

Nos. 12-2247 & 12-2503

**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 threatened, disciplined, and ultimately discharged four employees—Mark Baugher, Charles Newton, Richard Pace, and Nicholas Renfrew—for engaging in union and other protected activity under the National Labor Relations Act.

There are essentially two issues before the Court in this case. The first issue is whether substantial evidence supports the Board’s finding that the Company’s adverse actions against Baugher and Newton were motivated by their union activity and testimony before the Board in violation of Section 8(a)(3), (4) and (1) of the Act. The second rests on whether substantial evidence supports the Board’s conclusion that the Company violated Section 8(a)(1) of the Act by terminating Pace and Renfrew for engaging in concerted activity for mutual aid and protection under Section 7 of the Act. This issue turns on whether substantial evidence supports the Board’s conclusion that Pace and Renfrew engaged in concerted activity protected by Section 7 of the Act. All of these findings are supported by substantial evidence and the Board’s Order should be enforced .

The Board respectfully requests oral argument and submits that 15 minutes per side should be sufficient.

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NATIONAL LABOR RELATIONS BOARD

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v.

RELCO LOCOMOTIVES, INC.

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**ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION
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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 30, 2012, and is reported at 358

NLRB No. 37 (“*Relco II*”). (JA.881–900.)¹ The Board filed its application for enforcement on June 18, 2012. The Company filed its cross-petition for review on June 25, 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.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3), (4), and (1) of the Act by disciplining and terminating Mark Baugher and by threatening, disciplining, and terminating Charles Newton in retaliation for their testimony before the Board and union activity.

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

¹ “JA.” references are to the joint appendix. “Br.” references are to the Company’s brief. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Berbiglia, Inc. v. NLRB, 602 F.2d 839 (8th Cir. 1979).

Dynamics Corp., 296 NLRB 1252 (1989), *enforced sub nom.*, *NLRB v. Vermont, a Div. of Dynamics Corp. of Am.*, 928 F.2d 609 (2d Cir. 1991).

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

NLRB v. Sencore, Inc., 558 F.2d 433 (8th Cir. 1977) (per curiam).

Wilson Trophy Co. v. NLRB, 989 F.2d 1502 (8th Cir. 1993).

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the terminated employees, the Board's Acting General Counsel issued a complaint alleging that the Company committed multiple violations of the Act. An administrative law judge held a hearing on August 9–10, 2011, and on October 19, 2011, the judge issued a decision and a recommended order finding that the Company violated the Act as alleged. (JA.881–900.) The Company filed exceptions, and on April 30, 2012, the Board issued its Decision and Order affirming the findings and recommended order of the administrative law judge. (JA.881.)

I. THE BOARD'S FINDINGS OF FACT

A. Background and Relevant Company Policies

The Company is engaged in the business of leasing, rebuilding, and selling locomotives. (JA.882; 523.) The Company's main production facility is located in Albia, Iowa. (JA.882; 461.) Chief Operations Officer Mark Bachman manages the Albia facility and is assisted by several mid-level managers and foremen. (JA.882; 461.) At its Albia plant, the Company employs approximately 100 production employees. (JA.882; 463.)

The Company maintains a detailed employee handbook that contains various personnel policies. These policies include a progressive disciplinary system and a point-based attendance policy. (JA.371–73, 376–77.) In order to monitor compliance with these policies and track employee performance, the handbook provides for periodic performance reviews. (JA.882; 386–87.) These reviews are broken down into both numerical and qualitative ratings. The numerical portion of the review consists of 26 categories each rated on a 1 (outstanding) to 5 (unacceptable) scale. (JA.882 & nn. 4–5; 39–41.) The qualitative aspects of the review include summaries of strengths and weaknesses, required areas of improvement in performance or behavior (Section C), and goals for the next review period (Section D). (JA.882; 41–42.) The reviews also rate employees' "Growth Potential" at one of three different levels: (1) "Performance [G]rowth":

an employee is learning and developing new job skills and knowledge; (2) “Performance Plateau”: an employee has learned basic job skills and knowledge and is actively working on refining those skills and knowledge; (3) “Performance Peaking”: an employee shows few, if any, signs of improvement or desire to expand knowledge or job skills. (JA.882–83; 4.) Company foremen initially fill out these reviews and then meet with Bachman to discuss their ratings and make changes as necessary. (JA.882; 479–80, 814.) Bachman then decides whether employees will receive raises as a result of the reviews. (JA.882; 814.) At the end of the review process, Operations Manager Dave Crall conducts individual meetings with employees to discuss the reviews. (JA.883; 813–14.)

The Company also maintains policies not contained within the handbook that are relevant to the present case. Foreman Cliff Benboe administers an optional, but encouraged, welding certification test to fabricators. (JA.882; 503–06, 565, 601–03, 748, 758.) Employees who fail their initial welding test are required to wait 30 days to retake the test; if they fail their second test, the waiting period extends to 90 days. The Company, however, does not have any formal deadlines for passing the certification test, and employees can still weld without being certified. (JA.882; 505–06, 609–13, 758, 835.)

The Company also maintains a “blue flag” policy to ensure work-place safety. (JA.884 & n.8; 116, 512, 775, 808–09.) Under this policy, the Company

provides employees with a magnetic blue flag to place outside the locomotive that they are working on. (JA.884 & n.8; 775, 808–09.) After completing their assigned tasks, employees are required to remove their flag. (JA.884 & n.8; 775.) The goal of the policy is to ensure that the Company does not attempt to move locomotives while employees are working on them. (JA.884 & n.8; 775, 808.) Employees who violate the policy are subject to discipline—for an initial violation, typically a verbal warning is issued, while multiple violations can result in a suspension or other disciplinary action. (JA.885 & n.14; 275–76, 294, 827–28.)

B. A Union Organizing Campaign Begins at the Company; Several Employees Are Discharged; Mark Baugher and Charles Newton Testify on Behalf of the Acting General Counsel at an Administrative Hearing Regarding the Discharges

In early 2009, the Brotherhood of Railroad Signalmen (“the Union”) began an organizing campaign at the Company’s Albia facility. (JA.883; 244–45, 574.) The Company became aware of this organizing activity in May 2009 and began opposing the Union shortly thereafter. (JA.883; 246–47.) Between June 2009 and March 2010, the Company terminated four employees. (JA.883; 249–54.) The Board’s Acting General Counsel, acting on charges filed by the Union, issued a complaint, alleging that the Company violated the Act by discharging these employees in retaliation for their union activities. The complaint also alleged that the Company violated the Act by maintaining overbroad non-disclosure

agreements and coercing employees to sign one of the overbroad agreements.

(JA.883; 241.)

On September 14–16, 2010, at a hearing before an administrative law judge regarding these allegations (“*Relco I*”), several employees working for the Company at that time testified as part of the Acting General Counsel’s case against the Company. (JA.883; 122–241.) Fabricator Mark Baugher testified that a discharged employee’s feet were not hanging off the edge of a locomotive, contradicting several company witnesses. (JA.884; 200–03, 251, 578–79.) Fabricator Charles Newton, testified regarding the Company’s non-disclosure agreement and contradicted the Company’s claim that it had distributed a notice rescinding the agreement. (JA.886–87; 200–03, 254–55, 529–30.) In accordance with the Board’s normal administrative procedures, at the hearing, Counsel for the Acting General Counsel gave the Company a copy of Baugher’s and Newton’s affidavits that they had provided to the Board’s Regional Office during its investigation of the allegations, along with a document supporting the Union that was signed by five employees—two employees that the Board found were unlawfully discharged in *Relco I*, a third employee, and Baugher and Newton. (JA.884, 886–87; 91–99, 106–12, 452, 530–32, 578–80.)

C. Baugher Forgets To Wear His Safety Helmet on September 13; Newton Serves as an Observer at the October 20 Board Election; Baugher Violates the Blue Flag Policy on October 26; Baugher Receives a Written Warning and Two-Day Suspension and Is Placed on Probation on November 1

On September 13, shortly before the Board hearing in *Relco I*, the Company assigned Baugher to work on a Herzog B-cab, a type of locomotive commonly repaired and rebuilt by the Company. (JA.884; 514, 856–57.) While Baugher was working, Bachman observed Baugher not wearing his hard hat in violation of company policy. (JA.884 & n.7; 350, 856–57.) Bachman then wrote an email to Crall, asking him to “[g]et a letter of reprimand to Baugher for not wearing his [personal protective equipment] today.” (JA.884; 350.) Crall asked for more detail regarding the violation and Bachman responded that, in light of the upcoming Board hearing, they would talk about it next week. (JA.884; 350.) Nobody spoke to Baugher about the hard-hat violation either that day or at any time during the next 7 weeks. (JA.884; 507–08, 806–07.)

About a month after the September 13 incident, the Board conducted a representation election on October 20. (JA.884; 464.) Newton served as the only election observer on behalf of the Union, and at a pre-election meeting identified himself as such in front of several company managers, including Crall. (JA.887; 526, 534–35.)

On October 26, the Company assigned Baugher and a co-worker to work on a locomotive. (JA.884; 584, 808.) Pursuant to company policy, both employees placed their blue flags on the side of the locomotive. (JA.884; 116, 584, 775.) At the end of his shift, however, Baugher forgot to remove his blue flag in violation of the blue flag policy. (JA.884; 512, 584, 775.) After ensuring that Baugher was no longer working on the locomotive, a Company supervisor removed his blue flag. (JA.884; 810.) The next morning, Baugher spoke to his supervisor, Cliff Benboe, and retrieved his blue flag. (JA.884; 585.)

On November 1, Baugher met with Crall and Benboe to discuss the blue-flag incident. (JA.884; 587.) In addition to the blue-flag violation, the Company also cited Baugher for not wearing a hard hat on September 13, as documented by Bachman's email on that day. (JA.884-85; 114, 350.) The Company further claimed that, in addition to the hard-hat violation noted by Bachman in his September 13 email, Baugher loitered and smoked in a prohibited area on September 13. (JA.885; 114, 810-11.) As a result of these alleged violations of company policy, the Company gave Baugher a written warning, suspended him for 2 days, and placed him on probation. (JA.884; 113, 587-89, 811.) The Company had never disciplined Baugher before November 1. (JA.588.)

D. Newton Is Told To “Be Careful” By His Supervisor and Is Disciplined for Allegedly Walking Around Too Much

On November 29, the Company assigned Newton to construct a rear headlight on a cab. (JA.887; 536.) The work assignment was unclear, so Newton asked his supervisor, Jim Cronin, for further directions. (JA.887; 536.) Cronin also had difficulty understanding the assignment and suggested that Newton should copy the design of the front headlight of the locomotive for the rear headlight of the cab. (JA.887; 536–37.) Newton followed his supervisor’s instructions, and walked back and forth between the cab and locomotive—which were located in different parts of the shop—to complete the job. (JA.887; 536–37.) While Newton was doing this, he walked past Crall twice. (JA.887; 537, 815–16.) The second time Newton walked by him, Crall asked Newton what he was doing, and Newton responded that he was building a headlight. (JA.887; 537, 815–16, 833.)

A few minutes after Crall talked to Newton, Cronin told Newton that he needed to be careful and stop walking around so much. (JA.887; 537.) When Newton responded that he was just walking to check on the locomotive headlight as Cronin had instructed him, Cronin responded, “I know but . . . be careful, they’re watching you.” (JA.887; 537.)

Later that day, a co-worker asked Newton for help bending a remote box, a job that usually requires two people due to the size and weight of the box. (JA.887; 537–38.) In order to help his co-worker, Newton walked approximately

50 feet to get his work gloves. (JA.887; 537–38.) While he was walking to get his work gloves, Benboe approached Newton and told him that he was walking around too much. (JA.887; 539–40.) Newton contested Benboe’s assessment and offered to write down all of his tasks and the steps necessary to complete them on a piece of paper to prove what he had been doing that day. Benboe responded that the discussion was not going to work out very well for Newton. (JA.887; 540.)

When Newton clocked out later that day, Cronin handed him a paper documenting “the verbal warning you received on November 29, 2010, in regards to your lack of productivity.” (JA.887; 100, 540–41.) Newton had never received any discipline or been told to speed up his productivity prior to receiving this warning. (JA.887; 541, 545–46.)

E. Baugher and Newton Receive Negative Performance Reviews

In December, 2010, the Company conducted widespread performance reviews. (JA.883; 44–90, 478–79, 598–99.) These were the first widespread reviews in several years, as the Company had not conducted performance reviews for most employees in 2008 or 2009 due to economic difficulties. (JA.883; 598–99, 646–47, 831, 850, 863–65.)

On December 22, Baugher met with Crall to receive and discuss his performance review. (JA.886; 599, 815.) Baugher’s performance review rated him as “satisfactory-(3)” in 16 areas, “exceeds expectations-(2)” in 1 area, and

“below expectations-(4)” in 9 areas.² (JA.886; 87–88, 600.) The subjective portion of the review listed his weaknesses as “focus on job assignments” and “welding certification,” and additionally stated under Section D (Goals) that he “[n]eeds to certify for welding requirements” and “[n]eeds to keep work area clean and organized.” (JA.886; 88–89.) Under Section C (Required Improvements) the Company noted that Baugher received a suspension for his job performance but did not list any mandatory future improvements. (JA.886; 89.) During the ensuing conversation about the review, Crall spoke with Baugher about his welding certification. (JA.886; 90, 600.) Baugher told Crall that he would try to get his welding certification after the holidays. (JA.886; 90, 601.) Baugher also asked Crall when his probation would end, and Crall told him that it “would be determined by his performance, self improvement[, and] attitude.” (JA.886; 90.) Crall also noted in his written notes that Baugher’s “attitude . . . needed to improve” and that Baugher would not be receiving a raise. (JA.886; 90.) The review listed Baugher’s “Growth Potential” as “Performance Plateau,” indicating that the Company still felt Baugher’s performance was improving. (JA.889; 41, 87–88.)

² The judge correctly listed the 9 areas where Baugher was performing “below expectations,” but mistakenly stated that there were only 8 areas. (JA.886; 87.)

Newton also met with Crall on December 22 to discuss his performance review. (JA.887; 542, 815.) Newton's review indicated that his performance was "satisfactory-(3)" in 22 areas, "below expectations-(4)" in 3 areas, and "unacceptable-(5)" in attendance. (JA.887; 83–84, 114.) The review further stated that Newton's strength was his "knowledge of tasks" and that his sole weakness was "speed." (JA.887; 84.) Under Section D (Goals) the Company listed "[a]ttendance," "[w]eld test," and "[s]tay on task." The Company did not list anything in Section C (Required Improvements). (JA.887; 85.) Crall's written notes from the meeting mention Newton's productivity issues, that he needed to get proper tools, that he had a bad attitude, and that he needed to get his welding certification in the first quarter of the year. (JA.887; 86.) Crall, however, did not mention the purported welding certification deadline to Newton during the meeting. (JA.887 & n.23, 888 n.24; 543–45.) While going over the review, Newton contested his attendance points; Crall later confirmed that Newton was correct and that Newton's attendance rate was not, in fact, "unacceptable." (JA.887; 542–43, 834.) Newton also contested claims that he had a bad attitude and welded poorly. Crall was unable to provide any examples of these alleged deficiencies. (JA.887–88, 888 n.24; 543–45.)

F. Employees Suspect that Their Co-Worker Chris Kendall Is Terminated; Richard Pace, Nicholas Renfrew, and Other Employees Engage in Group Discussions Regarding Kendall's Purported Termination and Find Out Later that Day that Kendall Was Not Terminated; Pace and Renfrew Are Terminated the Next Day for Spreading "Malicious Rumors"

On December 22, 2010, the same day that Baugher and Newton received their performance reviews, employees became concerned that their co-worker, Chris Kendall, had been terminated. (JA.890; 673–74, 705–06.) During the employees' morning safety meeting, electrician Richard Pace noticed that Kendall was absent. (JA.890; 673–74.) After the meeting, he overheard two employees talking about Kendall and claiming that he had been terminated. (JA.890; 674.) Pace stopped the employees and asked, "Do you mean Chris Kendall?" (JA.890; 674.) One of the employees responded "yes." (JA.890; 674.) Pace was "kind of shocked" by the discussion because Kendall "seemed like a good employee and did quite a bit of stuff around the shop." (JA.890; 674.)

After this initial conversation, Pace walked to his work station. (JA.890; 674–75.) Once he arrived, he saw a third co-worker and asked him, "What's this I hear about Chris?" (JA.890; 675.) The co-worker told Pace that he had heard from another co-worker that Kendall had been fired, and that he thought it was due to Kendall's absence the previous day when he had played Santa Claus at his child's school. (JA.890; 675.)

While these conversations were ongoing, electrician Nicholas Renfrew overheard Pace and another employee discussing Kendall. (JA.890; 706.) The other employee told Renfrew that Kendall was “fired for playing Santa Claus.” (JA.890; 706.) This surprised Renfrew because Kendall was a good employee and served as a “go-to man” at the plant. (JA.890; 707, 796–98.) After hearing that Kendall had been terminated, Renfrew and Pace discussed Kendall’s termination and expressed the shared sentiment that “if they fired Chris Kendall that they would fire anybody for anything.” (JA.890; 677, 707.)

Employees continued to discuss Kendall’s termination throughout the morning and during the noon lunch break. (JA.890; 651–54, 676, 689, 708–09.) The employees collectively decided that it was wrong that Kendall had been fired and thought that Kendall’s termination might be a sign that the Company was going to implement larger layoffs due to the expiration of a major contract with Burlington Northern Santa Fe Railway (“BNSF”). (JA.890; 677–78.)

Meanwhile, Kendall, whom the Company had not fired, was working over in the paint-blast booth—a building that is isolated from the rest of the plant. (JA.890; 650.) He received text messages shortly before 9:00 a.m. from two employees asking if he had been terminated. (JA.890; 650–51.) Kendall sent reply messages to both employees during his 9:00 a.m. work break and told them that he had not been terminated. (JA.890; 651–52.) During his lunch break, Pace

also sent a text message to Kendall asking him if he had been terminated. (JA.890; 652, 678.) Kendall responded to Pace's text during his 3:00 p.m. break and told Pace that he had not been fired. (JA.891; 679.) Sometime after lunch, another employee also approached Pace and told him the same information. (JA.891; 679.) Renfrew also found out shortly after lunch from a maintenance employee that Kendall had not been discharged. (JA.891; 707–08.) After discovering that Kendall was still employed by the Company, Renfrew told other employees that Kendall had not been fired and was working the paint-blast booth. (JA.891; 708–10.)

At the end of his shift, Kendall, who was upset about his fellow employees' discussions regarding his termination, met with Crall to discuss his performance review. (JA.891; 654–55, 820.) Kendall opened the review by telling Crall that “[i]f you’re going to fire me, let’s get it over with.” (JA.891; 667, 820.) Crall responded that, to his knowledge, Kendall was not going to get fired and proceeded to give Kendall his performance review. (JA.891; 654–55, 667–68, 670–71, 820.) Kendall received a positive performance review and, as a result of that review, he received a raise. (JA.891; 654–55, 670–71.) After receiving his raise and being assured by Crall that he was not terminated, Kendall calmed down and went home. (JA.891; 654–55, 667–68.)

Later that night, Bachman met with Crall and Dalman to discuss the conversations about Kendall's termination. (JA.891; 794–95, 820.) As a result of the meeting, Bachman decided to investigate the employees' discussions. (JA.891; 794–95.) Shortly after the meeting, Dalman called Kendall and told him to save the text messages on his phone so that Bachman could review them the next morning. (JA.891; 655, 795.)

When Kendall arrived at work the next morning, he met with Bachman, Crall, and Benboe to discuss the termination reports from the previous day. (JA.891; 656–58, 822.) Kendall reluctantly showed Bachman the text message from Pace and mentioned that Renfrew had been talking about his "termination" with other employees. (JA.891 & n.36; 655–56.) Bachman told Kendall that he was doing a good job and assured him that he was not going to be terminated. Bachman also told Kendall that "he was going to take care of the rumor mill." (JA.891; 658–59, 822.)

Later that morning, Bachman held separate meetings with Pace and Renfrew. (JA.891; 680–81, 711–12.) He informed them that they were terminated for spreading "malicious rumors." (JA.891–92; 682–83, 711–12.) Bachman handed each employee a nearly identical termination notice citing violations of the Company's "Standard[s] of Conduct[]" as the reason for their respective terminations. (JA.891–92; 43, 102, 683–85, 712–15.)

F. Baugher and Newton Resume Working After the Holiday Break; Neither Employee Receives any Further Criticism of His Performance; Baugher and Newton Are Terminated on the Same Day

After a brief holiday break, Baugher and Newton resumed work in January, 2011. (JA.886, 888; 524, 603.) Shortly thereafter, Baugher took the welding certification test with Benboe, as he had discussed with Crall during his performance review. Baugher did not pass the test, and was unable to find a time to schedule a new test with Benboe. (JA.886; 603–04.) Despite failing the test, however, the Company continued to assign Baugher to jobs that required welding. (JA.886; 609–10.) In between his performance review and his termination, no supervisors talked with Baugher about his welding certification or any performance deficiencies. (JA.886; 612–13, 766, 837.)

When Newton resumed working after the holidays, the Company assigned him to a new project refurbishing passenger rail cars. (JA.888; 524.) This project did not involve any welding, and, like Baugher, Newton did not receive any negative criticism or follow-up on his December performance review. (JA.888; 524, 549.) In fact, the only feedback that Newton received between his performance review and his termination was a positive review on some electrical work that he had performed for foreman Dragan Jankovic. (JA.888; 549, 568–69.)

On March 11, the Company terminated Baugher and Newton. (JA.886, 888; 551–53, 610.) Benboe first called Baugher to the company office, where Crall

informed Baugher that he was being terminated for not improving on the deficiencies listed in his performance review.³ (JA.886; 117, 497, 610, 817.) As Baugher was leaving the office, he asked Benboe if he had any issues with his performance. Benboe replied no, and stated, “I didn’t know they [were] going to do this myself until about a half hour ago.” (JA.886; 613, 767, 837.)

Later that day, supervisor Cronin told Newton to go to Crall’s office. (JA.888; 551–52.) Crall told Newton that he was being terminated for not improving his productivity after being put on probation. (JA.888; 552, 818–19.) Prior to this, Newton had never been told that he was on probation. (JA.888 n.26; 553, 568.) Newton contested his termination, and claimed that he had been productive. (JA.888; 552.) Crall was unable to provide any examples of Newton’s productivity issues and summarily terminated him. (JA.888; 101, 552, 837.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Pearce and Members Griffin and Block) found that the Company violated Section 8(a)(3), (4) and (1) (29 U.S.C. § 158(a)(3), (4) and (1)) of the Act by placing Baugher on probation and giving him a written warning and 2-day suspension on November 1 for conduct allegedly occurring on September 13 and October 26; issuing Baugher an unfavorable

³ Baugher’s termination notice incorrectly states that he was placed on probation on December 22. (JA.101.) As the judge noted, the credited evidence establishes that the Company placed Baugher on probation on November 1. (JA.893 n.41; 113, 513.)

performance review on December 22; and terminating Baugher on March 11, 2011. The Board also found that the Company violated the same Section of the Act by issuing Newton a verbal warning on November 29; issuing him an unfavorable performance evaluation and placing him on probation on December 22; and terminating him on March 11. The Board additionally found that the Company violated Section 8(a)(1) of the Act by threatening Newton on November 29. The Board finally found that the Company violated Section 8(a)(1) of the Act by terminating Pace and Renfrew on December 23 for engaging in protected concerted activity.

The Board's Order requires the Company to cease and desist from discharging, disciplining, or otherwise discriminating against employees because of their union activity, testimony before the Board, and/or concerted activities protected by Section 7 of the Act; threatening employees to be careful because they support a union or give testimony under the Act; giving employees unfavorable performance reviews because they support the union or gave testimony under the Act; and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act. Affirmatively, the Board's Order requires the Company to offer reinstatement to and make whole Baugher, Newton, Pace, and Renfrew; remove from its records any references to any unlawful discipline and performance reviews issued to

Baughner, Newton, Pace, and Renfrew; provide appropriate records to the Board in order to allow for the calculation of back pay; and post a remedial notice.

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the discipline and discharges of Baughner and Newton violated the Act. The Company issued unprecedented discipline to Baughner, based partially on fabricated misconduct, less than two months after his testimony in *Relco I*. Less than one month later, the Company issued unprecedented discipline to Newton for purportedly being unproductive—without having any idea what his work assignments were. In December, the Company issued both employees unfavorable performance reviews that unlawfully relied on their prior unlawful discipline.

Less than three months after the unlawful performance reviews, the Company terminated Baughner and Newton on the same day. These terminations violated the Act by virtue of their reliance on the previously-unlawful discipline. Even discounting this reliance, ample evidence supports the Board's finding that the Company was unlawfully motivated. It terminated the employees for failing to obtain a job "requirement"—a welding certification—that was not required of any other employees. The Company never informed them that they had to improve their performance or face termination, and between their performance reviews and terminations, neither employee received any negative feedback. Finally, the

Company's own records show it terminated Baugher and Renfrew while retaining other employees who performed worse. This evidence demonstrates the Company's pretext in its purported justification for the discharges and provides substantial evidence to support the Board's finding that the employees' terminations, along with the previously unlawful discipline and performance reviews, violated Section 8(a)(3), (4), and (1) of the Act.

Substantial evidence also supports the Board's finding that the Company violated Section 8(a)(1) of the Act by terminating Pace and Renfrew for engaging in discussions regarding the possible termination of their co-worker because the discussions were protected concerted activity. The subject matter of these discussions fell within the protection of Section 7 of the Act, because Kendall's termination implicated the mutual welfare of all employees. These conversations also constituted concerted activity under the Act, because Pace, Renfrew, and other employees engaged in multiple discussions regarding Kendall's termination over several hours, and the conversations were more than "mere griping," as employees discussed not only the cause of Kendall's termination, but also the implications that the termination might have on their employment. These conversations also led Pace to take further actions, as he texted Kendall to discover whether he actually had been terminated. It was only after employees found out that Kendall had not in fact been terminated that the concerted activity ceased. Therefore, these

conversations constituted concerted activity for mutual aid and protection under Section 7 of the Act.

The Company undisputedly terminated both employees for engaging in these protected conversations. The Company's effort to paint these conversations as unprotected and a violation of the Company's policy is unavailing, as the Company's personnel policy cannot trump the employees' statutory rights and the conversations themselves never lost of protection under the Act.

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. Section 10(e) of the Act (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 other words, the Board's finding 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, “the 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), (4), AND (1) OF THE ACT BY DISCIPLINING AND TERMINATING BAUGHER AND THREATENING, DISCIPLINING, AND TERMINATING NEWTON BECAUSE OF THEIR UNION ACTIVITIES AND TESTIMONY BEFORE THE BOARD

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 disciplines an employee because of the employee’s union activity.⁴ *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400–03 (1983);

⁴ 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).

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). Section 8(a)(4) and (1) (29 U.S.C. § 158(a)(4) and (1)) of the Act prohibits employee discipline that is motivated by hostility toward employee participation in proceedings before the Board. *See, e.g., Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 845 & n.9 (8th Cir. 1979).

The critical question in most cases under this Section of the Act 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). Under the Board’s *Wright Line* analysis, 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 the Board to accept the employer’s affirmative defense that the employee would have been disciplined even in the absence of protected union activity. *Transp. Mgmt.*, 462 U.S. 397, 401–03; *Wright Line*, 251 NLRB at 1089; *NLRB v. Delta Gas, Inc., a Subsidiary of La. Energy & Dev. Corp.*, 840 F.2d 309, 311 (5th Cir. 1988) (applying *Wright Line* analysis to Section 8(a)(4) allegations). In other words, as described by this Court, “[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 (citation omitted) (emphasis in original).

An employer's reliance on previously unlawful discipline as a justification for disputed discipline necessarily taints the employer's motivation, as "the justification" for the employer's discipline rests, at least partially, on the unlawful motivation inherent in the previously unlawful disciplinary action. *See Opportunity Homes, Inc. v. NLRB*, 101 F.3d 1515, 1521 (6th Cir. 1996), *overruled on other grounds as recognized in NLRB v. Webcor Packing, Inc.*, 118 F.3d 1115 (6th Cir. 1997); *see also NLRB v. Vought Corp.-MLRS Sys. Div.*, 788 F.2d 1378, 1383–84 (8th Cir. 1986) (determination of motivation unnecessary where decision to discharge employee rested on previously-unlawful discipline; instead, lawfulness of discipline turned on whether employee lost the protection of the Act by using "intemperate language"). Therefore, where it can be established that the employer relied on previously unlawful discipline in taking adverse action against an employee, unlawful animus is established and the burden is on the employer to show that it would have taken the same action even in the absence of the previously unlawful discipline. *See Dynamics Corp.*, 296 NLRB 1252, 1253–54 (1989), *enforced sub nom., NLRB v. Fermont, a Div. of Dynamics Corp. of Am.*, 928 F.2d 609 (2d Cir. 1991); *see also Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 31–32 (D.C. Cir. 1998).

Motive is a question of fact, and the Board may rely on circumstantial evidence to find that 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 969; *Berbiglia, Inc.*, 602 F.2d at 844; suspicious timing of discipline, *Lemon Drop Inn, Inc. v. NLRB*, 752 F.2d 323, 326 (8th Cir. 1985) (per curiam); 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. v. NLRB*, 881 F.2d 542, 545–46 (8th Cir. 1989).

B. The Company's Disciplinary Actions Against Baugher Leading up to His Discharge Were Motivated by His Union Activity and His Testimony Before the Board and Thus Violated the Act

1. Substantial evidence supports the Board's finding that the discipline issued to Baugher on November 1 violated the Act

The Board properly concluded that the Company's November 1 decision to issue Baugher a written warning and place him on probation and suspension, purportedly for violating numerous company policies on September 13 and October 26, was unlawfully motivated and violated the Act. Baugher engaged in protected activity by signing a statement on behalf of the Union and testifying on behalf of the Acting General Counsel in *Relco I*.⁵ The Company had knowledge of

⁵ The Company's argument (Br.24–25) that the employee testimony in *Relco I* is inadmissible hearsay should be rejected. As the judge explained (JA.738–39), he

these protected activities, as Bachman had an opportunity to listen to Baugher's testimony, review his affidavit, and view the statement that Baugher signed to support the Union.⁶

Substantial evidence also supports the existence of animus towards Baugher's protected activities. As the Board noted, Baugher's discipline occurred "less than 2 months after learning of his union and protected activities, and less than 2 weeks after the [October 20] union election was held." (JA.894.) Such suspicious timing supports a finding of unlawful motivation.⁷ *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983) (per curiam); *Novartis Nutrition Corp.*, 331 NLRB 1519, 1525 (2000) (noting that discipline 2 months after protected activity was "highly suspicious"), *enforced mem.*, 23 F. App'x 1, 3 (D.C. Cir.

admitted this testimony solely for the purpose of showing that the Company was on notice that Baugher and Pace testified favorably to the General Counsel's case-in-chief. Contrary to the Company's contentions, this notice argument does not depend on underlying veracity of the employees' testimony, but rather on the fact that they testified and that the Company, through Bachman, was on notice of this testimony. *See* 2 MCCORMICK ON EVIDENCE § 249 (6th ed. 2009).

⁶ The Company's attempts (Br.9–10) to equate Baugher's (and Newton's) actions to the other employees who testified are unavailing. Baugher and Newton, unlike the other three employees who testified, signed statements supporting the Union *and* gave favorable testimony to the General Counsel at the hearing in *Relco I*.

⁷ The Company completely mischaracterizes (Br.33–34) the holding in *Medic One, Inc.*, 331 NLRB 464 (2000), in attempting to argue that the suspect timing in this case does not support a finding of animus. In *Medic One*, the administrative law judge found that the alleged discriminatee had not engaged in any union activity, and on that basis dismissed the complaint without deciding whether the timing of the discipline supported a finding of animus. 331 NLRB at 476.

2001); *Equitable Resources Exploration*, 307 NLRB 730, 731 (1992), *enforced mem.*, 989 F.2d 492 (4th Cir. 1993). In addition, the Company offered shifting reasons for the discipline that it issued to Baugher. (JA.894.) As discussed below, the existence of shifting justifications for disciplinary action both supports a finding of unlawful animus and refutes the Company's affirmative defense.

The Company claims that it had valid reasons to discipline Baugher on November 1—namely, his failure to wear a helmet, smoking in a confined area, and loitering on September 13, along with a violation of the blue-flag policy on October 26—that have nothing to do with his support for the Union and testimony before the Board. The Board, however, reasonably found that despite these purported reasons, the Company failed to show that it would have disciplined Baugher absent his union and protected activity.⁸

⁸ The Company's attacks (Br.26–31) on the administrative law judge's credibility determinations as they relate to Baugher and other witnesses are unavailing. This Court has indicated that where a judge exhaustively examines the record and makes reasoned credibility determinations based on witness demeanor and record evidence, those findings will not be disturbed. *Beird-Poulan Div., Emerson Elec. Co. v. NLRB*, 649 F.2d 589, 592–93 (8th Cir. 1981). The judge's decision in this case falls squarely within this precedent. Here, the judge fully articulated the reasons underlying his credibility determinations—some of which favored the General Counsel's witnesses, while others favored the Company's witnesses—after painstakingly considering each witness's demeanor, testimony, and the accompanying documentary evidence. (JA.893; 882 n.3, 884 n.7, 884 n.9, 885 n.12, 885 n.14, 886 n.17, 888 n.26, 890 n.35, 891 n.36, 892–93, 893 n.39, 893 n.40, 894, 894 n.42, 894 n.45, 896, 898 n.50).

As the Board explained, the Company significantly shifted its position as to what, if any, misconduct Baugher actually engaged in on September 13. The Company's initial, credited position regarding the misconduct cited Baugher's failure to wear his "PPE" as the sole basis of his misconduct.⁹ (JA.350.) However, when the Company actually issued Baugher his discipline for this conduct 7 weeks later, the Company's account of his misconduct suddenly included not only the PPE violation, but also violations for smoking in a confined area and loitering on duty.¹⁰ (JA.894; 114, 588–89.) On this basis, the Board reasonably found that the Company "embellished its account of Baugher's misconduct on September 13 to justify the written warning, suspension, and probation it imposed." (JA.894.) As this Court has specifically noted, where an employer adds justifications after the misconduct has in fact occurred, the Board can use that additional, after-the-fact reasoning as a factor in inferring unlawful animus. *NLRB v. Rockline Indus., Inc.*,

⁹ The Company attempts to refute this conclusion (Br.32–33) by relying on testimony that the administrative law judge logically discredited after exhaustively considering all the evidence surrounding Baugher's conduct on September 13. Specifically, the judge found Bachman's email to be the most credible evidence of what happened on September 13 because it was prepared on the day of the incident and before the Company became aware that Baugher was testifying at the hearing in *Relco I.* (JA.884 n.7.)

¹⁰ Contrary to the Company's contentions (Br.32–33), these after-the-fact justifications represent more than simply the "additional details" on the hard-hat violation requested by Crall. Rather, they are independent violations, not noted in the original document regarding Baugher's misconduct, that were added *only after* the Company became aware of his union activity and testimony before the Board.

412 F.3d 962, 969–70 (8th Cir. 2005). Moreover, it is well-established by both courts and the Board that an employer cannot rely on shifting justifications to rebut a finding of unlawful motivation. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 784–85 (6th Cir. 2002) (finding that even when one possible basis for layoffs could be credited, shifting reasons for layoffs supported a finding of unlawful motivation); *Desert Toyota*, 346 NLRB 118, 120 (2005).

Beyond the Company’s shifting justifications, other factors also undermine the Company’s purported justification for Baugher’s discipline. As the judge noted, “the credibility of [the Company’s] claims about Baugher’s misconduct on September 13 is undermined by the fact that no one in management bothered to speak to Baugher about the alleged misconduct” for 7 weeks. (JA.894.) The Company claims that its delay can be explained by the intervening October 20 union election and more specifically by instructions from its attorneys to delay any discipline or raises until after the election. (JA.828.) The Board, however, considered and properly rejected this claim for two reasons. First, between Baugher’s alleged misconduct and the election, the Company, contrary to its contentions (Br.19–20), informally reprimanded at least one employee for misconduct.¹¹ (JA.894 n.45; 36–38, 829–30.) Second, the Board noted that it

¹¹ The Company also gave at least one employee a wage increase, contrary to instructions from its attorney (JA.828), during the same time period that Baugher engaged in misconduct (JA.55).

“defies logic that [the Company] would adopt an anything goes attitude towards safety violations (or smoking violations that could result in penalties) in the workplace” and fail to even talk to Baugher in order to correct violations that exposed the Company to potential monetary liability.¹² (JA.894 n.45.) This inexplicable delay, combined with the Company’s after-the-fact justifications, provides substantial evidence to support the Board’s finding that the Company was unlawfully motivated when it warned, suspended, and placed Baugher on probation. Therefore, those actions violated Section 8(a)(3), (4), and (1) of the Act. *See, e.g., Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 100 (D.C. Cir. 2000) (1-month delay between alleged misconduct and discipline); *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 984 (7th Cir. 2002) (3-week delay).

2. Substantial evidence supports the Board’s finding that Baugher’s negative performance review violated the Act

Substantial evidence also supports the Board’s conclusion that Baugher’s negative performance review on December 22 was unlawful. As discussed *supra*

¹² The Board also noted that although the Company demonstrated a consistent history of disciplining employees for violating the blue-flag policy, Baugher was the only employee ever to receive formal discipline for failing to wear a hard hat and (purportedly) smoking in a prohibited area. (JA.888; 269–348.) The Company’s apparent failure to consistently enforce its smoking and hard-hat policy further supports a finding of unlawful animus. *SCA Tissue N. Am. LLC v. NLRB*, 371 F.3d 983, 989 (7th Cir. 2004) (unprecedented enforcement of existing “no jewelry” rule against union supporter supports unlawful animus finding); *Nortech Waste*, 336 NLRB 554, 555 (2001).

pp. 26–27, disciplinary actions that are based on previously unlawful discipline violate the Act. Here, the Company’s evaluation of Baugher states that he “received suspension for [his] job performance,” that he was “on probation for poor job performance,” and that he was denied a raise because of this probation.

(JA.89.) As the Board noted, these references explicitly tie Baugher’s performance review to the prior unlawful discipline and establish that this unlawful discipline served as a “significant predicate for giving Baugher a negative performance review.” (JA.895); see cases cited *supra* pp. 26–27. Therefore, Baugher’s negative performance review on December 22 violates Section 8(a)(3), (4), and (1) of the Act.

C. The Company’s Disciplinary Actions Against Newton Leading Up to His Discharge Were Motivated by His Union Activity and Testimony Before the Board and Thus Violated the Act

1. Substantial evidence supports the Board’s conclusion that the Company’s verbal warning to Newton on November 29 violated the Act

On November 29, while Newton was rebuilding a headlight and working on several other projects, the Company issued Newton a verbal warning that the Board correctly found was unlawfully motivated by his union and protected activity. As in the case of Baugher, there is no dispute that Newton engaged in protected activity under the Act and that the Company had knowledge of this activity. Newton served as an observer at the union election on October 20, and

was seen in that capacity by several management representatives. Newton also testified at the administrative hearing in *Relco I*, and Bachman and the Company's attorney both had opportunities to witness this testimony and review Newton's affidavit to the Board. The Company also reviewed a statement expressing support for the Union that was signed by Newton and Baugher.

Substantial evidence also supports the Board's finding that the Company's discipline against Newton was motivated by animus towards his union and protected activity. The suspect timing of Newton's discipline supports this finding, as the discipline occurred roughly 1 month after Newton served as an observer at the union election and a little over 3 months after he testified at the administrative hearing in *Relco I*. See *TLC Lines, Inc. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983) (per curiam); *Novartis Nutrition Corp.*, 331 NLRB 1519, 1525 (2000), *enforced mem.*, 23 F. App'x 1, 3 (D.C. Cir. 2001). Shortly before Newton was disciplined, the Company violated Section 8(a)(1) of the Act by unlawfully threatening him, specifically stating that he should "be careful" because "the Company was watching him."¹³ Further, the unlawful discipline issued to his co-worker Baugher

¹³ The Board's finding that this warning violated Section 8(a)(1) is itself supported by substantial evidence. It is well-established that the test for determining whether a threat to an employee violates this Section of the Act is whether the statement has a reasonable tendency to interfere with employees' Section 7 activity in light of all the circumstances, "tak[ing] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be

earlier in November for engaging in similar protected activities— signing a statement on behalf of the Union and testifying favorably to the General Counsel at the administrative hearing in *Relco I*—also supports the Company’s animus towards Newton’s protected activities. *See, e.g., NLRB v. Big Three Indus. Gas & Equip. Co.*, 579 F.2d 304, 315 (5th Cir. 1978) (prior 8(a)(3) and (1) violations support finding of unlawful motivation).

The Company attempts to rebut this evidence by claiming that it was Newton’s productivity issues on November 29, and not his protected activities, that led to the verbal warning. As the Board noted, however, this justification is fundamentally flawed because the Company failed to investigate Newton’s supposed misconduct. (JA.896.)

It is well-established in this Court that a failure to investigate alleged misconduct before issuing discipline undermines an employer’s purported justification for disciplinary actions. *See, e.g., NLRB v. Rockline Indus., Inc.*, 412

more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *see also NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1257–58 (8th Cir. 1982). The Board has previously found, with court approval, that warnings to employees to “be careful” are unlawful if issued in the context of Section 7 activity. *Gaetano & Assocs., Inc.*, 344 NLRB 531, 534 (2005), *enforced*, 183 F. App’x 17 (2d Cir. 2006). Here, although Newton was not engaged in Section 7 activity at the time he received the warning from Cronin, the Company’s heightened surveillance of Newton and other employees after the hearing and election (JA.506) supports the logical inference “that Newton was being targeted because of his recent union activities and testimony as a witness in [*Relco I*].” (JA.895.) Thus, this statement would be reasonably interpreted to interfere with employee’s Section 7 rights and the Board’s finding should be sustained.

F.3d 962, 968–70 (8th Cir. 2005); *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 845 (8th Cir. 1979). Here, the Company had two opportunities to investigate Newton’s work activities on November 29 and failed to do so. When Crall initially witnessed Newton walking around the shop, he did not ask Newton or his immediate supervisor, Cronin, whether Newton’s work assignment required him to walk around the shop, as it in fact did. Then, later, when Benboe confronted Newton about his supposedly unnecessary forays around the shop floor, Newton not only explained why his current project required him to walk across the shop floor, but offered to show Benboe all the tasks he had been assigned that day and the steps required to complete those tasks.¹⁴ Instead of accepting Newton’s reasonable offer, however, Benboe told Newton that “the discussion wasn’t going very well, it wouldn’t work out very well for me and we better drop it.” (JA.540.) He then walked away, without conducting any further investigation.

This failure to investigate supports a finding that the Company’s true motivation for disciplining Newton was not his “productivity” but rather his protected activities—particularly where, as here, Newton could have provided a reasonable explanation for his observed movement around the shop floor. While

¹⁴ The Company reliance (Br.14) on its records from that day showing that Newton took 5 hours to complete a series of jobs that only should have taken 2 hours is misplaced as these records are inaccurate. (JA.349.) For example, they do not list the headlight project that Newton undisputedly worked on for part of the morning.

this failure to investigate Newton's claims might be explainable if, perhaps, he was a recidivist employee with a record of dishonesty, the opposite was the case: the November 29 was his first formal discipline at the Company.¹⁵ *Berbiglia, Inc.*, 602 F.2d at 845 (finding that employee's good work record, combined with employer's "superficial" investigation, weak evidence of misconduct, and union animus, established that employee's termination was unlawful).

The Company's failure to investigate purported misconduct by a previously undisciplined employee is even more suspect in light of its failure to call Cronin as a witness. Cronin, as Newton's direct supervisor and the individual who gave Newton his work assignments on November 29, was the best-positioned management representative to refute Newton's testimony regarding his work assignments that day and his need to walk around the plant. Despite this fact, however, the Company failed to call Cronin. In the absence of any evidence that Cronin was unavailable for the Company to call as a witness, the Board reasonably

¹⁵ The Board also noted that the Company has a very limited history of disciplining employees for productivity issues prior to Newton's verbal warning on November 29. (JA.888.) Prior to this warning, the Company had only given one other warning that even arguably implicated productivity: a 2008 warning to an employee for horseplay. (JA.286–87). Even this warning did not solely implicate productivity, as the Company cited to it as a violation of both the safety and productivity policies. Further, although the Company did eventually discipline two employees in March 2011 for productivity reasons, this discipline occurred after most of the relevant events at issue in this case. (JA.269, 281.) Thus, Newton's discipline for productivity was at the very least uncommon, and could be considered unprecedented, at the time it was issued.

drew an adverse inference (JA.896) against the Company and inferred that Cronin's testimony would not have supported the Company's account of the events on November 29.¹⁶ See *Rockingham Mach.-Lunex Co. v. NLRB*, 665 F.2d 303, 304–05 (8th Cir. 1981); *Int'l Automated Machs.*, 285 NLRB 1122, 1122–23 (1987), *enforced mem.*, 861 F.2d 720 (6th Cir. 1988); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) (“The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.”).

Thus, on the basis of the Company's failure to investigate and the supporting adverse inference drawn against the Company, substantial evidence supports the Board's finding that the Company's verbal warning to Newton on November 29 violated the Act.

2. Substantial evidence supports the Board's conclusion that Newton's December 22 performance review and probation violated the Act

The Board's conclusion that Newton's negative performance review and probation violated the Act is also supported by substantial evidence. As discussed *supra* pp. 26–27, reliance on previously unlawful discipline unlawfully taints any future discipline. Here, the Company premised Newton's negative performance review on the previously unlawful verbal warning that it issued to him on

¹⁶ There is no record evidence to support the Company's contention (Br.40) that Cronin was unavailable to testify because of illness.

November 29. Specifically, section E of Newton’s review criticizes Newton for not staying on task and walking around the shop—the exact same conduct that led to his initial warning. And Crall’s notes from the review indicate that he specifically relied on Newton’s November 29 write-up as part of the review. (JA. 85–86.) By virtue of this reliance on unlawful discipline, the Company’s negative performance review of Newton violated the Act.

The Company’s decision to place Newton on probation on December 22 also violates the Act. The credited evidence establishes that the Company never informed Newton of his probationary status until he was terminated roughly 3 months later. Crall’s notes from his meeting with Newton about the review and the review itself mention nothing about Newton’s probation. Newton testified, without contradiction, that Crall never discussed his probation at the time of the review. (JA.545.) In fact, there is no documentation of his probation until his termination notice on March 11, which mentions for the first time that Newton was placed on probation on December 22. As the judge aptly stated, “[t]he assertion in Newton’s termination letter that Newton was placed on probation on December 22 therefore does not ring true, and in fact suggests that the probation was imposed without Newton’s knowledge at a later date to serve as a springboard for Newton’s

subsequent discharge.”¹⁷ (JA.896.) This failure to mention Newton’s probation to him at the time it occurred, or any time during the next 3 months leading up to his termination, provides ample support for the Board’s finding that his probation was unlawfully motivated and thus violated Section 8(a)(3), (4), and (1) of the Act.

D. Substantial Evidence Supports the Board’s Finding that the Company’s Discharges of Baugher and Newton on March 11 Violated the Act

On March 11, the Company abruptly fired Baugher and Newton, purportedly for not receiving their welding certifications or otherwise improving their performance. The Board’s finding that Baugher’s and Newton’s terminations on March 11 violated the Act is further supported by substantial evidence. As in the case of their negative performance reviews on December 22, the Company relied on previously unlawful discipline in making its decision to terminate them.

Baugher’s and Newton’s virtually identical termination notices explicitly reference both their unlawful performance reviews and the unlawful decisions to place them on probation as justifications for their terminations. (JA.101, 117.) Such reliance, as discussed *supra* p. 26–27, necessarily taints the terminations, and the Company has proffered no evidence that the decision to terminate Baugher or Newton would have occurred absent reliance on the prior unlawful discipline. Thus, on this basis alone, the Company’s discharge of the employees violates the Act.

¹⁷ In fact, the record demonstrates that the only two employees purportedly placed on probation between 2008 and 2010 were Baugher and Newton. (JA.462–63.)

Even if the Company's undisputed reliance on previously unlawful discipline is discounted, independent evidence exists to support the Board's finding that the discharges were unlawfully motivated. The Company claims (Br.4, 17–18) that because Baugher and Newton never received their “required” welding certifications, its decision to terminate them is justified. This justification, however, is completely pretextual, as the Board reasonably found that the Company's “requirement” that employees obtain their welding certification in fact did not exist.

The Board explicitly found that the Company had no general requirement that fabricators, like Baugher and Newton, become certified welders. (JA.882; 505–06, 758.) Although the absence of a general requirement for all fabricators does not necessarily preclude the Company from giving Baugher and Newton specific, neutrally motivated instructions to obtain their certifications, the Board found that the Company never communicated any such requirement to the employees. The employee's written evaluations list “welding certification” as a “goal,” not a requirement.¹⁸ Additionally, during the review process, the Company never orally communicated any specific deadlines to the employees.¹⁹

¹⁸ The Company's argument (Br.17–18), that it communicated an implied requirement to Baugher and Newton by stating in their reviews that they “needed” to obtain their welding certifications, is unavailing. Many other employee reviews also stated that employees “needed” to become certified, yet none of these

Further, between their performance reviews on December 22 and their terminations on March 11, no supervisors ever told Baugher or Newton that they needed to obtain their welding certifications and improve their performance or face termination. In Baugher's case, during the period between his performance review and his termination, he did not receive *any* criticism over his welding or any of his other work, despite the fact that the vast majority of his work over this period of time involved welding. (JA.612–13, 766, 837.) Like Baugher, Newton also did not receive any criticism from supervisors regarding his work performance. In fact, the only feedback that Newton did receive during this period was *positive* feedback for his electrical work.²⁰ (JA.549, 568–69.) This lack of a general

employees was terminated for not obtaining a welding certification. (JA.49, 52–54, 56–58, 77.)

¹⁹ The judge properly discounted the portion of Crall's notes indicating that Newton was given a deadline of the first quarter of 2011 in which to complete his welding certification. (JA.887 n.23; 86.) Newton credibly denied that Crall mentioned a deadline to him (JA.545), and although Crall testified that Newton's welding certification was discussed during his review, he did not mention anything about giving Newton a formal deadline during the review. (JA.817.) Even assuming that a first quarter deadline was communicated, which would require overturning the judge's well-reasoned credibility determinations, the first quarter of the year is typically understood to extend from January until the end of March, and thus, Newton would still have been within the deadline when he was terminated on March 11.

²⁰ Further, when pressed by Newton at the time of his termination, Crall was unable to name *any* specific deficiencies in his performance during the period of time when he was on probation. (JA.101, 552, 837.) This further supports a

requirement for welding certifications, combined with the fact that the Company never gave the employees specific instructions to get a welding certification or even to improve their performance while on “probation,” shows that the Company’s reliance on this justification is pretextual and thus further supports a finding of unlawful motivation.²¹ *See L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 983–84 (7th Cir. 2002) (reliance on non-existent Department of Transportation regulation to justify discharge supports finding of animus); *Jet Star, Inc. v. NLRB*, 209 F.3d 671, 677 (7th Cir. 2000) (employer claimed to see discharged employee abusing equipment, yet never warned employee to improve his performance); *Health Mgmt., Inc.*, 326 NLRB 801, 801, 805–06 (1998), *enforced in relevant part mem.*, 210 F.3d 371 (6th Cir. 2000).

The Board’s finding of unlawful motivation is further supported by evidence that the Company treated Baugher and Newton in a disparate manner from other employees who did not testify at the hearing in *Relco I*. Specifically, the Board noted that the Company had six employees, including Baugher and Newton, who

finding of unlawful motivation. *See Handicabs, Inc. v. NLRB*, 95 F.3d 681, 685–86 (8th Cir. 1996).

²¹ Incredibly, Bachman did not even consult Baugher’s timesheets or formally discuss Baugher’s work with Baugher’s immediate supervisor, Benboe, when he made the decision to terminate Baugher. (JA.886 n.20; 498, 501, 767, 837.) Similarly, Bachman, Benboe, and Crall all admitted that in Newton’s case they made the decision to terminate him without looking at his time records to determine whether his productivity had improved. (JA.498–99, 782–83, 837.)

had “welding certification” listed as a goal under Section D and were rated as “performance plateau” for growth potential.²² (JA.889; 44–45, 52–53, 57–58, 76–77, 84–85, 88–89.) Apart from Baugher and Newton, none of these employees was discharged for not obtaining a welding certification.

The Company attempts (Br.37–38) to distinguish Baugher and Newton from these other employees by arguing that, as more senior employees, Baugher and Newton should be required to get a welding certification. This argument is belied by the Company’s own performance reviews. As the Board noted, the Company rated Baugher, Newton, and the four other employees who were not discharged as “Performance Plateau”—meaning that these employees all have “learned basic job skills and knowledge and [are] actively working on refining that skill and knowledge.” (JA.889; 41.) This demonstrates that the Company viewed these employees as having both a similar skill level and a similar growth potential, despite their differing levels of seniority. Further, regardless of seniority, the objective, numbers-based portion of the rankings demonstrates that the Company viewed Baugher and Newton as better employees than at least three of the four employees who also had “welding certification” listed as a goal on their

²² The Company’s contention (Br.37) that there could be no disparate treatment because Baugher, Newton, and other employees had different supervisors is inapposite where their performances were all ultimately reviewed by the same upper-level managers (specifically Crall and Bachman) as part of the same review process.

performance reviews.²³ Yet these employees, unlike Baugher and Newton, were not terminated or even disciplined. This evidence of disparate treatment further serves to establish the Company’s unlawful motivation. *Berbiglia, Inc. v. NLRB*, 602 F.2d 839, 844 n.8 (8th Cir. 1979) (noting that evidence of disparate treatment can “furnish[] the keystone for the arch of the Board’s case.”); *see also Spurlino Materials, LLC v. NLRB*, 645 F.3d 870, 881 (7th Cir. 2011); *Eaton v. Ind. Dept. of Corrections*, 657 F.3d 551, 559 (7th Cir. 2011) (distinguishing *Bio v. Federal Express Corp.*, 424 F.3d 593 (7th Cir. 2005), cited by the Company, because there was no evidence that employer took “other objective considerations”—an employee’s disciplinary history—into account).

In sum, the Board’s finding that Baugher’s and Newton’s terminations on March 11 violated Section 8(a)(3), (4), and (1) of the Act is supported by substantial evidence. The unlawful motivation underlying these terminations is established solely by the Company’s reliance on the previously unlawful discipline from November 1 and the December 22 performance review. In addition to this

²³ Under the Company’s rating system, a higher number of points equates to a lower rating. Baugher’s review rated his performance at 86 points and Newton’s review rated his performance at 83 points. (JA.83, 87.) Three of the four other employees had 88 points or higher, and thus were rated worse than Baugher and Newton. (JA.44, 52, 76.) Additionally, the one employee who had a lower aggregate number of points (82) than Baugher and Newton actually had an incomplete review, as the review did not assign *any* points to the “required tools” category. (JA.57.) Therefore, if this review were correctly filled out, the fourth employee would have had at least as many points as Newton and possibly as many points as Baugher.

tainted reliance, circumstantial evidence—in the form of imposing a novel and unspoken welding certification requirement, failing to provide any notice of performance deficiencies, and disparate treatment—further supports the Board’s decision.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY TERMINATING PACE AND RENFREW FOR ENGAGING IN PROTECTED CONCERTED ACTIVITIES

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 collective bargaining or other 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.” Accordingly, an employer violates Section 8(a)(1) of the Act by discharging an employee for engaging in concerted activity that is protected by Section 7.

The elements of a Section 8(a)(1) violation are 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 for mutual aid and protection under 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 not grounded in solely personal concerns, that speech is protected by Section 7. *See NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (per curiam).

Where there is a dispute as to whether a disciplinary action was in fact motivated by hostility toward protected activity, the Board and this Court utilize the *Wright Line* analysis, discussed *supra* pp. 25–26. *E.g.*, *Woodline Motor Freight, Inc. v. NLRB*, 843 F.2d 285, 287–88 (8th Cir. 1988); *TM Grp.*, 357 NLRB No. 98, 2011 WL 4619132, slip op. at 1 n.2 (Sept. 30, 2011). Where there is no dispute that hostility towards protected concerted activity motivated the 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) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978)). “[O]n 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 (citing *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978)).

B. Substantial Evidence Supports the Board’s Finding that Pace’s and Renfrew’s Conversations Implicated Subject Matter Protected by Section 7 of the Act

As an initial matter, the Board reasonably found that Pace’s and Renfrew’s conversations—discussing whether and for what reason Kendall might have been discharged—implicated subject matter falling within the “mutual aid or protection” clause of Section 7 of the Act. The Supreme Court has found that the statutory phrase “mutual aid or protection” should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563–68, 567 n.17 (1978). Employee protests regarding the

termination of a co-worker, like those engaged in by Pace and Renfrew in the instant case, clearly fall within this broad range of protected employee concerns. *See, e.g., Webasto Sunroofs, Inc.*, 342 NLRB 1222, 1223 (2004).

Further, it is of no moment that the concern of Pace's and Renfrew's protests ultimately turned out to be in error. Section 7 clearly encompasses protests for mutual aid and protection, even when those protests are based on a mistaken, but good-faith, belief. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, 2011 WL 4542499, slip op. at 3 (Sept. 30, 2011) (employees' mistaken belief does not remove protection of the Act, unless employees acted in bad faith); *see also OMC Stern Drive*, 253 NLRB 486, 486 n.2 (1980), *enforced*, 676 F.2d 698 (7th Cir. 1982) (table). As there is no evidence that Pace and Renfrew acted in bad faith, the Board's finding on this issue should be affirmed.

C. Substantial Evidence Supports the Board's Finding that the Group Discussions Engaged in By Pace and Renfrew Were Concerted Activity Protected by Section 7 of the Act

The Board reasonably found that Pace and Renfrew engaged in concerted activity by discussing Kendall's discharge. "The term 'concerted activit[y]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals." *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). Consistent with this general principle, this Court has held that an employee who engages in repeated discussions regarding

shared terms and conditions of employment is engaged in concerted activity. *NLRB v. Sencore, Inc.*, 558 F.2d 433, 434 (8th Cir. 1977) (per curiam). Here, Pace’s and Renfrew’s conversations clearly involved a shared employment concern, just as those conversations at issue in *Sencore*. Pace, Renfrew, and other employees shared concerns that if Kendall, “the go-to-guy at Relco,” could be terminated, then all of their jobs were at risk. (JA.674, 677, 707, 796–98.) The subject of Kendall’s termination struck a nerve with the Company’s employees, as Pace, Renfrew, and other employees continued to discuss the topic for several hours at work, only ending the conversations after lunch when it became common knowledge that Kendall had not, in fact, been terminated. (JA.650–54, 679, 823.) Thus, like in *Sencore*, the employees’ repeated conversations regarding a mutual term and condition of employment constituted concerted activity.

Although this Court has stated, consistent with the Third Circuit’s decision in *Mushroom Transportation*, that “mere griping” does not constitute concerted activity for mutual aid and protection under Section 7 of the Act, *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 840 (8th Cir. 2003) (citing *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), Pace’s and Renfrew’s conduct was not unprotected griping. Pace and Renfrew did not simply complain to one another about a co-worker being fired. Instead, they, and other employees, discussed both the possible cause—that the Company fired Kendall for missing work to play

Santa Claus at his child’s school—and the potential future implications—that they all were going to get laid off due to the loss of a major contract with BNSF—of the termination. Based on the duration of the conversations and the future implications that were discussed by employees, the Board reasonably found that the discussions were not mere griping and instead constituted concerted activity. (JA.897) (citing *Meyers II*, 281 NLRB 882, 887 (1986), *affirmed sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987)).

This Court’s holding in *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993) further supports the Board’s finding of protected concerted activity. In *Wilson Trophy*, the Court found that an office employee engaged in concerted activity merely by placing a telephone call on behalf of another employee. *Id.* at 1507. Here, Pace and other employees engaged in almost exactly the same type of activity by texting Kendall to determine if, in fact, he had been terminated.²⁴

²⁴ The fact that the employee’s telephone call in *Wilson Trophy* was directed towards a union representative, whereas here the text messages were directed towards a co-worker, is a meaningless distinction. As this Court explicitly recognized in *Wilson Trophy*, “[n]on-union employees as well as union employees share the right to engage in concerted activity.” 989 F.2d at 1508; *see also Brady v. Nat’l Football League*, 644 F.3d 661, 672–73 (8th Cir. 2011) (“Employees may engage in activities for the purpose of ‘mutual aid or protection’ *without* the present existence of a union.”) (emphasis in original) (citations omitted). Indeed, courts have recognized that Section 7 rights are especially important in the context of a nonunionized workplace. *See NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14–15 (1962); *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005) (“The broad protection of Section 7 applies with particular force to

These texts were the outgrowth of the earlier conversations between Pace, Renfrew, and other employees, and the fact that these group conversations led to future action by multiple employees further serves to separate these extended conversations from unprotected griping.²⁵

The fact that Pace and Renfrew never explicitly discussed employees “banding together” (JA.691, 721) does not, contrary to the Company’s claims (Br.7, 55–57), establish that their conversations were not concerted activity. Concerted activity protected by Section 7 is an expansive concept that extends well beyond groups of employees physically “banding together.” *See, e.g., City Disposal Sys., Inc.*, 465 U.S. at 832 (“A lone employee’s invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.”); *Every Woman’s Place*, 282 NLRB 413, 413 (1986) (individual’s activity protected if it is a “logical outgrowth” of prior concerted activity), *enforced*, 833 F.2d 1012 (6th Cir. 1987) (table). As the Board aptly stated in this case (D&O 17), citing longstanding precedent, “the object of or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate.” *Whittaker Corp.*, 289 NLRB 933, 933–

unorganized employees who, because they have no designated bargaining representative, must ‘speak for themselves as best they [can].’”) (citation omitted).

²⁵ That these conversations led only to the limited action of sending text messages is natural given that shortly after Pace sent his text message, he and Renfrew separately found out that Kendall had not been terminated.

34 (1988); *see also Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951). Under this well-established precedent, Pace’s and Renfrew’s failure to explicitly announce to their fellow employees that they intended to “band together” does not remove their sustained discourse from the reach of concerted activity.²⁶

Further, the instant case is readily distinguishable from cases where this Court has held, in superficially analogous circumstances, that employees were not engaged in concerted activity. *See Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981) (per curiam); *NLRB v. Dawson Cabinet Co.*, 566 F.2d 1079, 1084 (8th Cir. 1977). In both *Koch Supplies* and *Dawson Cabinet*, the alleged concerted activity involved an *individual* employee expressing a purely *personal* concern. Here, by contrast, Pace, Renfrew, and numerous other employees all engaged in the concerted discussions, and the subject matter of their discussions—

²⁶ The cases cited in support of the Company’s overly-restrictive view of Section 7 activity are inapposite. In both *Esco Elevators, Inc.* and *Eggo Frozen Foods*, the employee activity was not concerted because, in stark contrast to the instant case, there was no evidence that employees ever shared their employment concerns with one another. 736 F.2d 295, 297, 300 (5th Cir. 1984); 209 NLRB 647, 647–48 (1974). The two other cases cited by the Company simply do not represent good law on this issue. *See City Disposal Sys., Inc.*, 465 U.S. at 831–32 (overturning 6th Circuit’s decision in *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979)); *Fresenius USA Mfg.*, 358 NLRB No. 138, 2012 WL 4165822. slip op. at 3 (Sept. 19, 2012) (finding that employee engaged in “protected *union* activity” without adopting administrative law judge’s analysis of whether employee engaged in protected concerted activity) (emphasis added).

Kendall’s discharge and the effects it might have on all of their future employment prospects—involved a group concern.²⁷

D. Substantial Evidence Supports the Board’s Finding that the Company Discharged Pace and Renfrew for Engaging in Protected Concerted Activity in Violation of Section 8(a)(1) of the Act

Despite the Company’s contentions (Br.53–54), there is no serious dispute in this case as to the motivation for Pace’s and Renfrew’s terminations. Bachman undisputedly told both employees that they were being terminated for discussing Kendall’s termination with their fellow employees. (JA.475–76, 683, 711–12, 822–23.) This activity was protected by Section 7, and thus the Company’s actions in terminating Pace and Renfrew for engaging in these conversations violated Section 8(a)(1) of the Act.

The Company attempts (Br.53–54) to defend its actions by characterizing Pace’s and Renfrew’s protected activities as “malicious rumors” in violation of Company policy. (JA.370.) This argument patently fails. It is well-established that employer policies generally cannot limit Section 7 rights.²⁸ *See, e.g.,*

²⁷ In fact, this Court in *Dawson Cabinet*, while denying enforcement of the Board’s Order in that case, characterized *Sencore* and *Mushroom Transportation* as protecting precisely the type of conduct at issue here—namely, group discussions regarding shared employment concerns. 566 F.2d at 1084.

²⁸ This is, of course, different than saying employees’ Section 7 rights are unlimited. As the Supreme Court has repeatedly recognized, Section 7 rights must be balanced against legitimate employer interests. *See, e.g., Republic Aviation*

Handicabs, Inc. v. NLRB, 95 F.3d 681, 685–86 (8th Cir. 1996). The Company therefore does nothing to advance its argument by claiming that its decision to terminate Pace and Renfrew for engaging in protected conduct is somehow justified by its policies prohibiting employees from spreading what it contends are “malicious rumors.”²⁹

Finally, while the Company is correct in citing the general proposition (Br.54) that otherwise protected activity loses the protection of the Act when it is “maliciously” false, neither Pace’s nor Renfrew’s discussions fall within the legal definition of “maliciousness.” The Supreme Court and the Board have evaluated labor speech under the “malice” test enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), that is, whether the statements were made with

Corp. v. NLRB, 324 U.S. 793, 797–98 (1945). However, it is the Board and the courts, not employers, who determine the proper balance under the Act. *Id.* at 798.

²⁹ The Company’s related attempt (Br.53–54) to characterize this case as a “dual motive” case requiring a *Wright Line* analysis is unavailing. Contrary to the Company’s assertion, this Court did not apply nor even mention the *Wright Line* test in *NMC Finishing*, instead focusing solely on whether the striker’s conduct lost the protection of the Act. *See* 101 F.3d 528, 531–32 (8th Cir. 1996). And although this Court applied the *Wright Line* analysis in *St. Luke’s Episcopal-Presbyterian Hospitals* and *Carleton College*, the supposedly “protected conduct” at issue in those cases was, in fact, not protected by the Act according to this Court. 268 F.3d 575, 580–81 (8th Cir. 2001); 230 F.3d 1075, 1081–82 (8th Cir. 2000). Where, as here, an employer disciplines an employee for engaging in protected conduct under Section 8(a)(1), the *Wright Line* motivation analysis is inapposite. *See, e.g., NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 22–24 (1964) (employer violates Act for discharging employee engaged in protected concerted activities, regardless of the employer’s motive).

knowledge of their falsity or with reckless disregard for their truth or falsity. *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65 (1966); see *Cent. Sec. Servs., Inc.*, 315 NLRB 239, 243 (1994).

Here, Pace's and Renfrew's communications do not fall within this definition. While discussing Kendall's termination, neither employee knew that Kendall had not been discharged. And once Pace and Renfrew discovered that Kendall had not been terminated, Pace stopped talking with other employees about the subject, and Renfrew went a step further by correcting other employees who still thought that Kendall had been terminated. (JA.679, 708–10.) Further, there is no evidence that Pace or Renfrew acted with "reckless" disregard for the truth or falsity of their statements. The possibility that Kendall had been terminated was plausible, given that both employees knew that he had been absent from work the previous day and that the Company's work load was decreasing. (JA.677, 705–06.) Thus, Pace's and Renfrew's conversational concerns, while not ultimately borne out, were not "maliciously" false as understood by the Board and the courts and thus retained their protection under the Act.³⁰

³⁰ The 8th Circuit cases cited by the Company (Br.53–54, 57–58) where employees lost the protection of the Act are readily distinguishable, as there is no evidence that either Pace or Renfrew engaged in obscene or violent conduct nor is there any evidence that these relatively brief, internal employee discussions "indefensibly injured" the Company.

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**

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| NATIONAL LABOR RELATIONS BOARD |) | |
| |) | |
| Petitioner/Cross-Respondent |) | Nos. 12-2447 & 12-2503 |
| |) | |
| v. |) | |
| |) | |
| RELCO LOCOMOTIVES, INC. |) | |
| |) | Board Case Nos. |
| Respondent/Cross-Petitioner |) | 18-CA-019720, 18-CA- |
| |) | 019721, 18-CA-019744, |
| |) | & 18-CA-019745 |

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,944 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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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
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