

Nos. 13-2722 & 13-2812

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

RELCO LOCOMOTIVES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART
Supervisor Attorney

AMY H. GINN
Attorney

National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2942

STUART F. DELERY
Assistant Attorney General

BETH S. BRINKMANN
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

SUMMARY OF THE CASE

The Board seeks enforcement of its Order issued against RELCO Locomotives, Inc. (“the Company”). In this case, the Company responded to a union organizing campaign by taking unlawful several steps and ultimately firing two employees for pretextual reasons. Before this Court, the Company does not contest the Board’s findings that it solicited employee grievances and made implied promises to remedy them as well as instructed an employee not to distribute authorization cards on “company time” while maintaining an unlawful solicitation and distribution policy.

The Board’s findings that the Company unlawfully interrogated union supporters Mark Douglas and Jerry Sindt are supported by substantial evidence on the record as a whole. Likewise, substantial evidence supports the Board’s finding that the Company, with knowledge of Douglas’ and Sindt’s union activities and while harboring well-established antiunion animus, hastily fired them. The Company was unable to show that it would have discharged them absent their union activity. As such, the Board’s Order should be enforced in full.

The Board believes that oral argument would not be of material assistance to the Court because this case involves the application of well-settled principles to straightforward facts. However, if the Court grants the Company’s request for oral argument, the Board asks that it be permitted to participate.

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues presented.....	2
Statement of the case.....	3
I. Procedural history	3
II. The Board’s findings of fact.....	4
A. The Company’s business and relevant policies	4
B. The Company has a recent history of unlawfully discharging its employees for union and protected activities	5
C. Mark Douglas’ and Jerry Sindt’s two-year tenure with the Company	6
D. Employee Douglas attends a union meeting and becomes the Union’s organizing campaign representative; Sindt works on the union campaign; the Union openly handbills outside the company gate	8
E. Supervisor Benhoe interrogates Sindt and Douglas; Bachman and Supervisor Benhoe make comments about unions in morning meetings; D. Bachman holds mandatory meetings with employees and solicits ideas to improve employee morale; D. Bachman gives out personal contact information to employees	9
F. The Company discharges Douglas and Sindt on the same day	11
III. The Board’s conclusions and order.....	13
Summary of argument.....	14
Standard of review	17

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
Argument.....	19
I. The Board is entitled to summary enforcement of the portions of its order that are based on the uncontested findings that the Company violated Section 8(a)(1) of the Act through its responses to union campaign.....	19
II. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees Douglas and Sindt about their union activities	20
A. Applicable principles of employer interrogations	20
B. The Company unlawfully interrogated Douglas.....	22
C. The Company unlawfully interrogated Sindt.....	24
III. Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating employees Douglas and Sindt because of their union activities	26
A. Principles of unlawful discharges	26
B. Substantial evidence supports the Board’s finding that the Company acted with union animus when it discharged Douglas and Sindt	29
C. The Board found that the Company’s stated reason for discharging Douglas was a pretext, thus further supporting the Board’s finding of unlawful motivation and demonstrating the Company failed to carry its burden under <i>Wright Line</i> of proving that it would have discharged Douglas even in the absence of his union activities.....	32
D. The Board found that the Company’s stated reason for discharging Sindt was a pretext, thus further supporting the Board’s finding of unlawful motivation and demonstrating that the Company failed to carry its burden under <i>Wright Line</i> proving that it would have discharged Sindt even in the absence of his union activities.....	36

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
IV. The Company’s challenge to the Board’s quorum is foreclosed by binding Circuit precedent.....	41
Conclusion.....	43

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Ahlberg v. Chrysler Corp.</i> , 481 F.3d 630 (8th Cir. 2007)	19
<i>Allentown Mack Sales & Serv., Inc. v. NLRB</i> , 522 U.S. 359 (1998)	18
<i>Amyx Indus., Inc. v. NLRB</i> , 457 F.2d 904 (8th Cir. 1972)	26
<i>Berbiglia, Inc. v. NLRB</i> , 602 F.2d 839 (8th Cir. 1979)	27,32
<i>Cintas Corp. v. NLRB</i> , 482 F.3d 463 (D.C. Cir. 2007).....	20
<i>Concepts & Designs v. NLRB</i> , 101 F.3d 1243 (8th Cir. 1996)	26,27
<i>Evenflow Transp., Inc.</i> , 358 NLRB No. 82, 2012 WL 2590500 (2012), <i>petition for review pending</i> , 2d Cir. Case Nos. 12-3054, 12-3462.....	29
<i>Fruin-Colnon Corp. v. NLRB</i> , 571 F.2d 1017 (8th Cir. 1978)	18
<i>Gold Circle Dep't Stores</i> , 207 NLRB 1005 (1973)	24
<i>Hall v. NLRB</i> , 941 F.2d 684 (8th Cir. 1991)	17,26,27
<i>Hickmott Foods</i> , 242 NLRB 1357 (1979)	14
<i>Hotel & Restaurant Employees Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985)	21

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Jays Foods, Inc. v. NLRB</i> , 573 F.2d 438 (7th Cir. 1978)	31
<i>JHP & Assocs., LLC v. NLRB</i> , 360 F.3d 904 (8th Cir. 2004)	18
<i>King Soopers, Inc. v. NLRB</i> , 254 F.3d 738 (8th Cir. 2002)	17
<i>Lemon Drop Inn, Inc. v. NLRB</i> , 752 F.2d 323 (8th Cir. 1985)	27,28
<i>Loparex LLC</i> , 353 NLRB 1224 (2009)	19
<i>Mader v. United States</i> , 654 F.3d 794 (8th Cir. 2011) (en banc)	42
<i>McGraw-Edison Co. v. NLRB</i> , 419 F.2d 67 (8th Cir. 1969)	27
<i>Midland Transp. Co. v. NLRB</i> , 962 F.2d 1323 (8th Cir. 1992)	3,19,21,23
<i>NLRB v. Ark.-La. Gas Co.</i> , 333 F.2d 790 (8th Cir. 1964)	31
<i>NLRB v. Bolivar-Tees, Inc.</i> , 551 F.3d 722 (8th Cir. 2008)	3,20
<i>NLRB v. Broyhill Co.</i> , 514 F.2d 655 (8th Cir. 1975)	19
<i>NLRB v. Clark Manor Nursing Home Corp.</i> , 671 F.2d 657 (1st Cir. 1982)	20

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Cornerstone Builders, Inc.</i> , 963 F.2d 1075 (8th Cir. 1992)	40
<i>NLRB v. Gissel Packing Co.</i> , 395 U.S. 575 (1969)	21
<i>NLRB v. Intertherm, Inc.</i> , 596 F.2d 267 (8th Cir. 1979)	3,23,25
<i>NLRB v. La-Z-Boy Midwest</i> , 390 F.3d 1054 (8th Cir. 2004)	28
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941)	27
<i>NLRB v. Midwest Hanger Co.</i> , 474 F.2d 1155 (8th Cir. 1973)	38
<i>NLRB v. MDI Commercial Servs.</i> , 175 F.3d 621 (8th Cir. 1999)	20,27,28
<i>NLRB v. RELCO Locomotives, Inc.</i> , 734 F.3d 764 (8th Cir. 2013)	3,5,6,17,18,24, 26, 27,28,32,34,36,39,41,42
<i>NLRB v. Rockline Indus., Inc.</i> , 412 F.3d 962 (8th Cir. 2005)	3,20,26,27,28,34,40
<i>NLRB v. Superior Sales, Inc.</i> , 366 F.2d 229 (8th Cir. 1966)	32,34
<i>NLRB v. Transp. Mgmt. Corp.</i> , 462 U.S. 393 (1983)	3,26,28
<i>NLRB v. Vought Corp-MLRS Sys. Div.</i> , 788 F.2d 1378 (8th Cir. 1986)	20

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Wal-Mart Stores</i> , 488 F.2d 114 (8th Cir. 1973)	31
<i>Owsley v. Luebbers</i> , 281 F.2d 687 (8th Cir. 2002)	42
<i>Radisson Plaza Minneapolis v. NLRB</i> , 987 F.2d 1376 (8th Cir. 1993)	20
<i>Ridout v. JBS USA, LLC</i> , 716 F.3d 1079 (8th Cir. 2013)	39
<i>Rossmore House</i> , 269 NLRB 1176 (1984)	21
<i>St. George Warehouse, Inc.</i> , 331 NLRB 454 (2000), <i>enforced mem.</i> , 261 F.3d 493 (3d Cir. 2001)	19,22
<i>Torbitt & Castleman, Inc. v. NLRB</i> , 123 F.3d 899 (6th Cir. 1997)	21,23
<i>Town & Country Elec., Inc. v. NLRB</i> , 106 F.3d 816 (8th Cir. 1997)	18
<i>United Servs. Auto. Ass'n v. NLRB</i> , 387 F.3d 908 (D.C. Cir. 2004)	31
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	17
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645 (1982)	14,40
<i>Wright Line, Inc. ("Wright Line")</i> , 251 NLRB 1083 (1980) <i>enforced on other grounds</i> , 662 F.2d 899 (1st Cir. 1981)	26,28,32,36,40

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>York Prods., Inc. v. NLRB</i> , 881 F.2d 542 (8th Cir. 1989)	27,28
 Statutes:	
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 7 (29 U.S.C. § 157)	14,20,21
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	3,13,19,20,21,26,32
Section 8(a)(3) (29 U.S.C. § 158(a)(3))	3,13,26
Section 10(a) (29 U.S.C. § 160(a))	2
Section 10(e) (29 U.S.C. § 160(e))	2,17,40,41,42
Section 10(f) (29 U.S.C. § 160(f))	2
 Other Authorities:	
Members of the NLRB since 1935, http://www.nlr.gov/who-we-are/board/members-nlr-1935 (last checked Feb. 26, 2014)	41

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

Nos. 13-2722 & 13-2812

RELCO LOCOMOTIVES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the petition of RELCO Locomotives, Inc. (“the Company”) to review and the cross-application of the National Labor Relations Board (“the Board”) to enforce the Decision and Order of the Board that issued against the Company on June 12, 2013, and is reported at 359 NLRB No. 133. (JA

1153-88.)¹ The Company filed its petition for review on August 6, 2013. The Board filed its cross-application for enforcement on August 16, 2013. 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) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred within this circuit in Albia, Iowa.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portions of its order that are based on the uncontested findings that the Company violated Section 8(a)(1) of the Act by soliciting employee grievances and impliedly promising to remedy those grievances; instructing employees not to distribute union authorization cards on company time; and maintaining a distribution and solicitation policy requiring employees to seek management authorization before engaging in any distribution or solicitation.

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 decision; those following are to the supporting evidence.

NLRB v. Bolivar-Tees, Inc., 551 F.3d 722 (8th Cir. 2008).

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

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees about their union activities.

Midland Transp. Co. v. NLRB, 962 F.2d 1323 (8th Cir. 1992).

NLRB v. Intertherm, Inc., 596 F.2d 267, 274 (8th Cir. 1979).

3. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by terminating employees Mark Douglas and Jerry Sindt because of their union activity.

NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983).

NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013).

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

4. Whether the Company's challenge to the Board's quorum is foreclosed by binding Circuit precedent.

NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Acting on unfair labor practice charges filed by the International Brotherhood of Electrical Workers, Local Union #347 ("the Union"), the Board's Acting General

Counsel issued a complaint alleging that the Company committed several violations of the Act. Following a hearing before an administrative law judge, the judge issued a decision and recommended order finding that the Company violated the Act as alleged. (JA 1156-88.) Following consideration of the Company's exceptions to the judge's decision, the Board issued its Decision and Order affirming, as modified, the findings and recommended order of the judge. (JA 1153-56.)

II. THE BOARD'S FINDINGS OF FACT

A. The Company's Business and Relevant Policies

The Company is engaged in the business of repairing and rebuilding locomotives at its production facility in Albia, Iowa. (JA 1157; 436-37.) Mark Bachman is the Company's chief operating officer and is in charge of the Albia facility. (JA 5; 434.) He manages the Company along with his brother Doug Bachman, who is the chief administrative officer.² (JA 1157; 436.) At the Albia facility, the Company employs approximately 100 production employees who are supervised by 6 first-line supervisors. (JA 1157; 437.) Of the supervisors, only Cliff Benboe administers the test to become a certified welder. (JA 1174; 890.) The employees at the Albia facility are not represented by a union. (JA 1157.)

² Consistent with the Board's underlying decision, "Bachman" will be used to refer to Mark Bachman and "D. Bachman" will refer to Doug Bachman.

The Company maintains an extensive employee handbook, revised in October 2011, which includes a solicitation and distribution policy. The policy includes the following statement: “Employees are not permitted to sell chances, merchandise or otherwise solicit or distribute literature without management approval.” (JA 1166; 314.)

B. The Company Has a Recent History of Unlawfully Discharging Its Employees for Union and Protected Activities

The events in this case arose after the Union began an organizing campaign at the Albia facility in 2011. Two years prior, in early 2009, a different union, the Brotherhood of Railroad Signalmen, had undertaken a similar campaign. In connection with that earlier campaign, the Board found, and this Court upheld the Board’s findings, that the Company unlawfully terminated eight employees for either their union activity or engaging in other protected concerted activity. (JA 1153.) *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013) (“*RELCO*”).³ The Company first discharged two employees for their union activity less than 5 months after the union started the campaign. *RELCO*, 734 F.3d at 770-72. The Company discharged another two employees for engaging in activities related to the shared employee concern over cleaning costs of employee uniforms. *Id.* at 772-74. The Company also retaliated against and discharged two employees for testifying at an

³ Despite this Court’s findings to the contrary, the Company persists (Br 17) in suggesting its discharge of these eight employees was lawful.

unfair labor practice hearing. *Id.* at 775-78. The Company then fired two more employees for engaging in protected discussions regarding the possible termination of their co-worker. *Id.* at 778-79.

C. Mark Douglas' and Jerry Sindt's Two-Year Tenure with the Company

On April 5, 2010, the Company hired Mark Douglas and Jerry Sindt. Douglas was hired as a fabricator. For most of his employment after August 2010, Benboe was his supervisor. (JA 1168; 586.) In late 2010, the Company completed an evaluation of Douglas that resulted in a 50-cent-an hour raise. (JA 1169; 68.) The Company put a handwritten notation on the evaluation indicating that it wanted to see improvement in quality and quantity from Douglas and that he would receive another review within 30 days, which he never did. (JA 1169; 67-68.) The next performance review for Douglas covered the period from December 1, 2010 to June 1, 2011. Benboe went over the evaluation with Douglas on August 24, 2011, but Douglas never saw a copy. (JA 1169; 64-65, 635.) Douglas received 3 below satisfactory marks, 22 satisfactory marks, and 4 marginal marks for between below satisfactory and satisfactory. (JA 1169; 64.) The Company noted on the evaluation that Douglas was on probation. (JA 1169; 65.) However, Douglas was not told that he was on probation at his review and did not know if the notation was on the evaluation when he signed it. (JA 1169; 636, 640.) Douglas received a \$1-an-hour raise around that time for becoming a certified welder. (JA 1169; 676.) After the August 24

evaluation, Benboe gave him “attaboys” for his work performance and commended Douglas in front of his coworkers for a job well done and for saving the Company money. (JA 1169; 603-04, 732-33, 773.)

The Company hired Sindt as a general laborer but within 2 months promoted him to mechanic, which came with a \$4-an-hour raise. (JA 1170; 711.) The Company completed an evaluation for Sindt in late 2010 that resulted in an additional 75-cent-an hour raise. (JA 1171; 75.) The Company next completed an evaluation for Sindt covering the time from December 1, 2010 to June 1, 2011, which Sindt signed on September 15, 2011. (JA 1170; 71-72.) In that review, the Company gave Sindt the following marks: 6 below expectations, 22 satisfactory, and 2 exceeds expectations. (JA 1170; 71.)

As a mechanic, Sindt was not required to have a welding certificate. (JA 1170; 835, 890.) In the summer of 2011, the Company began cross training production employees and Sindt was then told that he would need a welding certificate to work as a fabricator. (JA 1170; 713-14, 745.) The Company did not tell Sindt of any consequence if he did not pass the welding test by a certain date. (JA 1170-71; 745-46, 775-76.) By the end of 2011, Sindt had made two attempts to pass the welding test. He succeeded in passing the vertical welding visual test in July 2011, but failed on each of two tries at the overhead welding test. (JA 1170; 782-83.) Sindt planned to take the overhead portion of the test again in early 2012. (JA 1170; 783-84.)

D. Employee Douglas Attends a Union Meeting and Becomes the Union's Organizing Campaign Representative; Sindt Works On the Union Campaign; the Union Openly Handbills Outside the Company Gate

In early 2011, the Union began a campaign to organize production employees at the Albia facility. (JA 1160; 561, 587, 717.) On September 26, union organizer Courtland Pfaff held a meeting with 10-15 company employees. (JA 1157; 561, 589.) At that meeting, Douglas raised issues about safety concerns and how employees were treated. (JA 1157; 562.) During the meeting, Pfaff selected Douglas to be on the Union's voluntary organizing committee. (JA 1157; 563, 590.) After that meeting, Douglas handed out authorization cards in the locker room, cafeteria, main shop, and parking lot. (JA 1157; 590-91.) He stored the cards in his toolbox, which he kept along the wall of the shop. (JA 1157; 591-92.) Employees asked him for a card at least once a week and also asked him questions that he relayed to the Union. (JA 1157; 592.) Douglas was in contact with Pfaff on a weekly or biweekly basis until Douglas called Pfaff on the day of Douglas' termination stating he could no longer be on the Union's committee because he was discharged. (JA 1157; 564-65, 592-93.)

Jerry Sindt attended union meetings beginning in early 2011. (JA 1157; 717-18.) He passed out authorization cards in the parking lot and sometimes on the shop

floor. (JA 1157; 719.) About once or twice a week, an employee would ask him for a card. (JA 1157; 719.)

In October 2011, during the shift change between 4 and 5 p.m., Pfaff and another union employee handbilled outside the Company's gate as vehicles exited the premises. (JA 1157; 566.) The gate is visible from the building. (JA 1157; 474.) Pfaff and Thomas wore union sweatshirts with a large union insignia on the front and back while handbilling. (JA 1157; 569.) The two organizers handed exiting drivers a blank manila envelope containing three pages of union literature, a blank authorization card, Pfaff's business card, and a union sticker. (JA 1157; 76-80, 566.) When Douglas came through the gate, Pfaff gave him six or seven envelopes for the other passengers in his car and to distribute in the plant. (JA 1157; 568, 595.) Supervisor Tom Shipp received an envelope as he exited. (JA 1160; 552.) Pfaff also gave an envelope to the driver of a white SUV with a RELCO license plate. (JA 1158.) On the day after the handbilling, Bachman found one of the Union's packets on his desk. (JA 1179; 477.)

E. Supervisor Benboe Interrogates Sindt and Douglas; Bachman and Supervisor Benboe Make Comments About Unions in Morning Meetings; D. Bachman Holds Mandatory Meetings with Employees and Solicits Ideas to Improve Employee Morale; D. Bachman Gives Out Personal Contact Information to Employees

A day or two after the handbilling in October, Sindt was scrapping out the cab portion of a locomotive when Supervisor Benboe approached him and asked what he

thought about the Union. (JA 1158, 1164; 727.) Sindt replied he had worked at a union and nonunion place and it did not matter to him one way or the other. (JA 1158, 1164; 727.) Benboe also asked Sindt how he felt he was treated by the Company and Sindt responded that he felt he was treated fairly. (JA 1158, 1164; 727.)

Employees are required to attend morning meetings where supervisors hand out daily assignments. (JA 1158; 724.) After the handbilling, Benboe commented on more than one occasion at those meetings that unions are basically not all they are cracked up to be, sometimes they are good and sometimes they are bad and “they just help the lazy people.” (JA 1158; 598, 724.) Likewise, after the handbilling, Bachman, who attended the meetings on rare occasions, commented in a morning meeting that he would rather “keep everything in house” and that he did not like unions. (JA 1158; 726.) Bachman said in years past, “even with the recent recession,” the Company never had to lay off employees, but “if a union was brought in that there was no promise” this would not happen. (JA 1158; 598.)

During end of day clean-up one day between Thanksgiving and the holiday shutdown on December 23, Benboe pointed to authorization cards sticking out of Douglas’ back pocket and asked if he was “doing that on company time.” (JA 1158, 1165; 599.) When Douglas replied no, Benboe said, “You better not be.” (JA 1158, 1165; 599.) The cards were sticking out from Douglas’ back pocket far

enough to see the union insignia on them, which Douglas discovered when he looked at his pocket after Benboe pointed in that direction. (JA 1158, 1165; 599.)

D. Bachman held small group meetings with employees in November or December 2011, during which he asked employees for ideas to make the plant more efficient and improve employee morale. (JA 1158-59, 1165-66; 608, 728-29.) The Company notified employees of the meetings by posting sheets of paper in the hallway listing each employee's name and the time they were to attend. (JA 1159, 1165; 609, 730.) Employees offered many suggestions. For example, Sindt proposed a bonus of a half day pay if an employee worked 30 days without an absence, an idea that D. Bachman said he liked. (JA 1158, 1165; 610, 729.) At the close of the meeting, D. Bachman wrote his cell phone number and email address on a flip chart in response to a question about how employees could get hold of him. (JA 1158, 1165; 611, 731.) D. Bachman had never shared this information in previous employee meetings. D. Bachman previously held meetings once a year only for the purpose of providing information about upcoming changes to health insurance. (JA 1159, 1166; 612, 731.)

F. The Company Discharges Douglas and Sindt on the Same Day

On January 2, 2012, the Company terminated employees Douglas and Sindt on the day the employees returned to work after the holiday shutdown. (JA 1170-71.)

On the afternoon of January 2, Benboe told Douglas to put his tools down and follow

him to the breakroom. When they entered, Benboe handed Douglas a piece of paper that said Douglas was being terminated. (JA 1170; 601-02.) The Company wrote on Douglas' termination letter that his employment ended "due to poor job performance" and that "required improvements from your last employee performance review have not been met." (JA 1170; 81.)

Douglas asked Benboe, "Are you fucking kidding me?" to which Benboe responded, "No, I'm not." (JA 1170; 603.) Douglas then asked Benboe about the "attaboys" and "job well dones" that Benboe had given him recently. (JA 1170; 603.) Benboe said that was not always the case and gave no further response regarding the reasons for Douglas' termination. (JA 1170; 603.)

Also on the afternoon of January 2, 2012, Benboe came up to Sindt holding a manila envelope and took Sindt to the west end of the building. (JA 1171; 734.) Benboe asked Supervisor Shipp to come over and then handed Sindt a piece of paper saying he was being terminated. (JA 1171; 734.) The Company wrote on Sindt's termination letter that his employment ended "due to poor job performance" and that "required improvements from your last employee performance review have not been met." (JA 1171; 82.)

Sindt responded, "You got to be fucking kidding me." (JA 1171; 551, 734.) Supervisor Shipp then also said, "You got to be fucking kidding me" to Benboe and commented that he would have to find someone to replace Sindt on bi-level truck

work. (JA 1171, 1176; 734.) Benboe did not give any reasons for Sindt's termination. (JA 1171; 734.) Shipp escorted Sindt to clean out his toolbox and then leave the premises. (JA 1171, 1175; 734-35.) At that time, Shipp told Sindt that he did not know what Sindt had done wrong. (JA 1171; 734.)

III. 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)(1) of the Act (29 U.S.C. § 158(a)(1)) by soliciting employee grievances and impliedly promising to remedy those complaints and grievances, instructing employees not to distribute union authorization cards on company time, and maintaining a distribution and solicitation policy requiring employees to seek management authorization before engaging in any distribution or solicitation including in nonwork areas during nonwork time. (JA 1154.) The Board further found that the Company violated Section 8(a)(1) by coercively questioning Douglas and Sindt about their union activities. (JA 1153-54 & n.1.) Additionally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by terminating employees Douglas and Sindt for their union activities. (JA 1153.)

The Board's Order requires the Company to cease and desist from the unlawful activities found. (JA 1154.) The Board further ordered the Company to cease and desist from "in any other manner" interfering with, restraining, or coercing

employees in the exercise of their Section 7 rights.⁴ (JA 1154.) Affirmatively, the Board's Order requires the Company to offer reinstatement to and make whole Douglas and Sindt, rescind its unlawful handbook rule, and notify employees in writing that it has done so. (JA 1154.) The Company must also post a remedial notice, as well as hold a meeting or meetings at its facility during working time at which the notice is to be read by a responsible management official, or by a Board agent in the presence of a responsible management official. (JA 1155.)

SUMMARY OF ARGUMENT

Following a recent pattern of discharging employees for union and protected activities, the Company took a number of unlawful steps to quash a new union campaign in the fall of 2011, culminating with discharging union supporters Mark Douglas and Jerry Sindt. The Company has not contested the Board's findings that, after it became aware of the union campaign, D. Bachman held small group meetings

⁴ The Board issued a broad cease and desist order in this case, which is "appropriate when a respondent is shown to have 'a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights.'" (JA 1153 (quoting *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).) The Board found that the Company's "record of unfair labor practices reflects *both* a 'proclivity to violate the Act' and a 'general disregard' for employees' rights." (JA 1153 (emphasis added).) The Company has not challenged this remedy, nor could it because the Company failed to raise any objection to the Board's imposition of this remedy before the Board in a motion for reconsideration. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Nor has, or could, the Company challenge the Board's further order that, in addition to its customary requirement that the Company post a remedial notice, the notice be read to employees by either a responsible company official or a Board agent in the presence of such an official.

with employees to solicit grievances and make implied promises to remedy them. The Company does not contest that supervisor Benboe instructed employee Douglas not to distribute authorization cards on “company time,” or that its employee handbook, revised in October 2011, contained an unlawful policy requiring employees to seek management authorization before engaging in any distribution or solicitation—including in nonwork areas during nonwork time. These actions to repel the union campaign, as well as the Company’s unlawful discharge of eight employees for protected activities in 2009 and 2010, set the stage for the Company’s discharge of Douglas and Sindt.

Before discharging them, the Company unlawfully interrogated both Douglas and Sindt. Supervisor Benboe questioned Douglas about whether he was distributing authorization cards on company time when he saw the cards in Douglas’ pocket. Benboe then admonished Douglas that he “better not be” doing so—an instruction that the Company also has not disputed was unlawful. Supervisor Benboe also interrogated Sindt in the fall of 2011 by asking Sindt what he thought about the Union and how he felt he was treated by the Company. Sindt was aware enough of the Company’s hostility to unionization that he could not truthfully answer for fear of repercussions. In both situations, Benboe acted coercively because he sought direct information about union activity and sympathies, was in the position of immediate supervisor and evaluator, and acted in an atmosphere rife with antiunion animus.

Then, to complete its goal of keeping the Union out, the Company fired Douglas and Sindt. That the Company acted with union animus can hardly be disputed given all of its prior actions as outlined above. Further bolstering the Board's finding is the timing and manner of both discharges—just 3 months after the Union handbilled openly at the facility, the Company fired both employees on the same day immediately following the holiday break in the middle of the work day so that they would be leaving in plain view of their coworkers.

To defend the firings, the Company relied on the same pretextual reason for both discharges, claiming with wholly inadequate support in the record that Bachman made the decision to discharge them because Douglas and Sindt were poor performers. In Douglas' case, Bachman could not recall specifics of Douglas' performance or cite any problems after June 2011. Additionally, Benboe openly praised Douglas in the fall of 2011, a time during which Douglas also became a certified welder. The Company's failed attempts at post hoc rationalizations only further harm its case.

Similarly, in Sindt's case, Bachman could not recall specific performance problems. Bachman tried unconvincingly to assert that Benboe recommended Sindt's discharge, a claim wholly undermined by Benboe's final evaluation of Sindt. Furthermore, Bachman failed to inform or consult with Supervisor Shipp about Sindt's discharge, which put Shipp in the position of scrambling to transfer

employees to cover certain work. The Company further failed to show that Sindt's discharge was because he lacked a welding certificate. Other employees cross-training in fabrication were not disciplined for failing to pass the welding test and Sindt had an approved plan to retake, in early 2012, the part of the test that he still needed to pass. Simply put, in neither Douglas' nor Sindt's case did the Company carry its burden of showing that it would have discharged either of them absent their union activity.

Finally, the Company's challenge to the Board's quorum is foreclosed by this Court's prior decision on the matter in *RELCO*. As in *RELCO*, the Company failed to raise this issue before the Board and because of that, as this Court held in *RELCO*, the Court is without jurisdiction to hear the challenge.

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). *Accord NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 780 (8th Cir. 2013). "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. 2002). *Accord RELCO*, 734 F.3d at 780. In other words, 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). Indeed, this Court will not overturn the Board’s findings “unless they shock the conscience.” *RELCO*, 734 F.3d at 787 (citing *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 911 (8th Cir. 2004)).

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.*, 360 F.3d at 910–11, and “afford[s] great deference to the Board’s affirmation of the ALJ’s findings,” *RELCO*, 734 F.3d at 779 (quoting *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816, 819 (8th Cir. 1997)).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTIONS OF ITS ORDER THAT ARE BASED ON THE UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT THROUGH ITS RESPONSES TO THE UNION CAMPAIGN

The Company's brief fails to contest the Board's findings that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by soliciting employee grievances and impliedly promising to remedy them;⁵ instructing employees not to distribute union authorization cards on company time;⁶ and maintaining a distribution and solicitation policy requiring employees to seek management authorization before engaging in any distribution or solicitation including in nonwork areas during

⁵ See, e.g., *NLRB v. Broyhill Co.*, 514 F.2d 655, 657 (8th Cir. 1975). The Company waives any challenge to this violation by not contesting it in the argument portion of its opening brief. See *Ahlberg v. Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007) (points not meaningfully argued in opening brief are deemed waived). Further, the Company's discussion of this violation in the fact section of its brief (Br 16) ignores the credibility-based findings made by the judge that "D. Bachman's testimony concerning prior meetings, their purpose, and who attended [was] hazy at best," such that the Company has not "established that D. Bachman has conducted such meetings in the past with groups of employees where he solicited grievances and provided his personal number." (JA 1166.)

⁶ See, e.g., *Midland Transp. Co. v. NLRB*, 962 F.2d 1323, 1325-26 (8th Cir. 1992) (rule stating that employees must not solicit during "working hours" presumptively invalid); *Loparex LLC*, 353 NLRB 1224, 1234 (2009) (limiting distribution to "nonworking hours" invalid because it does not permit distribution during periods of the workday that are the employees' own time such as meal times and break periods); *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), *enforced mem.*, 261 F.3d 493 (3d Cir. 2001).

nonwork time.⁷ Accordingly, the Board is entitled to summary enforcement of those portions of its order that are based on these findings. *See NLRB v. Bolivar-Tees, Inc.*, 551 F.3d 722, 727 (8th Cir. 2008); *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 966 (8th Cir. 2005); *NLRB v. MDI Commercial Servs.*, 175 F.3d 621, 624 (8th Cir. 1999).

The uncontested violations, however, do not disappear from the case simply because the Company has not challenged them. *See Bolivar-Tees*, 551 F.3d at 727 (in determining contested issues, this Court “consider[s] the evidence” from uncontested portions of the Board’s order); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir. 1993) (findings that are summarily enforced “remain relevant” in resolving remaining issues). *Accord NLRB v. Clark Manor Nursing Home Corp.*, 671 F.2d 657, 660 (1st Cir. 1982) (uncontested issues “remain, lending their aroma to the context in which the [contested] issues are considered”).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING EMPLOYEES DOUGLAS AND SINDT ABOUT THEIR UNION ACTIVITIES

A. Applicable Principles of Employer Interrogations

Section 7 of the Act (29 U.S.C. § 157) grants employees the right to “self-organization, to form, join, or assist labor organizations, to bargain collectively

⁷ *See Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (D.C. Cir. 2007) (“mere maintenance” of handbook rule likely to chill section 7 activity through “reasonable interpretation” violated Act even absent evidence of enforcement); *see also NLRB v. Vought Corp-MLRS Sys. Div.*, 788 F.2d 1378, 1381 (8th Cir. 1986) (a facially unlawful rule violates the Act even if never enforced).

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Those rights are enforced through Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which provides that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights.

An employer violates Section 8(a)(1) by coercively interrogating employees about their union activities. The basic test is whether, under all of the circumstances, the questioning reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176, 1178 n.20 (1984), *affirmed sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In determining whether a question is coercive, the Board considers the surrounding circumstances including evidence of employer hostility and discrimination, the type of information sought, the questioner’s identity, the means and location of the interrogation, and the veracity of the reply. *Midland Transp. Co. v. NLRB*, 962 F.2d 1323, 1329 (8th Cir. 1992).

Furthermore, “[i]t is unnecessary to show that any employee was in fact intimidated or coerced by the statements made.” *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 906 (6th Cir. 1997). In assessing the coercive impact of the employer’s statements, the Court defers to the Board’s judgment and expertise. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969) (“a reviewing court must

recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship").

B. The Company Unlawfully Interrogated Douglas

Applying these principles, there is ample support in the record for the Board's finding that supervisor Benboe's questioning of employee Douglas, about whether he was distributing union authorization cards on company time, was unlawfully coercive.

As an initial matter, instructing employees not to distribute union authorization cards on company time violates the Act because it can be interpreted as not permitting the employee to engage in such activity on his own time such as during breaks or other nonworking periods. *See St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), *enforced mem.*, 261 F.3d 493 (3d Cir. 2001). Indeed, the Company does not dispute that it violated the Act in precisely this manner. *See* p.19 and note 6. Here, the Board found Supervisor Benboe's questioning Douglas about whether he had been distributing authorization cards on "company time" to be unlawfully coercive as well. (JA 1165.)

First, Benboe sought information directly about Douglas' union activity. The Company offered no testimony to show that Douglas distributed cards other than permissibly, i.e., during breaks or nonworking periods. Instead, Benboe simply pointed to the authorization cards sticking out of Douglas' back pocket, prompting

Benboe to follow up the question with the unlawful warning “You better not be” distributing the cards on company time. (JA 1165.) Next, as the supervisor who completed Douglas’ performance evaluation, Benboe confronted Douglas on the shop floor during the work day and threatened him following the interrogation.⁸ *See NLRB v. Intertherm, Inc.*, 596 F.2d 267, 274 (8th Cir. 1979) (unlawful interrogation where official asked about union activity and threatened employee following response).

Finally, as the Board observed (JA 1165), the interrogation “came with the back drop” of company hostility toward the Union including Benboe and Bachman’s negative comments about unions at the morning meetings and D. Bachman’s small group meetings to solicit employees grievances. This evidence fully supports the Board’s finding that Benboe’s interrogation of Douglas was coercive.⁹

The Company primarily focuses (Br 33) on the fact that Douglas’ first affidavit to the Board did not mention this incident. The Board considered this argument (JA 1165 & n.22) but did “not find it sufficient to discredit this aspect of Douglas’

⁸ Contrary to the Company’s claim (Br 34), there is no additional requirement that the employee who was interrogated either subjectively feel, or actually be, coerced for the interrogation to be unlawful. *See Torbitt & Castleman*, 123 F.3d at 906 (Board does not consider subjective reactions because test is whether an interrogation has a reasonable tendency to coerce given all factors).

⁹ In reviewing whether interrogations are unlawful, this Court has also examined whether the employer has a valid purpose for obtaining the information sought (Benboe had no such purpose), this purpose is communicated to the questioned employee (Benboe stated no purpose to Douglas), and the employee receives assurances that no reprisals will be taken (Benboe gave none). *Midland Transp.*, 962 F.2d at 1329 (citing *Intertherm*, 596 F.2d at 274 n.2).

testimony.” (JA 1165 n.22 (citing *Gold Circle Dep’t Stores*, 207 NLRB 1005, 1010 n.5 (1973))). While “certain facts remain[ing] unmentioned in an affidavit may give one pause [. . .] it hardly amounts to impeachment of a witness for the simple reason that the perfect affidavit has yet to be written.” *Gold Circle Dep’t Stores*, 207 NLRB at 1010 n.5 (1973) (also recognizing that the “omission may be that of the interrogator or it may be that of the witness”). Among other things, the judge relied on Douglas’ demeanor during both direct and cross-examination to credit his account over that of Benboe’s. (JA 1165 n.22.) See *RELCO*, 734 F.3d at 787 (accordance with deference to judge who “carefully examined the record and witness demeanor in reaching his determinations”).¹⁰

C. The Company Unlawfully Interrogated Sindt

The record likewise supports the Board’s finding that supervisor Benboe coercively interrogated Sindt by asking what he thought about “the union” and how he felt he was treated at the Company. (JA 1164.) As with the interrogation of Douglas, the questions came from Benboe who was also Sindt’s immediate

¹⁰ The Company also relies (Br 10, 23) on Benboe’s past membership in a union (before he worked for the Company) as support for its claim that Benboe could not possibly harbor union animus. Not only did the judge consider and reject this proffered inference (JA 1159 n.11), but Benboe’s undisputed conduct proves otherwise when he unlawfully instructed Douglas not to distribute authorization cards during “company time.”

supervisor and the one who was slated to evaluate him. Benboe also was the one who would determine whether Sindt passed the last stage of the welding exam. (JA 1164.)

Benboe sought information directly about Sindt's union sympathies—and this was a workplace where four union supporters, including Charles Newton whom Sindt knew (JA 1164; 716), had recently been unlawfully terminated for their union activities. In fact, because he feared that support for the Union could have an impact on his job, Sindt could not truthfully answer Benboe and told him that it did not matter to Sindt if there was a union and that he felt that he was treated fairly.¹¹ (JA 1164.) *See Intertherm*, 596 F.2d at 274. The timing of Benboe's questioning of Sindt also came within a day or two of the Union's handbilling and in the context of the antiunion comments from both Benboe and owner Bachman during morning meetings. (JA 1164 & n.20.) This evidence fully supports the Board's finding that Benboe's interrogation of Sindt was coercive.

¹¹ In any event, as with Benboe's interrogation of Douglas (*see* p. 23 note 8), and contrary to the Company's claim (Br 35), there is no requirement that an employee feel coerced for an interrogation to be unlawful although actual coercion, as here, may be probative of a reasonable tendency to coerce.

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

A. Principles of Unlawful Discharges

An employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) when it disciplines or discharges an employee because of the employee's union activity.¹² *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 involving discharge of employees for protected union activity is “whether the employee’s termination was motivated by the protected activity.” *RELCO*, 734 F.3d 764, 780 (8th Cir. 2013) (citing *Concepts & Designs v. NLRB*, 101 F.3d 1243, 1245 (8th Cir. 1996)).

“[W]hen an employer articulates a facially legitimate reason for its termination, but that motive is disputed[,]” the Board applies the framework initially established in *Wright Line, Inc.* (“*Wright Line*”), 251 NLRB 1083 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *RELCO*, 734 F.3d at 780. Under *Wright Line*,

¹² Section 8(a)(3) makes it unlawful for an employer to “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.” 29 U.S.C. § 158(a)(3). A violation of Section 8(a)(3) 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 General Counsel must “establish that the employee’s protected activity ‘was a motivating factor’ in his or her termination.” *RELCO*, 734 F.3d at 780 (quoting *NLRB v. MDI Commercial Servs.*, 175 F.3d 621, 625 (8th Cir. 1999)). To make this showing, the General Counsel must establish that the employee was engaged in protected activity, the employer knew of the employee’s protected activity, and the employer harbored antiunion animus. *RELCO*, 734 F.3d at 780 (citing *Rockline Indus.*, 412 F.3d at 966 (citations omitted)).

Employer “[m]otivation ‘is a question of fact that may be inferred from both direct and circumstantial evidence.’” *RELCO*, 734 F.3d at 780 (quoting *Concepts & Designs*, 101 F.3d at 1245). The Board may rely on circumstantial evidence to find discriminatory motive. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Concepts & Designs*, 101 F.3d at 1244. The Board may infer unlawful motive from such indicia as an employer’s disparate treatment of union supporters, *Rockline Indus.*, 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. v. NLRB*, 752 F.2d 323, 326 (8th Cir. 1985); *see also 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). Additionally, as this Court recently recognized, the Board may “rely upon, take notice of, and use as background

findings and decisions it makes in other cases’ so long as they are not ‘the sole basis for its decision on motivation in a subsequent matter.’” *RELCO*, 734 F.3d at 786 (quoting *NLRB v. La-Z-Boy Midwest*, 390 F.3d 1054, 1061 (8th Cir. 2004)).

Once the burden of showing unlawful motivation is met, the employer’s actions are unlawful “‘unless the employer proves it would have taken the same action absent the protected activity.’” *RELCO*, 734 F.3d at 780 (quoting *MDI*, 175 F.3d at 625). *See also Transp. Mgmt.*, 462 U.S. at 395, 402-03. The mere “existence of a nondiscriminatory rationale” is not sufficient to meet the employer’s affirmative burden, which can only be met by the employer showing that the employer’s rationale is more than “a potential or partial reason for the termination, it must be ‘*the* justification.’” *RELCO*, 734 F.3d at 780 (quoting *Rockline Indus.*, 412 F.3d at 970 (emphasis in original)). 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.*, 881 F.2d at 545-46; *Lemon Drop Inn*, 752 F.2d at 325.

B. Substantial Evidence Supports the Board’s Finding that the Company Acted with Union Animus When It Discharged Douglas and Sindt

Substantial evidence supports the Board’s finding that the terminations of Douglas and Sindt – purportedly for poor performance– were in fact motivated by the Company’s union animus. Both Douglas and Sindt were active union adherents who had been distributing and collecting authorization cards for months. (JA 1180.) Douglas was on the organizing committee and received requests from employees for information about the union and cards. (JA 1157; 590-92.) Sindt likewise fielded inquiries from other employees for cards and gave them out at the facility, including sometimes on the shop floor. (JA 1157; 717-19.)

The record supports the Board’s reasonable determination that the Company knew of this union activity and that its decisions were motivated by its hostility to unions as established by the Company’s “separate unlawful interrogations of Douglas and Sindt” as well as “the timing of the terminations, the [Company]’s general knowledge of its employees’ union activity, the [Company]’s otherwise demonstrated union animus, and the pretextual reasons offered by the [Company] for the terminations. (JA 1153 n.1). *See Evenflow Transp., Inc.*, 358 NLRB No. 82, slip op. at 3, 2012 WL 2590500 (2012) (finding employer had knowledge of specific employees’ union activity based on same factors), *petition for review pending*, 2d Cir. Case Nos. 12-3054, 12-3462.

There is no doubt that the Company had knowledge of the union campaign and acted out of union animus in response.¹³ The Union began organizational soundings in early 2011, but established a visual presence at the plant in October 2011 by handbilling outside the entrance gate. Bachman promptly received a copy of the literature that the Union passed out. (JA 1179; 477.) Based on this handbilling, “all of [the Company’s] officials quickly became aware of the [Union] campaign.” (JA 1180.) Once armed with that knowledge, Bachman and Benboe spoke out against the Union at morning meetings and the Company unlawfully solicited and impliedly promised to remedy employee grievances.¹⁴

The Company interrogated both Douglas and Sindt about their union activities. (JA 1180.) Supervisor Benboe saw Douglas carrying authorization cards, constituting “direct evidence of knowledge of his union activities.” (JA 1180.) Benboe then demonstrated animus by threatening Douglas at the same time. Further,

¹³ The Company acknowledges (Br 7 n.4) that substantial evidence in the record establishes that it knew of the union campaign.

¹⁴ The Company incorrectly states (Br 25) that the Board “gleaned” union animus from photos of an office building that had the word “IBEW” on it with a caption “You can see this is where your union dues go to” that were posted at the employee sign-in terminals for 3-7 days following the handbilling. The Board specifically (JA 1153 n.1) found it unnecessary to rely on those postings to find animus.

as the Board found, “Benboe’s questioning of Sindt reveals Benboe was at least suspicious as to his involvement” with the Union. (JA 1180.)¹⁵

Finally, the Company discharged these two union adherents just 3 months after the Union handbilled outside the gate to establish its presence at the facility. Hired on the same day 2 years earlier, they also were fired without warning on the same day, when employees were fresh off their holiday breaks, and when Douglas and Sindt could be escorted out in plain view of other employees to “clearly send a message not to engage in the same [union] conduct.” (JA 1180.) The timing and manner of Douglas and Sindt’s terminations further “strongly supports” a finding that the Company knew of their union activities. (JA 1180.) *See NLRB v. Wal-Mart Stores*, 488 F.2d 114, 117 (8th Cir. 1973) (suspicious timing of an employee’s discharge relative to union activity aids in establishing employer knowledge when combined with other circumstantial evidence); *see also NLRB v. Ark.-La. Gas Co.*, 333 F.2d 790, 796 (8th Cir. 1964).

¹⁵ The Company claims (Br 18) that Sindt’s response to Benboe’s interrogation, when Sindt said that he did not care one way or another about a union, shows that there was no reason for the Company to suspect Sindt’s union activity. But where, as here, an employer has created an environment hostile enough to unionization such that employees are evasive when interrogated, an employer cannot fairly rely on an employee’s exercise of his right not to disclose union activities to that employer. *See, e.g., United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 917 (D.C. Cir. 2004); *Jays Foods, Inc. v. NLRB*, 573 F.2d 438, 444 (7th Cir. 1978).

The Board also noted (JA 1153 n.1) that the Company’s union animus “is clearly established by its multiple violations of the Act” found in the Board’s two earlier *RELCO* decisions and by the Company’s “independent [Section] 8(a)(1) violations in this case.” Since the issuance of the instant decision, this Court has enforced the Board’s orders in the two earlier *RELCO* decisions, including the finding of eight unlawful discharges. *RELCO*, 734 F.3d at 769. *See NLRB v. Superior Sales, Inc.*, 366 F.2d 229, 233 (8th Cir. 1966) (evidence of employer’s prior hostility toward unionization is “proper and highly significant for Board evaluation in determining motive.”). *Accord Berbiglia*, 602 F.2d at 843. And, the Company has not contested multiple Section 8(a)(1) violations in this case (see pp. 19-20 above). In sum, substantial evidence supports the Board’s finding that the General Counsel met the initial burden under *Wright Line*, which shifted the burden to the Company to establish that it would have discharged Douglas and Sindt absent their union activity.

C. The Board Found that the Company’s Stated Reason for Discharging Douglas Was a Pretext, thus Further Supporting the Board’s Finding of Unlawful Motivation and Demonstrating that the Company Failed To Carry Its Burden Under *Wright Line* of Proving that It Would Have Discharged Douglas even in the Absence of His Union Activities

Substantial evidence supports the Board’s determination that the Company proffered a pretextual reason for discharging Douglas. Douglas’ termination letter stated that he was discharged for poor performance. (JA 1173; 81.) Bachman, who

the Company acknowledges (Br 23) had antiunion animus, testified that he alone made the decision based upon Douglas’ “continued inability to improve,” although he acknowledged that Benboe, Douglas’ supervisor, did not say “anything vocally to Bachman in support of the decision to terminate Douglas.” (JA 1173; 860.) In his pretrial affidavit, Bachman stated: “I don’t recall the specifics of what [Douglas’] were. In general terms it was all performance based.” (JA 1172; 501.) At the hearing, Bachman also could not cite any specific problems with Douglas’ recent performance, nor could he say what types of work or what projects Douglas was assigned to at that time. (JA 1172-73, 856-59.)

The judge found Bachman’s testimony “not worthy of belief concerning the decision to terminate Douglas.” (JA 1182.) The judge noted (JA 1182) that Bachman’s affidavit occurred just 3 months after the discharge, yet Bachman—despite claiming he personally observed Douglas’ work—could not cite any specific performance problems with Douglas that occurred after his appraisal that ended on June 6, 2011. And, in the 6 months between that appraisal and his January 2, 2011 discharge, Douglas’ performance showed significant positive developments. (JA 1182.) The credited testimony revealed that Benboe had praised Douglas’ performance more than once during this period, including in November or December, and had praised Douglas in front of all shop employees—the only time any employee was known to have received such public praise—for having done a good job and for

having saved the Company money on repairs to the doors of a snow blower cab. (JA 1181; 603-04, 732-33, 773.) Douglas also passed his welding test and became certified during this period, even though 8 or 9 of his fellow 30 fabricators remained uncertified. (JA 1181; 639, 676, 925.) These developments contradicted Bachman's assertion that Douglas' performance had gone downhill since June 2011, and undermines the Company's argument that it fired Douglas for poor performance in January 2012 when it had not discharged him in June 2011 for poor performance.

In an attempt to bolster its defense, company witnesses at the hearing advanced additional justifications for Douglas' discharge. Not only did the Board reasonably reject those justifications, but, as this Court recently stated, a "decision to add after the fact justifications to prior misconduct is itself a recognized ground for inferring animus." *RELCO*, 734 F.3d at 787 (citing *Rockline Indus.*, 412 F.3d at 969-70). *See also Superior Sales*, 366 F.2d at 235 (differing reasons for employee's discharge presented at time of termination, unemployment hearing, and Board hearing weakened employer's affirmative defense and provided strong support for unlawful animus).

For example, the Company claims Douglas had been on probation following his June 2011 evaluation, even though that fact was not referenced in his termination letter. Indeed, neither Douglas nor supervisor Benboe recalled Douglas being placed on probation at that time. (JA 1181; 636, 934.) The only evidence otherwise was

Bachman's handwritten note on Douglas' evaluation. (JA 1181; 65.) But even assuming that Douglas had been on probation, the Company has failed to show what event happened after his June 2011 evaluation that justified converting probation into discharge.

The Company also asserts that Douglas' discharge was supported by his attendance problems, even though Douglas did not have the 12 attendance points that the Company's handbook specifies as warranting discharge. (JA 1181; 63, 274, 453-54.) Moreover, Benboe acknowledged that if attendance problems had indeed had played a role in Douglas' removal, that factor would have been listed in Douglas' termination letter. (JA 1181; 528-29.) As the Board reasonably surmised (JA 1181), the failure to list attendance in the termination letter "supports a conclusion that it was only after the termination took place the [the Company's] officials went back and reviewed records to justify their actions to prepare for the trial in this case."

In a final attempt to support its claim that Douglas was lawfully discharged, the Company falls back on the fact (Br 14-15, 24) that no one from the Company told Douglas that his union involvement was the reason for his discharge. If employers told their employees when they were acting unlawfully, the Board's work in enforcing the Act would indeed be simplified. However, employers do not generally utter such admissions against interest. And neither did this employer when it

unlawfully discharged eight other employees in 2009 and 2010. *RELCO*, 734 F.3d at 770-79.

In sum, the Board reasonably concluded (JA 1182) that, “given the inconsistent nature of the testimony of [the Company’s] officials, and their lack of recall, [] the reasons put forth for Douglas[’] discharge were concocted after the fact and were pretextual.” This finding of pretext not only further supports the evidence that Douglas’ termination was the product of antiunion animus, but it underscores the fact that the Company has not carried its *Wright Line* burden of showing that it would have discharged Douglas even in the absence of his union activity.

D. The Board Found that the Company’s Stated Reason for Discharging Sindt Was a Pretext, thus Further Supporting the Board’s Finding of Unlawful Motivation and Demonstrating that the Company Failed To Carry Its Burden Under *Wright Line* of Proving that It Would Have Discharged Sindt even in the Absence of His Union Activities

Substantial evidence supports the Board’s finding that the Company did not demonstrate it would have fired Sindt in the absence of his union activity. As was the case with Douglas’s termination letter, Sindt’s termination letter simply stated that he was discharged for poor performance. (JA 1171; 82.) Again Bachman, who the Company acknowledges (Br 23) had antiunion animus, made the decision to remove Sindt. (JA 1177; 493-94.) While Bachman testified that Benboe recommended the termination, the judge discredited Bachman. The judge noted that Benboe had

prepared a December 2011 evaluation for Sindt just a couple of weeks before his termination and the evaluation said, “If [Sindt] stays in fabrication, he will need to become certified in welding.” (JA 1177; 70.) The judge reasonably found that Benboe’s statement was envisioning the continued employment of Sindt and that “Sindt would be given another opportunity to complete the welding exam, and that if he failed he would be transferred,” not discharged. (JA 25, *see also* JA 32.)

While claiming that he terminated Sindt for poor performance, Bachman was unable to substantiate that Sindt’s removal was based on his work. First, as the judge noted, Bachman’s pretrial affidavit, which was given just 3 months after Sindt’s discharge, allowed that: “I don’t recall the specifics of his poor performance or how many times it happened, without going through documentation.” (JA 1184; 498.) The judge reasonably found that Bachman’s inability to recall the specifics as why he terminated Sindt, so close in time to his termination, showed that his decision to terminate Sindt was pretextual. (JA 1184.)

Second, to underscore the finding that the decision was not based on Sindt’s work, Bachman made the decision without consulting with or informing Shipp, the supervisor with whom Sindt had been working in refurbishing bi-level trucks. (JA 1175, 1185; 548, 908.) Had he consulted with Shipp, Bachman would have found out that, as the judge credited, “Shipp was upset and had a strong negative reaction to Sindt’s abrupt termination.” (JA 1185.) Shipp had exclaimed to Benboe “that Sindt

was the only one who knew anything about bi-level cars.” (JA 1185; 734.) The judge credited the testimony that Shipp had “informed Sindt that he was a good worker, and [that] Shipp did not know why Sindt was being terminated.” (JA 1185; 734.) Finally, there is no dispute that, after Sindt was terminated, Shipp borrowed not just one, but two other employees to finish the work Sindt had been doing on the trucks. (JA 1185; 908-09.)

Based on this, the Board reasonably found that that “contrary to Bachman’s testimony, [the Company] was in need of Sindt’s services at the time it abruptly discharged him. Bachman’s failure to consult Shipp about the effect of the discharge on [the Company’s] work flow in his haste to rush Sindt out the door, serves to confirm [the] conclusion that [the] reasons advanced for the discharge were pretextual.” (JA 1185.) *See NLRB v. Midwest Hanger Co.*, 474 F.2d 1155, 1159-60 (8th Cir. 1973) (inference of unlawful motivation is strengthened when an employer fails to consult an employee’s immediate supervisor before taking action against that employee).

In an attempt to bolster its defense, the Company now argues (Br 12) that the Board ignored Sindt’s “written reviews,” which it claims were “entirely consistent with the reasons for his termination.” But in looking at those written reviews, the Board observed (JA 1171; 71-72) that the Company gave Sindt primarily satisfactory remarks on his June 2011 evaluation, did not put him on probation, and never warned

him that he could be facing any disciplinary consequences, let alone the ultimate consequence of discharge.

The Company also argues (Br 11, 28) that Sindt was terminated because he failed to obtain his welding certificate, even though he had passed all but the final part. The judge specifically discredited this assertion. First, the judge noted (JA 1183; 924-25) that there were 8 or 9 other employees who, like Sindt, were cross-training to become fabricators and who also lacked a welding certification, but none of them was terminated or disciplined. *See RELCO*, 734 F.3d at 787 (finding lack of welding certificate pretextual reason for discharge of an employee in similar circumstances); *see also id.* at 788 (finding comparator evidence valid where discriminatee was discharged whereas four other employees who did not achieve goal of becoming certified welders were not discharged) (citing *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1085 (8th Cir. 2013)).

Second, Sindt was never told that he would be discharged without the welding certificate. Benboe testified that he never told Sindt individually that he even needed the certification, only that he spoke with the entire fabrication crew about it in the weeks leading up to mid-year evaluations in June 2011. (JA 1183; 923.) While

Benboe indicated that Sindt was present for this discussion, Sindt did not actually begin cross-training as a fabricator until July. (JA 1183 & n.39; 72.)¹⁶

Finally, Sindt not only planned to take the final part of the test again in early 2012, he also informed Benboe of this plan and Benboe agreed. (JA 1183; 784.) When writing Sindt's evaluation in December 2011, Benboe implicitly demonstrated that it was his understanding that Sindt would have another opportunity to take the test when he wrote, "If [Sindt] stays in fabrication, he will need to become certified in welding." (JA 1177; 70.) As noted above, Benboe's statement evinces the expectation of continued employment for Sindt, not a hasty termination for pretextual reasons motivated by union animus.

In sum, the Board reasonably concluded (JA 1185) that the reasons the Company advanced for discharging Sindt were pretextual. As with the discharge of Douglas, this finding of pretext not only further supports the evidence that Sindt's termination was the product of antiunion animus, but it underscores the fact that the Company has not carried its *Wright Line* burden of showing that it would have discharged Sindt even in the absence of his union activity.

¹⁶ The Company now claims (Br 28) that Sindt was also fired for insubordination because Sindt complained about needing to obtain his welding certificate. First, this claim is not properly before the Court because it was not presented to the Board. 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992). Second, the Company's now much after-the-fact reasoning is itself evidence of unlawful motivation. *Rockline Indus*, 412 F.3d at 969-70.

IV. THE COMPANY’S CHALLENGE TO THE BOARD’S QUORUM IS FORECLOSED BY BINDING CIRCUIT PRECEDENT

The Company argues (Br 35-45) that three Board members were unconstitutionally recess appointed on January 4, 2012, and that the Board therefore lacked a quorum when it issued its decision in this case on June 12, 2013.¹⁷ The Company concedes (Br 36) that it did not present this argument to the Board. In *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764 (8th Cir. 2013), this Court held that 29 U.S.C. § 160(e) barred the Company from raising an identical challenge in this Court when it had not raised such a challenge before the Board. *See id.* at 796-98; 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”). This Court concluded that no “extraordinary circumstances” excused the Company’s failure to raise this issue before the Board, reasoning that the Board’s decision was not “patently ... outside the orbit” of its authority, and that there had not been “any

¹⁷ On June 12, 2013, when it issued its decision in this case, the Board was comprised of one Senate-confirmed member and two – not three, as the Company suggests (Br 35) – members recess appointed in January 2012. See Members of the NLRB since 1935, <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (noting Terrence Flynn’s last day on July 24, 2012) (last checked Feb. 26, 2014). As the Board has explained elsewhere, these appointments were valid under the Recess Appointments Clause. *See* Brief for the Petitioner, Case No. 12-1281 (S. Ct.) (filed Sept. 13, 2013).

new developments of fact or law unavailable to the Company during the original Board hearing.” *Id.* at 798 (internal quotation marks omitted).¹⁸

The Company argues (Br 42-44) that *RELCO* was decided incorrectly, but offers no distinctions between that case and this. ““It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”” *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir.2002) (per curiam)). Under the binding precedent of *RELCO*, the Company’s failure to raise its recess appointment challenge before the Board bars it from raising that challenge now. This panel should therefore decline to address this issue.

¹⁸ The Board did not argue in *RELCO* that 29 U.S.C. § 160(e) precluded the Company from raising its Recess Appointments Clause argument for the first time in the court of appeals. Instead, the Board argued that the Company had waived this non-jurisdictional issue by failing to raise it until a post-briefing letter submitted to the court under Federal Rule of Appellate Procedure 28(j). *See* Supplemental Brief of the National Labor Relations Board, Case Nos. 12-2111, 12-2203, 12-2447, 12-2503 (8th Cir.) (filed April 26, 2013).

CONCLUSION

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

/s/Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s/Amy H. Ginn
AMY H. GINN
Attorney

National Labor Relations Board
1099 14th Street NW
Washington, DC 20570
(202) 273-2978
(202) 273-2942

STUART F. DELERY
Assistant Attorney General

RICHARD F. GRIFFIN, JR.
General Counsel

BETH S. BRINKMANN
Deputy Assistant Attorney General

JENNIFER ABRUZZO
Deputy General Counsel

DOUGLAS N. LETTER
SCOTT R. McINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys, Appellate Staff

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

February 2014

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

RELCO LOCOMOTIVES, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 13-2722
	* 13-2812
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 18-CA-074960
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,409 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007

Board counsel certifies that the electronic version of its brief has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 12.1.2015.2015. According to that program, the brief is free of viruses.

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

Dated at Washington, DC
this 26th day of February, 2014

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

RELCO LOCOMOTIVES, INC.	*
	*
Petitioner/Cross-Respondent	* Nos. 13-2722
	* 13-2812
v.	*
	* Board Case No.
NATIONAL LABOR RELATIONS BOARD	* 18-CA-074960
	*
Respondent/Cross-Petitioner	*

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2014, 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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Paul E. Starkman
PEDERSON & HOUPPT
161 N. Clark Street
Chicago, IL 60601-3242

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

Dated at Washington, DC
this 26th day of February, 2014