11.) The Company's main production facility is located in Albia, Iowa, where it employs over 100 hourly production employees, along with 25 managers and

[2] Consistent with the Board's underlying decision, "Bachman" will be used to refer to Mark Bachman. Any references to Doug Bachman will utilize his full name.

office employees. (JA.926; 407–09.) The employees at the Albia facility are not represented by a union. (JA.926; 36–37.)

The Company maintains an extensive employee manual that contains an attendance policy and a progressive disciplinary system. (JA.926; 968–1044.) Under the Company's attendance policy, the Company assigns employees points for absences and tardiness. If an employee accumulates 12 or more points over a rolling 12-month period, the employee is terminated. (JA.926; 412–13, 993–94.) The Company's progressive disciplinary policy is composed of a series of escalating punishments—oral reminders, written warnings, and suspensions—and provides that certain actions, such as theft or dishonesty, can result in immediate termination. (JA.926; 413–14, 988–90.)

B. Employee Jeffery Smith Contacts the Union and Begins an Organizing Campaign; Ronald Dixon and Other Employees Join the Campaign; the Company Discovers the Union Organizing Campaign

In early 2009, welder/fabricator Jeffery Smith, upset over his pay rate and the Company's attendance policy, attempted to meet with Bachman. (JA.926–27; 35.) After these attempts failed, Smith wrote a lengthy letter to the Company outlining his grievances. (JA.926–27; 35–36, 742.) Smith also contacted the Union on March 2, 2009, and requested more information about bringing a union to the Company. (JA.927; 37, 743.) Union organizer Mark Ciruej responded and encouraged Smith to talk to other employees about the Union. (JA.927; 37–39.)

Thereafter, Smith began talking to other employees about the Union on an almost daily basis. (JA.927; 39–40.) He recruited several other employees, including fabricator Ronald Dixon, to the organizing effort. (JA.927; 40, 106–07.) Ciruej made plans to visit Albia on April 10 to talk to the employees about unionization. (JA.927; 40, 108.) Smith set up the meeting and created 50 to 60 notices to advertise the meeting. (JA.927; 40–41.) Smith and other employees passed out these notices in the plant in the days leading up to the meeting. (JA.927; 41.)

On April 10, Ciruej met with the employees, as planned, to talk about the Union and the union organizing process. (JA.927; 41–42.) At this meeting, he gathered authorization cards from employees, including Smith and Dixon, and instructed them to try to gather cards from other employees who could not make the meeting. (JA.927; 41–42, 108–09.) Smith and Dixon took many of these cards—in actuality, 8 ½ by 11 sheets of paper—to distribute to their fellow employees. (JA.927 & n.5; 43–44, 109–10, Add.5.)

After the meeting, Smith and Dixon began soliciting authorization cards at work. (JA.927; 43–46, 110–11.) Smith solicited cards on a daily basis before, during, and after work. (JA.927; 45–46.) He kept authorization cards in his tool box and his back pocket while he was working. (JA.927; 44–46.) Dixon also solicited employees during work, and like Smith, kept a supply of cards in his back

pocket. (JA.927; 110.) Both Smith and Dixon solicited cards continuously up to their respective terminations in June and September. (JA.927; 45, 111.)

One of the first employees solicited by Smith and Dixon was Jonathan Graber. (JA.927; 49–51, 308–10.) Graber strongly opposed unions and refused to sign a card. (JA.927; 49–52, 309.) Around May 10, Graber met with Bachman at a car wash and told him about the union organizing campaign. (JA.927; 313–14.)

Meanwhile, Ciruej set up another meeting with the employees on May 15 to discuss further organizing efforts. (JA.928; 46, 111.) On the morning of Cireuj's visit, Bachman spoke to the employees for over an hour about unions, expressing his feelings that the Union would not be good for the Company. (JA.928; 47–48, 111–12, 440–41.) At this meeting, Smith asked Bachman if he would agree to have a discussion with employees about unionization; Bachman responded by telling Smith to "shut-up and sit down." (JA.928; 48–49, 180.) That evening, Ciruej held the previously planned meeting to discuss the Union. (JA.928; 46–47, 111.)

After Ciruej's meeting, Smith, Dixon, and other employees continued to solicit authorization cards while at work. (JA.927; 45, 111.) Sometime in May or early June, during a period when both Smith and Dixon were soliciting employees for union support, Graber stopped supervisor Dragen Yankovic and told him that a "couple of guys" were trying to bring in the Union. (JA.927 & n.6; 311–12.)

C. Smith Has Issues with His Work Boots and Is Terminated

In early June 2009, the Company assigned Smith to strip steel plate from a locomotive. (JA.929; 53.) During this assignment, Smith used a cutting torch, a tool that creates many sparks; these sparks subsequently damaged the laces on Smith's steel-toed work boots. (JA.929; 53.) Smith initially continued using the boots by replacing the laces with plastic zip-ties. (JA.929; 53.) However, by Monday, June 8, Smith had so badly burned the stitches that secure the sole of the boot that he had to duct-tape the soles to the body of the boots in order to prevent sparks from entering the shoes. (JA.929; 53.)

Later on June 8, supervisor Cliff Benboe noticed that Smith's boots were duct-taped and did not have proper laces. (JA.929; 53–54.) Benboe told Smith that he needed to get some new work boots. (JA.929; 53–54.) Smith responded that he could not afford new boots at that time. (JA.929; 54.) Benboe ended the conversation by telling Smith that he needed to deal with his boot problem, but allowed Smith to continue working. (JA.929; 54–55.)

From Tuesday until Thursday morning, Smith wore a different pair of boots to work that were not steel-toed. (JA.929; 55.) On Thursday morning, Benboe noticed that Smith was wearing different boots and asked him if they were steel-toed. (JA.929; 79, 615.) Smith responded that they were steel-toed safety boots. (JA.929; 615.) Later that morning, Benboe noticed that Smith's shoes were

smoking. (JA.929; 615–16.) He poked the toe of one of Smith's shoes with a hammer and discovered that they were, in fact, not steel-toed. (JA.929; 56, 615–16.) Benboe then instructed Smith to stop working and wait for him in the break room. (JA.929; 56, 616.)

Several minutes later, Smith met with Benboe and Operations Manager David Crall. (JA.929; 56–57, 532, 616.) Both supervisors told Smith that he could not come back to work until he got a new work boots. (JA.929; 56–57, 533.) Smith responded that he could not get new boots until his wife received her paycheck at 10:00 a.m. the next morning. (JA.929; 56–57, 557, 618.) Smith, knowing that he was near the 12-point maximum, then asked the supervisors whether the time that he was being forced to take off that afternoon and the next morning would count against his absentee point total. (JA.929; 56–57, 80–81.) Benboe and Crall both assured him that it would not. (JA.929; 57, 77–78.) Benboe then escorted Smith out of the plant. (JA.929; 57–58.) As they were leaving, Benboe told Smith that he should talk to him before clocking in the next day because "he was not sure how all of this would affect [Smith's] job." (JA.929; 57–58, 617.) Later that day, Benboe prepared an incident report that focused on the work-boot incident and did not mention any attendance issues. (JA.929; 626–27, 1080.)

That evening, Smith borrowed money from his mother-in-law and bought new steel-toed boots. (JA.929; 58–59.) The next morning, June 12, as Smith was picking up the phone to call Benboe regarding his new boots, he discovered that Benboe had already left him a message instructing him to call Benboe before returning to work. (JA.929; 59.) Smith called Benboe back from his wife's cellphone at 7:26 am. Benboe told him to come in for a meeting at 10 a.m. (JA.929; 59–66, 744.)

Smith came to work with his new steel-toed boots. (JA.930 n.7; 66–67.) He met with Benboe and Crall at 10 a.m., as instructed. (JA.929; 66–67, 542.) The supervisors informed Smith that he was being terminated for not wearing steel-toed boots the previous day, a "gross safety violation." (JA.929; 67.) Benboe then handed Smith a termination letter stating that his "employment at RELCO Locomotives, INC. ended on June 12, 2009, as a direct result of violations of safety procedures and company policies." (JA.929; 69, 746.) There was no discussion about Smith's attendance points at this meeting. (JA.929; 67–70.)

D. After Smith's Termination, Dixon Takes the Lead in Organizing; Ciruej Visits Albia To Handbill the Company's Plant

After Smith's termination, Dixon took a lead role in organizing the employees and continued to solicit authorization cards more frequently until his own termination in September. (JA.927; 113–14, 275–76.) He also became one of the lead contacts between union organizer Ciruej and the Company's employees.

(JA.927; 113.) Ciruej also continued to support the organizing campaign and sent a letter to the Company's employees on July 1 responding to the points made by Bachman at the May 15 meeting. (JA.927; 349, Add.9–13.)

The Company continued to oppose the union organizing efforts over the summer. At the end of July, Bachman held another meeting with employees to discuss the Union and, at the end of August, wrote another letter further expressing his opposition to the Union. (JA.928; 440–41, Add.6–8.) In response to these efforts, Ciruej handbilled the plant for several days in the middle of September. (JA.928; 113, 350.)

During the summer, Graber continued to tell company executives and supervisors details about the union organizing efforts. In July, Graber initiated a conversation with supervisor Jeff Dalman about the Union, asking him "if he had heard any rumors about [the Union]." (JA.928; 312.) And in early September, a few days prior to Ciruej's handbilling, Graber visited Bachman's office to inform him of Ciruej's plans to handbill. (JA.928; 312–13.)

E. The Company Claims Dixon Is Insubordinate and Terminates Him

Around the time that Ciruej was handbilling outside the plant, the Company gave Dixon a new assignment—installing rain guards and spark arresters on top of locomotives. (JA.930; 115–16, 130, 629.) Benboe, his supervisor, spent considerable time helping Dixon with his work, as this was the first time Dixon

had been assigned to this type of project. While they were working, Benboe climbed on top of the locomotive with Dixon using the built-in stairs on the locomotive. While on top of the locomotive, neither individual worked from a ladder or used any external ladders for fall-protection. (JA.930 & n.8; 130–31, 134–35.) At the end of the project, which lasted about a week, Benboe complimented Dixon on his work. (JA.930; 130–31.)

The week after Ciruej handbilled the Albia plant, the Company again assigned Dixon to install rain guards and spark arresters on a similar model locomotive. (JA.930; 114–15.) On the morning of September 21, Dixon climbed on top of the locomotive using the built-in steps, as he had done the prior week with Benboe. (JA.930; 116, 359–60.) Dixon steadied the rain guard—which is located at the center of the locomotive—between his knees, and began bolting it down with the assistance of a co-worker inside the train. (JA.930; 116–18, 125–26, 143, 359–61.)

While Dixon was working, Bachman, Crall, and several other managers were meeting in a conference room overlooking the shop floor. (JA.930; 480–81, 545–46.) During the meeting, Bachman claimed to see Dixon's feet hanging off the edge of the locomotive. (JA.930; 480–81, 545–46, Add.1.) Crall and Bachman contacted Benboe and told him to get Dixon off the locomotive. (JA.930; 481, 547.)

Benboe walked over to the locomotive and told Dixon that he needed to work from the center of the locomotive or work from a ladder. (JA.930; 119, 612.) Dixon responded that he could not reach the center of the locomotive if he worked from a ladder. (JA.930; 119.) Benboe then told him to put up a ladder for "fall-protection" and walked away. (JA.930; 119–21, 612, Add.1.) After the conversation with Benboe, Dixon set up a ladder to provide what he thought Benboe meant by "fall-protection"—the ladder wedged between the base of the locomotive and the railing of the train, leaning away from the train's body. (JA.930–31; 123–24, 126, Add.1.) After setting up the ladder, Dixon went back to work at the center of the locomotive. (JA.931; 126, Add.1.)

About 20 minutes later, Bachman, who was still in the conference room, claimed to see Dixon with his feet hanging off the opposite side of locomotive. (JA.931; 481–82.) He called Benboe again and told him to get Dixon off of the locomotive. (JA.931; 482, 548.) Benboe walked over to Dixon and told him to get down and meet him in the break room. (JA.931; 126–27, 613.)

When Dixon arrived in the break room, Benboe and Dalman were waiting for him. (JA.931; 127–28, 613.) Benboe told Dixon that he was being terminated for insubordination. (JA.931; 128, 614, 751.) Dixon responded "You've got to be kidding me," and tried to explain to Benboe that he could not have been hanging off the locomotive while installing the rain guard. (JA.931; 127–28, 614.) Dixon

then asked Benboe to investigate the work area with him so he could show Benboe that his feet were not hanging off the edge. (JA.931; 128.) Benboe refused to investigate, however, and escorted him from the building. (JA.931; 128.)

F. The Company Changes Its Attendance Policy; Timothy Kraber Has Attendance Issues Due to Back Problems

In a December 4, 2009 memo addressed to employees, Bachman modified the Company's attendance policy. (JA.931; 447–48, 880.) Among other changes, the Company announced that it would no longer accept a chiropractor's note as an excuse for a medical absence under the attendance policy. (JA.931; 880.) The Company posted the memo for an unknown period of time on a bulletin board near the employee break room but did not pass out copies to the employees. (JA.931; 447–48.)

Around this same time, fabricator/welder Timothy Kraber accumulated a significant number of attendance points. (JA.931; 197–98.) In late December, 2009, Crall met with Kraber to discuss Kraber's attendance issues. (JA.931; 197–98.) At this meeting, Kraber claimed that the Company's records were inaccurate because he had submitted medical excuses for several earlier absences. (JA.931; 197–98.) Crall agreed to look into the matter and get back to Kraber after the holidays. (JA.931; 197–98.) The new chiropractor policy was not discussed at this meeting, and Kraber denied ever seeing the revised policy. (JA.931; 218–19.)

Kraber's back problems persisted after the holidays, and he missed work from January 19 to January 25, 2010. (JA.931; 200–01.) On January 19 and 20, he received treatment from a chiropractor and on January 21, he received treatment from a physician. (JA.931; 200–01.) When he returned to work on January 26, he provided the Company with a chiropractor's note to cover the absences on January 19 and 20 and a physician's note to cover the remaining absences. (JA.931; 200–02, 461–63, 903–04.)

Around February 1, Kraber met with Crall and Benboe to discuss his attendance. (JA.931; 198.) At this meeting, the supervisors informed Kraber that he had 15 points. (JA.931; 198.) Kraber disputed these points, and during the ensuing discussion brought up the chiropractor's note covering his absences on January 19 and 20. (JA.931; 198–200, 904.) The supervisors told Kraber that the chiropractor's note would not excuse his absences, but left the attendance issue open and allowed him to return to work. (JA.931; 199, 201.) Later that afternoon, Kraber discussed his attendance issues with a different supervisor, Curt Peterson. (JA.931; 199–200.) Peterson promised to try to fix Kraber's attendance problems. (JA.932; 201–02.)

Several days later, Peterson met with Kraber to discuss his attendance issues. (JA.932; 202.) Peterson told Kraber that he had talked with Benboe about Kraber's attendance points, and that they had lowered Kraber's total points from

15 to 10. (JA.932; 202.) Peterson also told Kraber that he could further lower his point total to 6 points if he got a doctor's note to replace the chiropractor's note for his absences on January 19 and 20. (JA.932; 202.) To emphasize the point, he handed Kraber his attendance sheet with the January 19 and 20 dates circled in red. (JA.932; 102–04, 203, 207.)

Later that same day, Kraber called his physician, Dr. Alejandro Curiel, and had a note faxed over to the Company to excuse his absences on January 19 and 20. (JA.932; 203, 905.) Peterson received the fax later that afternoon, but told Kraber that he could not read Dr. Curiel's handwriting and instructed him to get another note. (JA.932; 203.) Kraber then called Dr. Curiel's office to request a more legible note. Instead of providing this note, a nurse from Dr. Curiel's office called Peterson to discuss the absences. (JA.932; 204.)

The next morning, Peterson met with Kraber to discuss his attendance. (JA.932; 205–06.) Peterson confirmed to Kraber, in the presence of employee Jammie McKim, that he had talked to a nurse from Dr. Curiel's office and that the disputed points from Kraber's attendance record would be removed. (JA.932; 205–06, 367–68.) Peterson assured Kraber that, with these four points removed, Kraber would only have six points on his attendance record. (JA.932; 206, 367–68.)

G. Employees Begin To Dispute the Company's Uniform-Cleaning Policy; Kraber and Dane See Investigate and Are Both Terminated

Around the time that Kraber was attempting to sort out his attendance points, employees at the Albia facility began to question the amount that the Company was charging employees for cleaning their work uniforms. (JA.928; 183–84.) These discussions grew out of a policy change that the Company had made in January 2009, when it began charging employees for the uniform-cleaning service provided by Cintas, a third-party contractor. (JA.928; 183, 240.) Kraber, hoping to figure out whether employees were being charged a fair amount, asked the Cintas delivery driver what Cintas charged the Company for the uniform-cleaning services; the driver told Kraber that Cintas charged the Company less than employees were required to pay. (JA.928; 181–82.)

In late January or early February 2010, Kraber brought up the uniform issue with Crall at a morning safety meeting. (JA.928; 184, 242, 556.) Kraber asked what the Company was being charged for uniforms, and specifically mentioned to Crall his earlier conversation with the Cintas delivery driver. (JA.928; 185–86, 234, 242.) Crall said he did not know what the Company was being charged but promised to get back to the employees on the issue. (JA.928; 185, 188, 242, 556.)

While the uniform issues were being sorted out, Kraber missed work because of illness on February 26, 2010. (JA.932; 208, 752.) That afternoon, Crall

called Bachman to tell him that Kraber had "pointed out." (JA.932; 450, 550.) Bachman, who was out of town on vacation, told Crall that he would review Kraber's records and make a final decision when he returned to the office. (JA.932; 450, 550.) Bachman returned to the office on Monday, March 1, but did not review Kraber's termination at that time. (JA.932; 450–51, 894–95.) Bachman again left the office, this time for business, on Tuesday, March 2, and returned on Friday, March 5. (JA.932; 453–54.) He did not review Kraber's records until Monday, March 8. (JA.932; 454–55.)

While Bachman was away on his business trip, his brother, Doug Bachman, held a meeting on March 4 to discuss uniform costs. (JA.928; 192–93, 555–56, 650.) At this meeting, Doug Bachman passed out forms to employees authorizing the Company to deduct the costs of the cleaning service from the employees paychecks—a process that had already been going on for over a year. (JA.928; 192–93.) During the meeting, Kraber and several other employees questioned Doug Bachman on the costs of cleaning the uniforms. (JA.928–29; 193.) Doug Bachman claimed that he was unable to provide the cost information. (JA.928–29; 193, 556–57.) This upset Kraber and many other employees. (JA.929; 195, 654.) Kraber eventually suggested that the employees vote whether to keep the arrangement the same until the Company could provide cost information on

cleaning the uniforms. (JA.929; 194.) The employees voted to follow Kraber's suggestion. (JA.929; 194.)

Dane See, a fabricator, called Cintas later that day to discuss the costs of cleaning the uniforms. (JA.929; 244–46.) A representative quoted See a price that was lower than employees were paying to the Company. See requested that the representative send him an email with the pricing information. (JA.929, 931; 246–47.) The representative and See exchanged emails later that day. (JA.929; 246–47, GC 16.) After the email exchange, the Cintas representative forwarded the email conversation to the Company. (JA.929; 753–54.) The Company drafted a termination notice for See the next day, March 5. (JA.931; 755.)

When See returned to work on Monday, March 8, Benboe and Crall terminated See for speaking with the Cintas representative. (JA.931; 255–56, 755.) See's termination letter stated that he was terminated for "inappropriate interaction with a vendor." (JA.931; 755.) On his way out of the plant, See shared the information he had received from the Cintas representative with several other employees. (JA.254–57.)

Later that day, Bachman reviewed Kraber's attendance records and determined that he should also be terminated. (JA.932; 455, 550–51.) On Tuesday, March 9, Benboe told Kraber that, as a result of his February 26 absence, he had accumulated 12 points and was being terminated. (JA.932; 209–11, 752.)

Kraber, obviously surprised, protested that Peterson had already excused his absences on January 19 and 20. (JA.932; 210, 213–14.) Benboe responded that the decision "was out of his hands and was made by management upstairs." (JA.932; 210, 214.)

That night, Kraber called Peterson to ask him why the points from January 19 and 20 had not been removed. (JA.932; 214–15.) Peterson responded that he had not had time to get the points straightened out but that he would talk to other managers the next morning. (JA.932; 214–15.) The next morning, Kraber went into work to return his uniforms and asked Crall whether he had talked to Peterson about his attendance points. (JA.932; 215–16, 551.) Crall responded that he had not, but that he would talk to Peterson and get back to Kraber. (JA.932; 215–16.) After not hearing from Crall, Kraber called him a few days later. (JA.932; 215–16, 554.) During this conversation, Crall told Kraber that he had talked with both Peterson and Bachman and that Bachman would not excuse his absences on January 19 and 20 because he could not read the doctor's note. (JA.932; 216, 473–74, 476, 554.)

H. The Company Maintains a Nondisclosure Agreement and Adopts a New Nondisclosure Agreement in July 2010

The Company historically has required new employees to sign an agreement barring them from disclosing to any third party, including their fellow employees, information concerning "compensation, payments, correspondence, job history,

reimbursements, and personnel records." (JA.932; 916.) In July 2010, the Company revised this agreement to prohibit employees additionally from contacting any of the Company's "current, former or prospective customer[s], partner[s], vendor[s], or employee[s]." (JA.932; 778, 915.)

At a meeting on July 10, Benboe told employees that they were required to sign the revised agreement and return it to him. (JA.932; 345–46.) Benboe further told the employees that if they did not sign the agreement they would have to "go upstairs" to see Bachman. (JA.932; 347.) Several employees refused to sign the agreement. (JA.932; 347.) A week or two later, at another meeting, Benboe again addressed the revised nondisclosure agreement and read aloud the names of those employees who had not signed the new agreement. (JA.932; 347–48.) At least one employee still refused to sign the agreement. (JA.932; 348.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hayes, Griffin, and Block) found that the Company violated Section 8(a)(3) and (1) (29 U.S.C. § 158(a)(3) and (1)) of the Act by terminating employees Smith and Dixon for their union activities and violated Section 8(a)(1) (29 U.S.C. § 158(a)(1)) by terminating employees Kraber and See for engaging in protected concerted activity. Additionally, the Board found that the Company violated Section 8(a)(1) by

maintaining initial and revised nondisclosure agreements and coercing employees to sign the latter agreement.

The Board's Order requires the Company to cease and desist from terminating employees for engaging in union or protected concerted activities; maintaining or requiring employees to sign an unlawful nondisclosure agreement or abide by any rule limiting their right to engage in union or protected concerted activities; and in any like or related manner inferring with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board's Order requires the Company to make whole and offer reinstatement to Smith, Dixon, Kraber, and See; rescind all nondisclosure agreements or any other rules prohibiting employees from engaging in union or concerted activities protected by the Act and notify employees in writing that it has done so; and post a remedial notice.

SUMMARY OF ARGUMENT

After years of feeling mistreated, Jeff Smith contacted the Union in March 2009 in an attempt to better employees' working conditions at the Company. Another employee, Ron Dixon, joined Smith's efforts and together they became the leaders of the nascent organizing drive. The Board found that, less than 5 months after the Company became aware of the union organizing campaign, it had unlawfully terminated both employees.

The evidence establishes that the Company's reasons for terminating these employees were clearly pretextual. At the time the Company terminated Smith in June, it told him that he was being terminated *solely* for not wearing the correct boots to work and not for attendance points. At his unemployment hearing several months later, the Company again repeated its argument that Smith was terminated for his work boots. Before the Board, the Company changed its tune, belatedly claiming that it had terminated Smith *solely* for violating the Company's attendance policy and that no decision was ever made regarding the safety issues. And incredibly, the Company again now argues that Smith was terminated for some unclear combination of safety *and* attendance issues. These unexplained shifts demonstrate the pretext inherent in the Company's purported justification(s) and, when combined with the animus shown towards Smith's union activities, establish that the Company's actions were unlawfully motivated.

Regarding Dixon's termination, the Company initially attempts to refute any wrongdoing by claiming that it had no knowledge of Dixon's union activities. This argument, however, is belied by Dixon's status as a leading union organizer for 6 months, the suspicious timing of his discharge relative to renewed handbilling at the plant, and the pretextual reason proffered for his discharge.

The Company claims that it terminated Dixon for insubordination because he failed to follow instructions from his supervisor, Benboe. The evidence clearly

demonstrates, however, that Benboe instructed Dixon either to get a ladder to work from *or* work from the center of the locomotive, and that Dixon got the ladder as instructed. Thus, Dixon was not insubordinate.

The Company, as a last resort, argues that regardless of whether Dixon was actually insubordinate, Bachman reasonably believed that Dixon had been insubordinate and on that basis decided to terminate him. However, Bachman's belief that Dixon was insubordinate cannot be considered reasonable where, as here, he never asked what instructions were actually relayed to Dixon by his supervisor. And furthermore, if the Company could have proved that Bachman held a reasonable belief, the evidence demonstrates that the Company treated Dixon disparately as compared to at least two other instances of insubordination.

The Company's terminations of Kraber and See further violated the Act. Both employees engaged in protected concerted activity, as their activities dealt with the shared concern of cleaning costs for employee uniforms. The Company's purported reason for terminating Kraber, absenteeism, was pretextual, as a supervisor had already excused his attendance points at the time the Company terminated him. The Company's reasonable belief argument also fails here, as the Company treated Kraber's purportedly illegible doctor's note in a completely unreasonable manner, choosing to summarily terminate him instead of engaging in even a cursory investigation of the note.

As for See, the Company admitted that it terminated him for his contact with the Cintas vendor—conduct that grew out of earlier protected concerted activity at the employer meetings and thus was itself protected under the Act. The Company erroneously argues that it could legally terminate See based on its mistaken belief that he engaged in misconduct during the course of his protected activities. This argument, however, is foreclosed by the Supreme Court's decision in *Burnup & Sims*, 379 U.S. 21 (1964), where the Court addressed this same argument and held that an employer's mistaken belief as to misconduct during protected activities *does not* privilege an employer's decision to terminate an employee under the Act.

The Board also found the Company's nondisclosure agreements, and its attempts to coerce employees into signing the revised agreement, unlawful. The Company has not seriously contended otherwise, and instead rests solely on the unproven assertion that these agreements were rescinded. However, as the Board noted, there is no evidence beyond the Company's bare assertion that these agreements were rescinded and thus this argument should be summarily dismissed.

STANDARD OF REVIEW

The findings of fact underlying the Board's decision are "conclusive" if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "Where either of two inferences may reasonably be drawn from the facts, the [Court] is bound by

the Board's findings . . . ." *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991). The Board's Order is entitled to "great deference" and should be enforced by the Court "if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the record as a whole, even if [the Court] might have reached a different decision had the matter been before [it] de novo." *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001). In sum, the Board's findings must be upheld if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366–67 (1998).

The Court's review of Board credibility determinations is even more limited. As this Court has stated, "[t]he question of credibility of witnesses is primarily one for determination by the trier of facts." *Fruin-Colnon Corp. v. NLRB*, 571 F.2d 1017, 1022 (8th Cir. 1978). Thus, this Court accords "great deference to the [administrative law judge's] credibility determinations." *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910–11 (8th Cir. 2004).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY TERMINATING SMITH AND DIXON BECAUSE OF THEIR UNION ACTIVITIES

A. Applicable principles

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) when it discharges an employee because of the employee's union activity.[3] *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400–03 (1983); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966–67 (8th Cir. 2005); *Hall v. NLRB*, 941 F.2d 684, 688–89 (8th Cir. 1991). The critical question in most cases under this Section is whether the employer's action was unlawfully motivated. *See, e.g., TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 463–64 (8th Cir. 1983) (per curiam). In *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), the Supreme Court approved the test for determining motivation in unlawful discrimination first articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980). Under the test, if substantial evidence supports the Board's finding that an employee's union activity was a "motivating factor" in the discipline, the Board's conclusion of unlawful discipline must be affirmed, unless the record, considered as a whole, compelled

[3] Section 8(a)(3) makes it unlawful for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." A violation of Section 8(a)(3) also derivatively violates Section 8(a)(1). *See, e.g., Amyx Indus., Inc. v. NLRB*, 457 F.2d 904, 905 (8th Cir. 1972) (per curiam).

the Board to accept the employer's affirmative defense that the employee would have been disciplined even in the absence of protected union activity.[4] *Transp. Mgmt.*, 462 U.S. 397, 401–03; *Wright Line*, 251 NLRB at 1089. In other words, "[h]aving disciplined an employee who has engaged in protected activity, it is not enough that an employer put forth *a* nondiscriminatory justification for discipline. It must be *the* justification." *Rockline Indus., Inc.*, 412 F.3d at 970 (emphasis in original) (citation omitted).

Where, as here, it is shown that the employer's proffered justifications for its actions are pretext, the analysis of the employer's motivation is logically at an end. As the Board explained in *Wright Line*, once it is proved that the reason advanced by the employer either did not exist, or was not in fact relied upon, there is no remaining predicate for any determination that the adverse action would have been taken even in the absence of protected activity. *Wright Line*, 251 NLRB at 1084; *see York Prods., Inc. v. NLRB*, 881 F.2d 542, 545–46 (8th Cir. 1989); *Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985) (per curiam).

Motive is a question of fact, and, contrary to the Company's insinuations (Br.27–28), the Board may rely on circumstantial evidence to find that

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[4] The Company disagrees (Br.27–28) with the Board's characterization (JA.923 n.4) of the General Counsel's initial burden under *Wright Line*. But resolution of that disagreement would not affect the outcome of the case. Regardless of the framing of the General Counsel's initial burden, ample evidence, as will be shown below, supports the Board's finding that the discharges were in retaliation for the employees' union or protected activities.

discriminatory motive has been established. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Concepts & Designs, Inc. v. NLRB*, 101 F.3d 1243, 1244 (8th Cir. 1996). The Board may infer unlawful motive from such indicia as an employer's disparate treatment of union supporters, *Rockline Indus., Inc.*, 412 F.3d at 968–70; *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 844 (8th Cir. 1979); suspicious timing of discipline, *Lemon Drop Inn, Inc.*, 752 F.2d at 326; *see McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969); and the shifting, contrived or implausible nature of the employer's proffered reasons for its actions. *See, e.g., Hall*, 941 F.2d at 688; *York Prods., Inc.*, 881 F.2d at 545–46.

B. Substantial Evidence Supports the Board's Finding that the Company Unlawfully Discharged Smith Because of His Union Activities

1. The Company knew of and expressed hostility towards Smith's union activities

Smith was the instigator and initial leader of the union organizing effort at the Company. Moreover, as the Board noted (JA.923), Smith openly spoke up in favor of the Union at an antiunion meeting held by Bachman on May 15, less than 1 month before the Company terminated him. In response to his question to Bachman about whether the Company would discuss unionization, Bachman told Smith to "shut-up and sit down."[5] This exchange not only supports the Board's

[5] The Company claims (Br.24, 30–31) that Bachman's statement cannot serve as evidence of animus under Section 8(c) of the Act (29 U.S.C. § 158(c)), which

finding that the Company was aware of Smith's union sympathies, but also that the Company harbored animus towards Smith's and other employees' union activities.[6] *Hickory Creek Nursing Home*, 295 NLRB 1144, 1144, 1152–53 (1989) (manager telling lead union organizer to "sit down [and] shut up" during antiunion meeting supported both animus and knowledge under *Wright Line*), *enforced mem. sub nom., NLRB v. Health Care Mgmt. Corp.*, 917 F.2d 1304 (6th Cir. 1990) (per curiam).

Additional circumstantial evidence further supports the Board's finding of knowledge. As the instigator and leader of the union movement, Smith solicited authorization cards on the shop floor continuously for several months leading up to his termination and passed out union materials after work in the company parking lot. Although the Company's supervisors, particularly Bachman (JA.442), denied that they had knowledge of Smith's union activity, the administrative law judge specifically discredited these denials. (JA.934.) Thus, circumstantial evidence

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states that "the 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." Bachman's utterance, "shut-up and sit down," however, is not an expression of "views, argument or opinion." Rather, it is a direct command to Smith to stop talking about the Union.

[6] The Company's attempts (Br.33–34) to separate Bachman's undisputed animus from other supervisors also fails because, as the D.C. Circuit has noted, "it is eminently reasonable to assume that high-level corporate managers speak on behalf of the company when they express anti-union animus." *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 423 (D.C. Cir. 1996).

exists to support union activity, knowledge, and animus, and amply supports the Board's finding that the Company's discharge of Smith was unlawfully motivated.

2. The Company's proffered justifications for Smith's termination are pretextual, eliminating the Company's *Wright Line* defense and further supporting a finding of animus

Substantial evidence supports the Board's conclusion that the Company's justifications for Smith's termination "were pretexts designed to mask the [Company's] true motivation, the employee['s] union activity." (JA.923.) As emphasized by the Board (JA.923), an employer's pretextual justifications for discharging an employee necessarily preclude the employer's *Wright Line* defense and strongly support a showing of discriminatory motivation. *Austal USA, LLC*, 356 NLRB No. 65, 2010 WL 5462282, slip op. at 2 (Dec. 30, 2010); *Approved Elec.*, 356 NLRB No. 45, 2010 WL 4963187, slip op. at 3 (Dec. 3, 2010). This Court has adopted a similar position regarding pretext, and in particular has emphasized that "[b]oth implausible explanations and false or shifting reasons support a finding of illegal motivation . . . ." *York Prods., Inc. v. NLRB*, 881 F.2d 542, 545 (8th Cir. 1989), *cited with approval in Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991); *see Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 591 (8th Cir. 1997).

In the instant case, the Company has offered shifting reasons for Smith's termination, constantly vacillating between safety and attendance "justifications" for its discharge of Smith. On at least five occasions leading up to the

administrative hearing before the Board, the Company offered Smith's safety-boot violation as the sole or primary reason for his termination. First, when the Company sent him home for not having steel-toed boots, Smith asked Crall and Benboe whether he was going to accumulate any attendance points and they both told him no.[7] (JA.76–77.) Second, Benboe's incident report, prepared the night after Smith was sent home, mentions nothing about the Company's attendance policy and focuses entirely on the safety shoe issue. (JA.1080.) Third, when the Company terminated Smith the next day, Benboe and Crall told that him that he was terminated for violating the Company's safety policy. (JA.68–69) Fourth, the termination letter that Smith received from the Company stated that he was being terminated for violations of "safety procedures and company policies." (JA.746.) And finally, at his unemployment compensation hearing, the Company continued to proffer the safety-shoe incident as the reason for Smith's termination, as demonstrated by the Company's decision to submit portions of its safety policy—underlined for emphasis—as evidence but not to submit any corresponding attendance policies. (JA.830–47, 71, 564, 566, 572.)

[7] Although both Crall and Benboe denied that attendance points were mentioned at this meeting, the administrative law judge specifically discredited these denials. The judge noted that, given Smith's awareness that he was near the attendance-point limit, it was "highly improbable that he would have passively left the [] meeting without addressing the attendance question." (JA.935; 81.)

After Smith filed unfair labor practice charges, however, the Company changed its tune and argued that Smith was in fact terminated for violating the attendance policy because, despite Smith's and Crall's contemporaneous reassurances to the contrary, the Company decided to assess him absentee points for the safety shoe incident. At the administrative hearing, Crall went to great lengths to explain that it was *his* decision to terminate Smith and that his decision was based solely on attendance points. (JA.539–41.) Incredibly, Crall even volunteered that "[n]o decision was ever made" on the boot issue because "[Smith] took himself out from absenteeism." (JA.541.) The Company's brief to the Board unsurprisingly echoes Crall's position at the hearing. (Add.2–4.)

Before this Court, however, the Company has *yet again* flipped positions on the "justification" for Smith's termination. The Company now claims (Br.34–36), contrary to Crall's testimony and its assertions before the Board, that the "real" reason it terminated Smith included *both* the safety violation and the attendance violation. These abrupt and unexplained shifts in the Company's proffered justifications for Smith's termination not only fail as *Wright Line* defenses but also demonstrate the Company's unlawful motivation.[8] *See York Prods., Inc.*, 881 F.2d

[8] The Company's attempt (Br.36) to argue that there is no pretext because its reasons "were neither inconsistent or conflicting" is wrong on both counts. For example, Crall testified that "no decision was ever made" on the safety violation (JA.541), yet here the Company is relying on the same safety violation as a

at 545; *NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 235 (8th Cir. 1966) (differing justifications presented at time of termination, unemployment hearing, and Board hearing weakened employer's affirmative defense and supported unlawful animus finding). Thus, the Board's finding of pretext is supported by substantial evidence, and its finding that Smith's termination violated the Act should be enforced.

C. Substantial Evidence Supports the Board's Finding that Dixon's Termination Violated Section 8(a)(3) and (1) of the Act

1. Substantial evidence supports the Board's findings that the Company had knowledge of Dixon's union activities and expressed animus towards those activities

The Board reasonably found, based on circumstantial evidence, that the Company had knowledge of Dixon's union activities. This Court, in agreement with the Board, has consistently held that employer knowledge of union activity can be established via certain types of circumstantial evidence. Initially, an employee's status as a leading union organizer can serve as a foundation for establishing circumstantial evidence of employer knowledge. *See Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1384–85 (8th Cir. 1980); *A.P. Green Fire Brick Co. v. NLRB*, 326 F.2d 910, 914–15 (8th Cir. 1964); *see also NLRB v. Hosp. San Pablo, Inc.*, 207 F.3d 67, 74 (1st Cir. 2000). The suspicious timing of an employee's discharge relative to union activity also aids in establishing employer

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justification for its decision to terminate Smith. These positions are clearly inconsistent and conflicting.

knowledge . *Wal-Mart Stores*, 488 F.2d at 117; *see also NLRB v. Ark.-La. Gas Co.*, 333 F.2d 790, 796 (8th Cir. 1964). Finally, this Court has explained that where pretext is established, "it [is] reasonable for the trier of fact to infer that the company [] discharged [the employee] for engaging in union activity." *NLRB v. Wal-Mart Stores*, 488 F.2d 114, 116 (8th Cir. 1973).

All of these evidentiary factors are present in Dixon's case. Dixon served as the leading union organizer after Smith's discharge and had solicited employees every day at work for over 5 months by the time he was discharged in September.[9] The timing of Dixon's discharge was extremely suspicious, as it occurred only days after union organizer Cireuj openly visited the plant to bolster the Union organizing drive. Moreover, as will be shown below, the Company's asserted reason for terminating Dixon was pretextual.

Ample circumstantial evidence also supports the Board's finding of animus. As noted *supra* p. 29, animus can be shown where, as here, there is a suspicious connection between union activities and the timing of a discharge. The Company's termination of Smith for engaging in the same union organization campaign additionally supports a finding of animus. Finally, as discussed below, the Company's purported justification for terminating Dixon, his "insubordination," is

[9] As the Company notes (Br.8), management's offices overlook the shop floor where Dixon engaged in his sustained union activities.

wholly pretextual. Thus, substantial evidence supports Board's finding of unlawful motive under *Wright Line*.

To rebut this ample circumstantial evidence, the Company relies (Br.30–32, 37) on the discredited testimony of Benboe, Crall, Bachman, and Graber in claiming that it did not have knowledge of Dixon's union activity. (JA.925–26.) Admittedly, this Court has held that an affirmative finding of employer knowledge cannot be based solely on a decision to discredit an employer's witnesses, even when combined with suspicious timing for a disputed disciplinary action. *Gen. Merchantile & Hardware Co. v. NLRB*, 461 F.2d 952, 955–56 (8th Cir. 1972); *Amyx Indus., Inc. v. NLRB*, 457 F.2d 904, 906–07 (8th Cir. 1972) (per curiam). However, as discussed above, there is an abundance of circumstantial evidence in this case that did not exist in either *General Merchantile* or *Amyx* upon which to infer that the Company did, in fact, have knowledge of Dixon's union activity. Dixon's status as a leading union organizer for a period of over 5 months prior to his discharge and the clearly pretextual reason proffered for his discharge distinguishes this case from *General Merchantile* and *Amyx* and provides substantial evidence to support the Board's finding that the Company was aware of Dixon's union activity at the time he was discharged.

2. The Company's asserted reason for terminating Dixon is pretextual, eliminating the Company's *Wright Line* defense and further supporting a finding of unlawful animus

As in the case of Smith's discharge, the Board principally relied on the fact that insubordination, "the asserted reason[ ] for [Dixon's] discharge," was a "pretext designed to mask the Company's true motivation, the employee['s] union activity" in rejecting the Company's affirmative defense. (JA.923.) The record evidence amply supports the Board's finding of pretext.

Initially, the evidence demonstrates that Dixon did not, in fact, engage in any insubordination. As even the Company admits, Benboe asked Dixon to "work in the center of the locomotive *or* place a ladder on the locomotive." (Br.16–17 (emphasis added).) There is no dispute that Dixon placed a ladder on the locomotive, as the Company's own diagram (Add.1) demonstrates. Therefore, in a literal sense, Dixon was not insubordinate. Even apart from that, the credited evidence also strongly suggests that Dixon was not hanging off the edge of the locomotive, and the administrative law judge "seriously doubt[ed]" the Company's claims to the contrary. (JA.936.)

The Company's suggestion (Br.39–40), that even if Dixon did retrieve a ladder, he was insubordinate by failing to place it correctly (the "as intended" position indicated in Add.1) patently fails. When asked by company counsel at hearing whether he gave Dixon "any specific directions where to put a ladder,"

Benboe responded "[n]o."[10] (JA.612.) Dixon and several other employees all testified that, during their years of experience working at the Company, they had never seen a ladder used in the "as intended" manner, and that, conversely, ladders in the "as applied" position—the position in which Dixon actually placed the ladder—were used on a daily basis.[11] (JA.132, 335, 357–59.) Even Bachman admitted that employees did not use ladders in the "as intended" position for the work that Dixon was doing the day he was terminated. (JA.500–01.)

The Company further claims (Br.42–43) that, even though Dixon may not have been literally insubordinate, Bachman reasonably believed that he had been insubordinate and thus terminated him on this basis. However, the alleged "insubordination" in this case requires evidence that Bachman actually knew what instructions were given to Dixon. Benboe in fact never gave Dixon detailed

[10] Dixon repeatedly claimed that Benboe instructed him to place the ladder in the "as applied" position for "fall-protection" after he told Benboe that he would not be able to work from a ladder in the "as intended" position. (JA.119, 121, 141–42.) At an earlier unemployment hearing, Benboe in fact admitted that he instructed Dixon to place the ladder in the "as applied" position. (JA.764–65.) However, regardless of whether Dixon's or Benboe's account of the instructions is credited, both agree that Benboe never instructed Dixon to place the ladder in the "as intended" position.

[11] The argument that a ladder in the "as applied" position would not actually provide any fall protection refutes, rather than supports, the Company's claim of insubordination. Dixon admitted under cross-examination that a ladder placed in the "as applied" position would probably not do anything to break his fall, but he placed the ladder in that position because "[t]hat's what I was told to do, so that's what I did." (JA.142.)

instructions on how to place the ladder or how to work on top of the locomotive, nor did he monitor compliance after giving his initial instructions to Dixon. More importantly, as the Board noted and the Company's account does not contest (Br.17), Benboe never actually reported to either Bachman or Crall that Dixon "acted in an insubordinate manner" by failing to follow instructions. (JA.936). Rather, Bachman simply assumed Dixon's insubordination based on his position on top of the locomotive, despite the fact that Bachman had no idea what instructions Benboe had given Dixon at the time he made the decision to terminate Dixon. Bachman's failure to even conduct a cursory investigation into what instructions Benboe gave to Dixon before making the decision to terminate Dixon precludes any sort of good-faith belief by Bachman that Dixon had been insubordinate, and thus undermines the Company's defense and supports a finding of pretext and animus.[12] *See, e.g., NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 969 (8th Cir. 2005); *Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685 (8th Cir. 1996); *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 845 (8th Cir. 1979).

[12] Benboe, like Bachman, failed to investigate Dixon's supposed misconduct, even after Dixon repeatedly asked him to do so. This failure to investigate Dixon's work is made even more suspicious because only one week earlier, Benboe had applauded Dixon's work on top of a similar locomotive—when they had worked together without a ladder or any other fall-protection. Such blatantly inconsistent behavior further buttresses the finding of unlawful animus. *See, e.g., NLRB v. Advance Transp. Co.*, 965 F.2d 186, 193–94 (7th Cir. 1992).

Finally, even if the Company could have shown that Dixon was insubordinate, the Company treated Dixon in a disparate manner as compared to other summary terminations and other instances of insubordination. As the Board found, the Company's response to Dixon's "conduct appears entirely out of proportion with those other instances where [the Company] bypassed the progressive disciplinary system and discharged the employee immediately," including situations where employees demonstrated an inability to perform required work tasks and left work during working hours without permission. (JA.936; 881–84.) Bachman admitted that Dixon was the first employee at Albia ever to be summarily terminated for insubordination. (JA.486.) And, contrary to the Company's claims (Br.40–42), it has dealt with at least two other instances of insubordination in the past and not discharged employees. Specifically, prior to his discharge in June, Smith was disciplined, not discharged, for being insubordinate on two separate occasions in April.[13] (JA.749.) This unprecedented discipline and disparate treatment of union advocates supports a finding of unlawful motivation, even assuming that Bachman's belief in Dixon's insubordination had been shown to have been reasonable. *See Rockline Indus., Inc.*, 412 F.3d at 968–70; *Berbiglia,*

[13] This discipline occurred 2 weeks before Smith openly expressed his support for the Union at a company meeting, and thus occurred before the Company had knowledge of his union activity.

Inc., 602 F.2d at 844. Therefore, substantial evidence supports the Board's finding of pretext and unlawful motivation.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TERMINATING KRABER AND SEE FOR ENGAGING IN CONCERTED ACTIVITY PROTECTED BY SECTION 7 OF THE ACT

A. General Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees, whether or not represented by a union, the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of rights guaranteed by Section 7.

The elements of a Section 8(a)(1) violation were set forth in *Meyers Indus. (Meyers I)*, 268 NLRB 493, 497 (1984), *remanded on other grounds sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *reaffirmed on remand, Meyers Indus. (Meyers II)*, 281 NLRB 882 (1986), *affirmed sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). A violation will be found if the employer knew of the concerted nature of the employee's activity, the activity was concerted and protected under the Act, and the discharge was motivated by the protected concerted activity. *Meyers I*, 268 NLRB at 497.

A threshold question in determining whether an employer has violated Section 8(a)(1) is whether an employee has actually engaged in concerted activity protected by Section 7 of the Act. Although often understood as express activity by a group of employees, concerted activity also "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action . . . ." *Meyers II*, 281 NLRB at 887. Where an individual employee's speech contemplates or grows out of group action and is intended to benefit more than one employee, that speech is protected by Section 7. *See NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (per curiam).

Where motivation for an adverse employment action is disputed, the *Wright Line* analysis, discussed *supra* pp. 27–28, is appropriate. *E.g.*, *Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285, 287–88 (8th Cir. 1988); *TM Group*, 357 NLRB No. 98, 2011 WL 4619132, slip op. at 1 n.2 (Sept. 30, 2011). Where there is no dispute as to the motivation for a disciplinary action, however, there is no need to apply the additional *Wright Line* analysis. *E.g.*, *Plaza Auto Ctr., Inc. v. NLRB*, 664 F.3d 286, 291 n.1 (9th Cir. 2011), *remanding on other grounds*, 355 NLRB No. 85, 2010 WL 3246659 (Aug. 16, 2010); *St. Joseph's Hosp.*, 337 NLRB 94, 95 (2001).

The Supreme Court has held that the task of defining the scope of Section 7 "'is for the Board to perform in the first instance as it considers the wide variety of

cases that come before it.'" *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (citation omitted). "On an issue that implicates its expertise in labor relations," like the interpretation of protected concerted activity under Section 7, "a reasonable construction by the Board is entitled to considerable deference." *Id.* at 829–30 (citation omitted).

B. Substantial Evidence Supports the Board's Conclusion that the Company Terminated Kraber for Engaging in Protected Concerted Activity

1. The Board reasonably concluded that Kraber engaged in protected concerted activity, and that the Company had knowledge of and expressed animus towards Kraber's protected activity

Substantial evidence supports the Board's finding that Kraber's discussion regarding the cost of cleaning employee uniforms at the March 4 employee meeting with Doug Bachman constituted protected concerted activity. Kraber's concerns over the cost of cleaning the uniforms implicated a mutual term and condition of employment. All shop floor employees were required to pay the costs of cleaning the uniforms, and many employees expressed concerns over these costs. Therefore, these comments concerned subject matter protected by Section 7. *See NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (per curiam).

Kraber's comments were also concerted. The Board and courts have consistently held that shared employment concerns expressed during an employer meeting constitute concerted activity within the meaning of Section 7. *See, e.g.*,

NLRB v. Caval Tool Div., 262 F.3d 184, 190 (2d Cir. 2001) and cases cited therein; *Cibao Meat Prods.*, 338 NLRB 934, 934–35 (2003); *see also F.W. Woolworth Co. v. NLRB*, 655 F.2d 151, 153–54 (8th Cir. 1981). The Company essentially conceded that Kraber's concerns were shared by his fellow employees at the March 4 meeting by calling Tom Shipp as a witness, who testified that he, Kraber, and other employees all shared the concern at the meeting that "we [were] getting ripped off by [the Company]" on cleaning costs. (JA.650, 654–55.) Further, Kraber actually initiated group action *at that very meeting* by leading a vote with his fellow employees to see whether they wanted to continue the current uniform arrangement. (JA.194.) Thus, Kraber was clearly engaged in protected concerted activity under the Act.[14]

The Company also exhibited animus towards this protected concerted activity. According to Shipp, when Kraber and other employees challenged Doug Bachman on the uniforms, he "got pretty mad, pretty red in the face." (JA.650.) Kraber similarly described the meeting and Doug Bachman's reaction as "hyper." (JA.195.) The Company further displayed its animus towards employees' protected activities when it terminated See for engaging in protected discussions on the uniform issue, as discussed *infra* pp. 53–56, only three days earlier on March 5.

[14] The Company's arguments (Br.43–44) regarding Kraber's union activities and the Company's knowledge of these activities are irrelevant for a discharge motivated by Kraber's protected concerted activity under Section 8(a)(1) of the Act. *See, e.g., NLRB v. Burnup & Sims*, 379 U.S. 21, 22–23 (1964).

These factors, combined with the pretextual nature of the Company's asserted justification for Kraber's discharge, fully support the Board's finding that Kraber's termination was unlawfully motivated by his protected concerted activities.

2. Substantial evidence supports the Board's conclusion that the Company's justification for Kraber's termination was pretextual, defeating the Company's *Wright Line* defense and supporting the finding of unlawful motivation

Under its well-established attendance policy, the Company terminated employees after they received 12 attendance points during a rolling 12-month period. The Company claims that Kraber reached 12 attendance points after missing work on February 26, 2010, and that the Company made the decision to terminate him 10 days later on March 8 because of this absence. It is undisputed that Kraber missed work on February 26, and that under the Company's attendance policy he was rightfully assigned 2 points for missing work that day. However, as found by the Board, leading up to February 26, Kraber should have only had 6 points on his attendance record, not 10 points as contended by the Company. The dispute over Kraber's attendance points turns on whether the 4 points he received on January 19 and 20 should have been excused under the Company's attendance policies.

Ample evidence, including the Company's written policies and the evidence presented at trial, support the Board's finding that Kraber's absences on January 19 and 20 should have been, and at one point were, excused by company supervisors.

Under the Company's attendance policy, an employee who is absent due to illness or injury for 3 consecutive days and calls in properly each day will not receive attendance points if the employee brings in a doctor's note to cover the absences. (JA.994.) This is exactly what happened in Kraber's case. He was absent from work from January 19 through January 25, and produced doctor's notes to cover all of these absences. (JA.903–05.) Thus, under the Company's policy, his absences should have been excused.

Not only *should* Kraber's absences have been excused, supervisor Peterson *did* excuse these absences pursuant to this policy. After Peterson received a doctor's note from Kraber covering his absences on January 19 and 20 and a phone call from the doctor's office confirming the validity of the note, he met with Kraber and told him that "he had talked to the doctors and that the note would work since he had talked to them." (JA.205.) He also stated that after he cleared the points as required under company policy, Kraber would "be down to six points" and handed him an attendance sheet with those two dates circled that was seen by at least one other employee. (JA.102–05, 205–07.) Jammie McKim, an employee standing next to Kraber during this conversation, reported that Peterson told Kraber that "he had talked to the nurse and that he got everything squared away." (JA.368.) Thus, under the Company's policy, Kraber had only 6 points

going into February 26, and only 8 points after missing work on that day, well below the 12 points required for termination under the Company's policy.[15]

The Company claims (Br.9–10, 48–49) that Peterson could not excuse these absences because he lacked authority to do so under the Company's attendance policy. However, Peterson had already exercised this authority once by modifying Kraber's attendance point total in February, reducing his points from 15 to 10. Further, the Company's attendance policy, as discussed above, allowed for absences to be excused in precisely this situation. Kraber followed this policy, and in fact even went beyond the written terms by providing both a doctor's note and by following up with the doctor's office after submitting the initial note. Finally,

[15] The Company argues, erroneously, (Br.48–49) that Peterson's statements are inadmissible hearsay. Under Rule 801(d)(2)(D) of the Federal Rules of Evidence, an admission against interest made by a party's agent concerning a matter within the scope of his agency is not hearsay, and is therefore admissible. Because Peterson is unquestionably an agent of the Company, and applying the attendance policy, as discussed below, fell within the scope of his authority as a supervisor, the Board's reliance upon his statements as probative evidence was reasonable. Moreover, even assuming that Peterson's statements do not fall within the exact bounds of the Federal Rules, Peterson's statements were corroborated by another disinterested witness, McKimm, and thus the Board reasonably exercised its discretion in allowing these statements into evidence. *See* Section 10(b) (29 U.S.C. § 160(b)) of the Act (Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States."); *RC Aluminum Indus., Inc.*, 343 NLRB 939, 940 (2004) (citations omitted); *see also NLRB v. Addison Shoe Corp.*, 450 F.2d 115, 117 (8th Cir. 1971). Additionally, the nurse's statements to Peterson are not, contrary to the Company's contentions (Br.49), "double hearsay," as they were not relied on for the truth of the matter asserted. Rather, they were clearly relied on only for their effect on Peterson's state of mind and his subsequent actions in excusing Kraber's absences.

when Kraber objected to Crall at the time of his termination that his points had already been excused by Peterson, Crall did not object or claim that Peterson did not have the authority to remove attendance points; instead, he said that he would check to see whether Peterson had in fact excused the points. (JA.215–16, 552–53.) Thus, Peterson, acting within his authority and following the Company's well-established attendance policy, excused Kraber's absences.

The Company's decision to simply sit on its claim that Kraber had too many points for 11 days further supports the pretextual nature of Kraber's discharge. The Company presented evidence of 33 discharges for attendance between July 2008 and August 2010. (JA.1045–77.) In a majority of these cases (17/33), it appears that employees were terminated on the same day as their last absence. (JA.1045–46, 1054–58, 1060–61, 1064–70, 1072.) For those discharges in which there was a gap between the date of the last absence and the date of termination, the longest gap between the 2 dates is only 4 days. (JA.1077.) This, of course, contrasts markedly with the 11-day gap that existed in Kraber's case, and supports a finding that he would not have been terminated were it not for his protected conduct that took place between his last absence and his termination.[16]

[16] The Company's argument (Br.45–46) that it did not discriminate against Kraber because he had already accumulated 12 points by the time he engaged in the protected concerted activity that led to his termination is unavailing. Peterson had already excused these points before the protected concerted activity, and even

The Company attributes (Br.46) this unprecedented delay to the fact that Bachman needed to review Kraber's termination and that, because he was away from the office during these 11 days, he could not review the absences. Bachman, however, admitted to being in daily contact with the office via telephone, and in fact discussed Kraber's attendance issues with Crall at least once while he was out of the office. (JA.450–51, 512–13.) Further, Bachman was not on vacation during this entire period, and actually did come in to the office for at least 1 day on Monday, March 1. (JA.450–51.) Therefore, contrary to the Company's claims, Bachman had the opportunity to review Kraber's termination and his failure to do so until March 8 cannot be explained by his travel schedule.

More importantly, Dane See's termination, discussed below, completely discredits the Company's claim (Br.20–22) that Bachman reviewed all terminations during this period before they were finalized. The Company terminated See for inappropriate conduct with a vendor on March 5, *during the same period of time that Bachman claimed he could not review Kraber's termination*. The distinction between the Company's treatment of Kraber's and See's terminations becomes even more inexplicable when one considers the offenses which supposedly led to their respective terminations. The purported reason for Kraber's termination—excessive absenteeism—was by far the most

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Bachman admits that no final determination on the points was made until March 8, after Kraber's protected activity had occurred.

common cause for discharges at the Company. In fact, terminations for absenteeism were the only terminations that could occur *without* approval by Bachman.[17] This contrasts markedly with the unique nature of See's termination for "inappropriate contact with a vendor," an issue which apparently had never arisen before in the Company. The Company's termination of See completely undercuts the Company's explanation of the delay in Kraber's termination, and this inexplicable delay, combined with the timing of Kraber's protected activities, further supports a finding of unlawful motivation. *See, e.g., L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 984 (7th Cir. 2002); *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000).

The Company's assertion (Br.21–22) that its termination of Kraber could not have been motivated by protected concerted activity because other employees, namely Tom Shipp, engaged in similar conduct and were not terminated is legally misguided and factually untrue. First, it is well-established as a matter of law that an employer cannot defend against a finding of unlawful motivation simply by claiming that it did not terminate all employees who engaged in protected activities. *See, e.g., McGaw of Puerto Rico, Inc. v. NLRB,* 135 F.3d 1, 8 (1st Cir. 1997); *Union Tribune Pub. Co. v. NLRB*, 1 F.3d 486, 492 n.3 (7th Cir. 1993).

[17] Indeed, Crall went to great lengths in discussing Smith's termination to explain that the only terminations which did not need to be approved by Bachman were those for absenteeism. (JA.539–41.)

Second, Kraber's protected concerted activities fundamentally differed from Shipp's activities. Kraber, not Shipp, initiated the uniform issue, and Kraber, not Shipp, had contacted Cintas about the cost of cleaning the uniforms. Thus, the Company gains no ground by attempting to compare its treatment of Shipp to its treatment of Kraber.

Finally, as a last ditch effort, the Company argues (Br.49–50) that its good-faith, reasonable belief that Kraber violated the attendance policy should be enough to refute any evidence of unlawful motivation. This argument, of course, ignores the fact that a Company supervisor, Peterson, had already excused these absences at the time Bachman made the decision to terminate Kraber on March 8. Even in the absence of Peterson's actions, however, the Company's treatment of Kraber's doctor's note completely contradicts this argument and demonstrates that the Company did not act in good faith when dealing with Kraber's termination. Bachman claims that he was unaware of the doctor's note at the time he decided to terminate Kraber, and he later rejected the doctor's note because it was unreadable. (JA.584–87.) Even assuming that the note is unreadable, Bachman's treatment of the note is inconsistent with good faith. When the note was brought to his attention, instead of contacting Kraber about the note, contacting Kraber's physician to confirm the validity of the note, or even contacting Peterson to check whether Peterson had any discussions with the doctor's office, Bachman instead

simply dismissed the note as unreadable, cryptically claiming that "our insurance company stipulates that [doctor's notes be legible]." (JA.475–76.) Bachman's failure to investigate the note, and instead dismiss it on its face, is completely unreasonable given what Peterson and Crall had already discussed with Kraber, and precludes the Company from relying on any good-faith argument to the contrary.

The Company's prior treatment of Kraber's attendance issues further betrays its unlawful motivation and refutes any good-faith mistake defense. Roughly a month before his protected concerted activity and his subsequent termination, Kraber purportedly exceeded the attendance points according to the Company's records. Crall and Benboe confronted Kraber over his point total, Kraber disputed these points, and he was allowed to continue working while the points' dispute was investigated and resolved in Kraber's favor. This contrasts markedly with the way his attendance issues were treated after his protected concerted activities at the March 4 meeting. Instead of engaging in even a cursory investigation of Kraber's claims that the January 19 and 20 absences had already been excused by Peterson, Bachman summarily terminated Kraber. Such differing treatment after known protected activities helps to refute any neutral justifications for an adverse employment action. *See, e.g., NLRB v. Advance Transp. Co.*, 965 F.2d 186, 193

(7th Cir. 1992). In short, substantial evidence supports the Board's finding of unlawful motivation.

C. Substantial evidence supports the Board's conclusion that the Company's termination of See Violated Section 8(a)(1) of the Act

1. The Board reasonably concluded that See engaged in protected concerted activity

The Board found that See's activity, in contacting Cintas, was a "logical outgrowth" of Kraber's and other employees' protected concerted activity at the employee meetings in February and March. This finding is consistent with well-established Board precedent and supported by substantial evidence.

The Board and courts have consistently held that "individual employee action may constitute concerted activity if it represents either a 'continuation' of earlier concerted activities or a 'logical outgrowth' of concerted activity." *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 238 (5th Cir. 1999), and cases cited therein; *Every Woman's Place*, 282 NLRB 413, 413 (1986), *enforced mem.*, 833 F.2d 1012 (6th Cir. 1987); *Salisbury Hotel*, 283 NLRB 685, 686–87 (1987). An individual employee need not receive express authorization from a group of employees to be engaged in concerted activity; rather, "[i]t is sufficient that the employee intends or contemplates, as an end result, group activity which will also benefit some other employees." *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840 (8th Cir. 2003) (citations omitted); *see also Citizens Inv. Servs.*

Corp. v. NLRB, 430 F.3d 1195, 1198–99 (D.C. Cir. 2005) (citations omitted). The Board has noted, with court approval, that individual telephone calls and other communications directed to third parties that deal with the same subject as earlier protected concerted activity are themselves protected concerted activities. *Every Woman's Place*, 282 NLRB at 413, *enforced mem.* 833 F.2d 1012.

Here, See's contacts with Cintas constituted a logical outgrowth of his fellow employees' earlier concerted activities. As noted by the judge, "[t]he actual charge to Relco for the uniform maintenance service was clearly the most serious unresolved question that grew out of the two meetings management had with employees on this subject." (JA.936.) See's efforts focused directly on this subject. In his phone call to Cintas, he asked the Cintas representative "what *we* are paying for *our* uniforms," and, after getting a price quote, asked the representative to email the information to him. (JA.246) (emphasis added). After receiving an unsatisfactory email response, See sent an email back to the Cintas representative, asking again about uniform cleaning costs.[18] These communications illustrate that, like his fellow employees, See was concerned

[18] See's contacts with Cintas involved the exact same subject matter as Kraber's activity at the March 4 meeting. Therefore, the analysis of whether See's activity involved protected subject matter is the same as that applied to Kraber's activity, discussed *supra* p. 43.

about the cost that *all* employees paid to have their uniforms cleaned.[19] And after receiving an answer, he later shared it with a group of his fellow employees. (JA.257.) Thus, although See's contact with the Cintas representative may have been an individual action, it was clearly concerted under established Board precedent.[20]

2. The Company's Belief Regarding See's Misconduct Is Irrelevant When the Misconduct Did Not Occur

The Company attempts (Br.52–53) to defend See's termination by arguing that it discharged See on the basis of its belief that he engaged in misconduct

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[19] The Board in *Every Woman's Place* distinguished *Allied Erecting Co.*, 270 NLRB 277 (1984), cited by the Company (Br.51), on these same grounds, noting that "[i]n *Allied Erecting*, [the charging party] was the only employee who ever complained to the employer about wages, so the employer would have had no necessary reason to connect his activity to group activity." *Every Woman's Place*, 282 NLRB at 413 n.4.

[20] The Company's attempts (Br.51 n.11) to distinguish *Every Woman's Place* from the instant case are unavailing. The Board in *Every Woman's Place* explicitly renounced any reliance on the fact that the employee's call was placed to a government agency in determining that the call constituted concerted activity. 282 NLRB at 413. And, contrary to the Company's claim, a prior "tacit agreement" is not a prerequisite to finding a single employee's conduct concerted under a "logical outgrowth" theory. In *Every Woman's Place*, for example, there was no evidence of any prior "tacit agreement"; rather, as is the case here, employees had engaged in prior group complaints to the employer and a single employee later raised these complaints in a call to a third party, without any evidence that the employee sought authorization from her fellow employees before placing the telephone call. *See id.* at 413; *see also id.* at 414–15 (Chairman Dotson, dissenting) ("There is also no evidence that the employees in any way chose [the charging party] as their spokesman, directed her to make the contact, or were even aware that she made the contact.")

during his phone calls with Cintas. This argument, however, is foreclosed by the Supreme Court's decision in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), where the Court addressed the same argument by an employer and held that "Section 8(a)(1) is violated if it is shown . . . that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee, was not, in fact guilty of that misconduct." *Id.* at 23. By conceding that See did not, in fact, engage in any misconduct during his protected activity, the Company is precluded from arguing under *Burnup & Sims* that it could rely on its belief that misconduct occurred in deciding to terminate See.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING OVERBROAD NON-DISCLOSURE AGREEMENTS AND BY COERCING EMPLOYEES TO SIGN THE REVISED AGREEMENT

A. Applicable Principles

A workplace rule violates Section 8(a)(1) of the Act when it "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Rules prohibiting salary discussions and contact with third parties are unlawful under this standard. *See NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990); *Double Eagle Hotel & Casino*, 341 NLRB 112, 113–14 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005). A facially unlawful rule

violates the Act even if never enforced. *Id.*; *see also NLRB v. Vought Corp-MLRS Sys. Div.*, 788 F.2d 1378, 1381 (8th Cir. 1986). Further, employer efforts to pressure employees into signing an unlawful agreement are themselves unlawful coercion under Section 8(a)(1) of the Act. *Heck's, Inc.*, 293 NLRB 1111, 1119–20 (1989).

B. Substantial Evidence Supports the Board's Finding that the Company's Nondisclosure Agreements Violated the Act and that the Company Further Violated the Act by Coercing Employees To Sign the Revised Agreement

The Company's initial nondisclosure agreement, which prohibits employees from discussing or sharing any information regarding "compensation, payments, correspondence, job history, reimbursements, and personal records," clearly violates Section 8(a)(1). Employees reading the agreement reasonably would conclude that they were prohibited from discussing with their colleagues a full range of workplace matters. Such a restriction necessarily inhibits employees from engaging in protected activity, and therefore violates the Act. See cases cited *supra* p. 56.

Further, the Board reasonably found that the revised July 2010 version of the nondisclosure agreement also violated Section 8(a)(1). The revised version—like the earlier version—prohibited discussion of salary and personnel information, in violation of the Act. The revised agreement additionally prohibited employees from contacting any "current, former or prospective customer[s], partner[s],

vendor[s], or employee[s] of [the Company] in regard to Information" (JA.778, 915), which further violated the Act. *See Handicabs, Inc. v. NLRB*, 95 F.3d 681, 684–86 (8th Cir. 1996).

Finally, the Board has established that threatening employees with discipline for not signing unlawful employer policies violates the Act. *See Heck's, Inc.*, 293 NLRB 1111, 1119–20 (1989). The Company violated this rule when Crall told employees that they would have to "go upstairs" if they did not sign the agreement.

In its defense, the Company, without citing to the record, claims (Br.53) that it had retracted the changes to the nondisclosure agreement in a memo to employees. However, the Board found that the document referred to by the Company was never properly introduced in evidence, and therefore should not be considered part of the record. (JA.923 n.3, 933.) As there was no other independent evidence establishing the rescission of the rule, the Court should reject the Company's argument.

CONCLUSION

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

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October 2012

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner/Cross-Respondent	)	Nos. 12-2111 & 12-2203
	)	
v.	)	
	)	
RELCO LOCOMOTIVES, INC.	)	
	)	Board Case Nos.
Respondent/Cross-Petitioner	)	18-CA-019175, 18-CA
	)	-019350, 18-CA-019367,
	)	& 18-CA-019499

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,976 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying brief have been scanned for viruses using Symantec Antivirus Corporate Edition, version 11.0.6100.645 (2012 R.9.) According to that program, the brief is free of viruses.

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Dated at Washington, DC
this 24th day of October 2012

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	)	& 18-CA-019499

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I further certify that all persons who have filed appearances are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Dated at Washington, DC
this 24th day of October 2012